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MARCIA COBURN, AS MOTHER AND NEXT FRIEND OF DUSTIN COBURN, APPELLEE, V. MARTIN F. REISER, PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES L. REISER, DECEASED, THIRD-PARTY PLAINTIFF, APPELLANT, DOUGLAS R. COBURN AND BOYD COUNTY, NEBRASKA, A BODY POLITIC AND CORPORATE, THIRD-PARTY DEFENDANTS, APPELLEES.

577 N.W.2d 289

Filed April 23, 1998. Nos. S-96-654, S-96-655.

1. **Demurrer: Appeal and Error.** When there are no specific findings before an appellate court, the court must review the grounds of the demurrer to determine if any one objection, or any objections taken together, support the trial court's decision to sustain the demurrer and dismiss the action.
2. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but the court is not required to accept as true the conclusions of the pleader.
3. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally. If, as so construed, the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.
4. **Demurrer: Pleadings: Words and Phrases.** A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1995), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
5. **Negligence: Words and Phrases.** Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty.
6. **Pleadings: Negligence: Demurrer.** A petition based on alleged gross negligence is sufficient to survive a demurrer if the pleading describes the alleged acts of negligence and alleges that the negligence is gross.

Appeal from the District Court for Boyd County: WILLIAM CASSEL, Judge. Reversed and remanded for further proceedings.

Thomas A. Grennan and Alison L. McGinn, of Gross & Welch, P.C., for appellant.

David D. Ernst and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellee Douglas R. Coburn.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

This case involves an automobile accident between James L. Reiser and Douglas R. Coburn (Coburn), which resulted in the death of James Reiser.

When the accident occurred, James Reiser was driving northbound on a county road approximately 5 miles west of Spencer, Nebraska. At the same time, Coburn was driving eastbound on a county road approximately 5 miles west of Spencer. As Coburn traveled east on the county road toward Spencer, he approached an unmarked and uncontrolled intersection. As Coburn entered the intersection, his truck collided with James Reiser's truck, killing Reiser and causing personal injuries to the passengers in the Coburn vehicle. The passengers in Coburn's vehicle included Coburn's wife, Marcia Coburn, and their son, Dustin Coburn.

Marcia Coburn filed suit in Boyd County District Court against Martin F. Reiser (Reiser), James Reiser's personal representative, both individually and on behalf of Dustin Coburn. In response, Reiser filed an "amended third-party petition" against Coburn in each of the pending cases. Coburn demurred to Reiser's third-party petitions, which demurrers the district court sustained.

Reiser filed his second amended third-party petitions and Coburn again demurred, contending the petitions failed to state a cause of action or to allege facts constituting gross negligence. The district court sustained Coburn's demurrers without stating the grounds for so doing. Reiser elected to stand on his second amended third-party petitions, and in turn, the district court dismissed the third-party petitions. Reiser then filed a notice of appeal in each case.

As previously stated, the district court did not state the reasons for sustaining Coburn's demurrers. In this respect, we have consistently stated that when a demurrer is interposed stating several grounds, the court sustaining the demurrer should specify the grounds upon which the demurrer is sustained. *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997). If the court sustaining the demurrer does not specify the grounds for sustaining the demurrer, an appellate court is not informed in regard to wherein the complaint was determined to be deficient. *Id.*

We should not be required to examine all of the grounds in order to see if one or more of the grounds were well taken. *Clyde v. Buchfinck*, 198 Neb. 586, 254 N.W.2d 393 (1977). However, when there are no specific findings before the court, the court must review the grounds of the demurrer to determine if any one objection, or any objections taken together, support the trial court's decision to sustain the demurrer and dismiss the action. *Pratt, supra.* That is, if the ground or grounds upon which the demurrer was sustained do not authentically appear, considering all the grounds assigned becomes necessary. *Martin v. City of Lincoln*, 155 Neb. 845, 53 N.W.2d 923 (1952).

Coburn's demurrers alleged that Reiser's second amended third-party petitions did not state facts sufficient to constitute a cause of action upon which relief could be granted and that the petitions failed to allege facts constituting gross negligence. In his second amended third-party petitions, Reiser alleged (1) the collision and damages involved were caused by Coburn's negligence; (2) the collision and damages were caused by Coburn's gross negligence; (3) the Nebraska guest statute had been impliedly repealed by operation of the Nebraska comparative negligence statutes; (4) the Nebraska guest statute violates Neb. Const. art. I, §§ 13, 16, and 25; Neb. Const. art. III, § 18; and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution; and (5) Coburn's negligence should be apportioned by the jury via the Nebraska comparative negligence statutes, or contribution should be awarded in an amount reflecting Coburn's negligence.

The rules regarding demurrers are well settled. In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but the court is not required to accept as true the conclusions of the pleader. See *Billups v. Scott*, 253 Neb. 287, 571 N.W.2d 603 (1997). In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence

which might be adduced at trial. *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997). In addition, a demurrer reaches only defects which appear on the face of a petition and admits all allegations of fact which are relevant, material, and well pled, but does not admit the pleader's conclusions of law. *Pratt, supra.*

In determining whether a cause of action has been stated, the petition is to be construed liberally. *Giese, supra.* If, as so construed, the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *Id.* A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1995), means a narrative of events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. *Giese, supra*; *Pratt, supra.*

In the case at bar, Marcia Coburn filed suit against Reiser. Reiser responded by filing a third-party suit against Coburn, requesting apportionment or contribution. In *Teegerstrom v. H. J. Jeffries Truck Line*, 216 Neb. 917, 920-21, 346 N.W.2d 411, 414 (1984), we denied such a claim and specifically held that

> it appears that most, if not all, courts which have considered the matter have rejected a claim for contribution where the guest statute would preclude recovery by the guest from the host. The reasoning generally has been that in such a case the common liability required to support contribution does not exist between the host and other driver or that one not directly liable to his passenger should not be liable by indirection. See cases collected in Annot., 26 A.L.R.3d 1283 (1969), which uniformly hold that where a guest statute precludes recovery by the guest from the host, contribution will not lie. We have previously determined that, generally, a common liability must exist in order for there to be contribution. That is to say, each party must be liable to the same person.

The Nebraska guest statute, Neb. Rev. Stat. § 25-21,237 (Reissue 1995), provides in part that

> [t]he owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person related to such owner or operator as spouse or within the second

> degree of consanguinity or affinity who is riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by (1) the driver of such motor vehicle being under the influence of intoxicating liquor or (2) the gross negligence of the owner or operator in the operation of such motor vehicle.

Therefore, under the Nebraska guest statute and our holding in *Teegerstrom, supra*, a third party can maintain an action for contribution or indemnity only where the host driver is intoxicated or grossly negligent. As Reiser did not allege that Coburn was intoxicated, did he appropriately allege gross negligence?

Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty. *Youngs v. Potter*, 237 Neb. 583, 467 N.W.2d 49 (1991). In both third-party petitions, Reiser contended Coburn was either negligent or grossly negligent in (1) failing to look to the right until after he was already in the intersection; (2) failing to yield the right-of-way to the Reiser vehicle; (3) failing to maintain any lookout whatsoever until he was in the intersection; (4) driving under the false belief that he was on a "through road" and that there were stop signs for northbound and southbound traffic at the intersecting road in question, when, in fact, it was not a "through road" and was actually an uncontrolled intersection; (5) failing to keep his vehicle under reasonable and proper control; (6) traveling at an excessive rate of speed under the circumstances then and there existing; and (7) accelerating his vehicle once he reached the intersection.

In reviewing the allegations contained in the petition, we begin by noting that we are required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom. *Billups v. Scott*, 253 Neb. 287, 571 N.W.2d 603 (1997). In so doing, we cannot clearly say or definitely determine that reasonable minds would not differ in determining whether the multiple acts of negligence allegedly committed by Coburn did or did not constitute gross negligence. See, *Teegerstrom, supra*; *Paxton v. Nichols*, 157 Neb. 152, 59 N.W.2d 184 (1953).

In addition, a plaintiff claiming gross negligence under the Nebraska guest statute is not necessarily required to prove that

the facts alleged amounted to gross negligence at the pretrial stages of the lawsuit. Rather, the plaintiff need only *allege* that "the negligent acts charged amounted to gross negligence." *McDaniel v. Farlow*, 132 Neb. 273, 276, 271 N.W. 905, 907 (1937). In *McDaniel*, the court said

> [t]he specific objection . . . is that [the petition] does not allege . . . that the negligent acts charged amounted to gross negligence. However, the petition pleaded the facts. If the evidence did not show that they amounted to gross negligence no recovery could be had. The trial court considered the petition sufficiently charged the necessary facts and submitted the case to the jury. It was tried on the theory that the petition in effect charged gross negligence. The petition, in alleging the facts, stated that the car was driven by defendant "recklessly," that it was operated at a "reckless rate of speed" around a curve and turn with which defendant was unfamiliar. We are of the opinion the petition stated a cause of action.

Id.

The petition in the instant case comported with the direction given by the court in *McDaniel*, and therefore, the demurrer should have been overruled.

Reiser also claims that the Nebraska guest statute is unconstitutional. This court has consistently held the Nebraska guest statute constitutional. See, *Cushing v. Bernhardt*, 210 Neb. 272, 313 N.W.2d 688 (1981); *Beebe v. Sorensen Sand & Gravel Co.*, 209 Neb. 559, 308 N.W.2d 829 (1981); *Kreifels v. Wurtele*, 206 Neb. 491, 293 N.W.2d 407 (1980); *Wagner v. Mines*, 203 Neb. 143, 277 N.W.2d 672 (1979); *Circo v. Sisson*, 193 Neb. 704, 229 N.W.2d 50 (1975); *Lubash v. Langemeier*, 193 Neb. 371, 227 N.W.2d 405 (1975); *Botsch v. Reisdorff*, 193 Neb. 165, 226 N.W.2d 121 (1975); *Clarke v. Weatherly*, 131 Neb. 816, 270 N.W. 316 (1936). This assignment of error is without merit.

The remaining assignments of error need not be discussed. The judgment of the trial court is reversed, and the cause is remanded for trial on the merits.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, C.J., participating on briefs.

MARY JO FAABORG, APPELLANT, V. LOREN L. FAABORG, APPELLEE.
576 N.W.2d 826

Filed April 23, 1998. No. S-96-1124.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Child Support: Rules of the Supreme Court: Presumptions.** In determining child support payments, the Nebraska Child Support Guidelines are applied as a rebuttable presumption, and all orders for child support shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.
3. **Child Support: Rules of the Supreme Court.** A court may deviate from the Nebraska Child Support Guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate.
4. **Divorce: Equity.** In Nebraska, dissolution of marriage cases are equitable in nature.
5. **Child Support.** In determining the amount of a child support award, the Nebraska Supreme Court has consistently held that the trial court must consider the status, character, and situation of the parties and attendant circumstances, including the financial condition of the parties and the estimated cost of support of the children.
6. **Divorce: Equity.** The results obtained in dissolution of marriage cases are intended to be equitable.
7. **Child Support: Rules of the Supreme Court: Appeal and Error.** Child support calculations which exceed the combined net monthly income provided for in the Nebraska Child Support Guidelines should be left to the discretion of the trial court and affirmed absent an abuse of discretion.

Appeal from the District Court for Scotts Bluff County: BRIAN SILVERMAN, Judge. Affirmed as modified.

Rhonda R. Flower, of The Law Office of Rhonda R. Flower, for appellant.

Andrew W. Snyder, of The Van Steenberg Firm, for appellee.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

At issue is the method by which child support payments are calculated when the combined net monthly income exceeds the amount of $10,000 provided for in the Nebraska Child Support Guidelines.

On December 11, 1985, the Scotts Bluff County District Court granted Mary Jo Faaborg (appellant) and Loren L. Faaborg (appellee) a decree of dissolution, dissolving the couple's marriage. Appellant was granted custody of the two minor children, Jeffrey Faaborg, then 9 years old, and Daniel Faaborg, then 5 years old. Appellant was awarded child support in the amount of $500 per month per child, for a total of $1,000 per month. The court further ordered that said amount should be reduced to $750 per month upon the emancipation of the eldest child.

On September 22, 1995, appellant petitioned the district court to modify the original decree, specifically seeking an increase in child support payments for Daniel. On October 19, appellee filed an objection to the motion to modify and alleged the current support would not vary from the Nebraska Child Support Guidelines by more than 10 percent. The case proceeded to trial on June 12, 1996.

At trial, both parties produced evidence demonstrating their net incomes for 1993, 1994, and 1995. Appellant, a registered nurse, produced evidence indicating she earned $20,109, $25,202, and $35,025, respectively. Appellee, a physician, presented evidence which indicated he earned $266,662, $260,621, and $366,006, respectively. Appellee testified that his 1995 income included $50,779 of noncash reportable gain from his medical practice partnership, and gains in the amounts of $42,019 and $14,344 from the sale of his interest in a cattle partnership.

On October 10, 1996, the district court filed an order finding that a material change in circumstances warranted a change in the prior child support order. The court further found that several transactions, such as the sale of appellee's cattle partnership, caused appellee's 1995 tax return to inaccurately reflect his disposable income. Thus, the court ruled that appellee's 1995 income would not be used in calculating the payment.

The district court found that appellant's net monthly income was $1,796.27 and appellee's net monthly income was $13,966.64, for a combined net monthly income of $15,762.91. Accordingly, the percentage share of each party was determined as follows: 11.4 percent for appellant (1,796.27 ÷ 15,762.91 =

.1139) and 88.6 percent for appellee (13,966.64 ÷ 15,762.91 = .886). In this respect, table 1 of the guidelines lists support amounts based on the parents' combined net monthly incomes; yet, the guidelines do not list support amounts for combined monthly incomes exceeding $10,000. Nonetheless, the guidelines provide that "if total net income exceeds $10,000 monthly, child support for amounts in excess of $10,000 monthly may be more but shall not be less than the amount which would be computed using the $10,000 monthly income unless other permissible deviations exist." Paragraph C(3).

The district court determined the appropriate child support for Daniel was $1,481 per month. From the $1,481 amount, the court computed each party's share of child support according to his or her percentage of contribution. Appellee's share was calculated to be $1,312.23 per month ($1,481 × .8860). The $312.23 per month increase in appellee's child support obligation was ordered retroactive to July 1, 1996.

Appellant contends the district court erred in (1) determining that appellee's 1995 income should not be used in averaging his income for purposes of determining child support, (2) calculating child support when the combined net monthly income of the parties exceeded the child support guidelines, and (3) determining the increase in child support should be applied retroactively to July 1, 1996, rather than September 22, 1995, the date appellant filed the motion to modify.

Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994). In determining child support payments, the Nebraska Child Support Guidelines are applied as a rebuttable presumption, and all orders for child support shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. Paragraph C. See, Neb. Rev. Stat. § 42-364.16 (Cum. Supp. 1996); *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). A court may deviate from the Nebraska Child Support

Guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate. *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991). In addition, modification of child support cannot operate retroactively beyond the date of the filing of the application for such. See *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

Appellant initially argues the district court erred in determining that appellee's 1995 income should not be used in averaging his income for purposes of child support calculations. At trial, appellee testified that his 1995 income tax return reflected approximately $40,000 in reportable gain income on the sale of his interest in a cattle business and approximately $50,000 in reportable gain income from his medical partnership. Appellee claimed the cattle deal should not be included in determining his annual income because the deal was a "one time shot" and not recurrent income. The district court agreed with appellee's assertions, excluded his 1995 income, and used only his 1993 and 1994 incomes in calculating his average monthly income.

On appeal, appellant asserts that while appellee seeks to have the 1995 reported gain excluded from the child support determination, he also seeks to benefit from a $17,442 loss incurred from the same deal reported in his 1993 return. Appellant contends that "[i]t is abundantly clear that Appellee expects to have his cake and eat it too." Brief for appellant at 10-11. We agree.

In Nebraska, dissolution of marriage cases are equitable in nature. *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985). This rule applies not only in original dissolution proceedings, but also in proceedings for modification of the decree of dissolution. *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991). If appellee wants to benefit from a capital loss, he must also incur the concomitant detriment from the capital gain. As such, the district court should have included appellee's 1995 income in the child support calculation. The district court should have found appellee's net monthly income to be $16,810.11, forming a combined net monthly income of $18,606.38 ($1,796.27 for appellant and $16,810.11 for appellee). Accordingly, the percentage shares of each party are 9.65 percent for appellant (1,796.27 ÷ 18,606.38 = 0.0965) and 90.35 percent for appellee (16,810.11 ÷ 18,606.38 = .90345).

The district court erred in failing to consider appellee's 1995 income in determining his average monthly income.

Appellant next argues the district court erred in the method the court used in calculating child support given the fact appellant and appellee's combined net monthly income exceeded the amounts provided for by the guidelines. Table 1 of the guidelines provides for the amount of child support to be paid in relation to the parents' combined net monthly income. However, table 1 does not provide for support amounts when the combined net monthly income exceeds $10,000, as in the instant case.

In addressing this issue, the district court ordered the total monthly amount of support for Daniel to be $1,481; yet, the district court did not indicate how the court arrived at the total amount, but merely noted "the income curve addressed by the child support guideline clearly flattens as it approaches $10,000.00 in combined gross income."

As we noted earlier, the guidelines provide that deviations are permissible "if total net income exceeds $10,000 monthly, child support for amounts in excess of $10,000 monthly may be more but shall not be less than the amount which would be computed using the $10,000 monthly income unless other permissible deviations exist." Paragraph C(3). From our reading of the district court's modification order, it seems that the court merely extended the percentage decrease that is apparent from the guidelines. See table 1.

In determining the amount of a child support award, this court has consistently held that the trial court must consider the status, character, and situation of the parties and attendant circumstances, including the financial condition of the parties and the estimated cost of support of the children. *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991). However, the results obtained in dissolution of marriage cases are intended to be equitable. *Ohler, supra.* In addition, modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994); *Sabatka v. Sabatka*, 245

Neb. 109, 511 N.W.2d 107 (1994). Extending these general principles, we find that total monthly child support calculations which exceed the combined net monthly income provided for in the guidelines should be left to the discretion of the trial court and affirmed absent an abuse of discretion. Finding no abuse of discretion in the district court's calculation of the total monthly child support for Daniel, $1,481, we affirm. However, given the increase in appellee's percentage of increase (88.6 percent to 90.35 percent), appellee's child support payments should be increased from $1,312.23 per month to $1,338.08 per month.

Appellant's final assignment of error is that the district court erred in determining that the increase in child support should be retroactively applied to July 1, 1996. Instead, appellant argues that the order should be applied retroactively to the date she filed her motion for modification, September 22, 1995. We agree. See *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991).

For the foregoing reasons, the order of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

WRIGHT, J., not participating.

VOWERS AND SONS, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. JERRY STRASHEIM, APPELLEE AND CROSS-APPELLANT.
576 N.W.2d 817

Filed April 23, 1998. No. S-96-1154.

1. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sus-

tained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just.

4. **Election of Remedies.** In general, election of remedies may be applied to require a party to choose between inconsistent remedies for redress of a single injury. It is considered a harsh rule which should not be applied in an oppressive manner.
5. ____. Election of remedies can be applied to bar a claim only if there are two coexisting remedies which are so inconsistent that a party cannot logically choose one without renouncing the other.
6. ____. The doctrine of election of remedies is applicable only where inconsistent remedies are asserted against the same party or persons in privity with such party.
7. **Estoppel.** Inconsistent claims against different parties may be barred by the doctrine of judicial estoppel.
8. ____. The doctrine of judicial estoppel holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. The doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.
9. ____. Judicial estoppel may be applied even if detrimental reliance or privity does not exist.
10. ____. The doctrine of judicial estoppel is to be applied with caution so as to avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement.
11. ____. Absent judicial acceptance of the inconsistent position, application of the rule of judicial estoppel is unwarranted because no risk of inconsistent results exists.
12. **Estoppel: Words and Phrases.** Judicial acceptance requires not that a party prevail on the merits, but only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition.
13. **Breach of Contract: Real Estate: Damages.** The measure of the seller's damages for breach of a contract to purchase real estate is the difference between the contract price and the fair market value of the property at the time of the breach.
14. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position he would have occupied if the contract had been performed, that is, to make the injured party whole.
15. **Damages.** As a general rule, a party may not have double recovery for a single injury, or be made "more than whole" by compensation which exceeds the actual damages sustained.
16. **Actions.** Where several claims are asserted against several parties for redress of the same injury, only one satisfaction can be had.
17. **Breach of Contract: Pleadings: Proof.** In order to recover for breach of contract, a plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that actuate the defendant's duty.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Jerald L. Ostdiek, of Nichols, Douglas, Kelly, and Meade, P.C., for appellant.

Robert G. Simmons, Jr., of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

In this action, Vowers and Sons, Inc. (Vowers & Sons), alleges that Jerry Strasheim breached a contract to purchase real estate. We previously reversed an order sustaining Strasheim's demurrer and dismissing the case and remanded the cause to the district court for Kimball County for further proceedings. *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 538 N.W.2d 756 (1995). Following remand, the district court entered summary judgment in favor of Strasheim, based upon a finding that Vowers & Sons made a binding election of remedies when it brought a professional negligence action against the real estate agent who had prepared the purchase agreement and accepted the benefit of a settlement of that action. Vowers & Sons appeals this order, as well as the denial of its motion for summary judgment. We conclude that the doctrine of election of remedies is inapplicable to claims asserted against different parties and that genuine issues of material fact preclude summary judgment for either party. We, therefore, reverse, and remand to the district court for further proceedings.

BACKGROUND

In May 1992, Strasheim signed an agreement to purchase certain real estate in Kimball County owned by Vowers & Sons. The agreement identified two additional buyers, but they did not sign the document. Merle Vowers, president of Vowers & Sons, signed the purchase agreement in his own name without naming the corporation or indicating his capacity as a corporate officer. *Id.* When closing did not occur, Vowers & Sons filed this action against Strasheim, alleging breach of the purchase agreement and requesting general damages, loss of bargain damages of $50,000, consequential damages, and costs. *Id.* The district court sustained Strasheim's demurrer on the grounds that there

were defects of parties and a failure to state facts constituting a cause of action. Vowers & Sons appealed, and we reversed the order and remanded the cause to the district court for further proceedings. *Id.*

In March 1994, prior to our decision in *Vowers & Sons, Inc.*, Vowers & Sons filed an action in the district court for Kimball County against Sheila Newell, doing business as Newell Realty and Auction. Vowers & Sons alleged that Newell, acting as its agent in the transaction with Strasheim, was negligent in failing to obtain the signatures of the other two purported buyers, failing to require Vowers to sign the agreement in his capacity as a corporate officer of Vowers & Sons, and in "not prepar[ing] and arrang[ing] a purchase agreement which is enforceable." Vowers & Sons further alleged that "[e]ntirely because of [Newell's] negligence and lack of skill in drafting and preparation of said purchase agreement, said purchase agreement has been held unenforceable." Vowers & Sons prayed for loss of bargain damages in the amount of $50,000, general and consequential damages in unspecified amounts, and costs and attorney fees. In an amended petition, the prayer for loss of bargain damages was increased to $95,775.30. Newell subsequently paid an unspecified amount to Vowers & Sons to settle the claim, and the action against Newell was dismissed with prejudice pursuant to a stipulation of the parties.

Following issuance of the mandate in *Vowers & Sons, Inc.*, Strasheim filed an answer to the second amended petition in which he alleged that by commencing the action against Newell and receiving the benefit of the settlement, Vowers & Sons had made an election of remedies and was "barred and estopped from requesting a double recovery and proceeding further herein." Strasheim prayed for dismissal of the action and attorney fees and expenses pursuant to Neb. Rev. Stat. §§ 25-824 to 25-824.03 (Reissue 1995).

Both parties filed motions for summary judgment. On October 17, 1996, the district court denied Vowers & Sons' motion and entered summary judgment in favor of Strasheim. The court determined that Vowers & Sons elected to pursue a remedy against Newell which was inconsistent with its claim against Strasheim in that the claim against Newell alleged that

the purchase agreement with Strasheim was unenforceable, whereas the claim against Strasheim was an attempt to enforce the agreement. Concluding that Vowers & Sons "pursued one remedy and received benefit thereby and is not entitled to another recovery," the district court dismissed the action but did not award attorney fees to Strasheim.

Vowers & Sons appeals the order of the district court denying its motion for summary judgment and granting Strasheim's motion for summary judgment. Strasheim cross-appeals, claiming that he was entitled to recovery of attorney fees because the claim against him was frivolous.

ASSIGNMENTS OF ERROR

Vowers & Sons contends that the district court erred in sustaining Strasheim's motion for summary judgment and overruling its motion for summary judgment. Strasheim cross-appeals, contending that the district court erred in failing to award attorney fees.

STANDARD OF REVIEW

In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence. *Brown v. Wilson*, 252 Neb. 782, 567 N.W.2d 124 (1997); *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997); *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997).

ANALYSIS

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998); *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998); *Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 573 N.W.2d 739 (1998). Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order,

when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just. *American Family Ins. Group v. Hemenway, ante* p. 134, 575 N.W.2d 143 (1998); *Elliott v. First Security Bank*, 249 Neb. 597, 544 N.W.2d 823 (1996). Thus, we have jurisdiction to review the judgment of the district court in its entirety.

STRASHEIM'S MOTION FOR SUMMARY JUDGMENT

The district court held that Vowers & Sons' acceptance of benefits under its settlement with Newell barred its claim against Strasheim as a matter of law under the doctrine of election of remedies. In general, election of remedies may be applied to require a party to choose between inconsistent remedies for redress of a single injury. It originated as a means to prevent double recovery and to limit potential harassment of defendants. *Porter v. Smith*, 240 Neb. 928, 486 N.W.2d 846 (1992). We have characterized the doctrine as a "somewhat vague notion lying somewhere between the areas occupied by the doctrines of equitable estoppel and res judicata." *Bryant Heating v. United States Nat. Bank*, 216 Neb. 107, 112, 342 N.W.2d 191, 194-95 (1983). It is considered a harsh rule which should not be applied in an oppressive manner. *Id.*

Election of remedies may be employed to require a party to choose between inconsistent remedies asserted in the same action. *Southwest Trinity Constr. v. St. Paul Fire & Marine*, 243 Neb. 55, 497 N.W.2d 366 (1993). The doctrine has also been applied to prevent a plaintiff who has been unsuccessful in suing a defendant on one theory from bringing a second action against the defendant on an inconsistent theory of recovery. *State ex rel. Schaub v. City of Scottsbluff*, 169 Neb. 525, 100 N.W.2d 202 (1960); *James v. Hogan*, 154 Neb. 306, 47 N.W.2d 847 (1951); *Turner v. Grimes*, 75 Neb. 412, 106 N.W. 465 (1906). Election of remedies can be applied to bar a claim only if there are two coexisting remedies which are so inconsistent that a party cannot logically choose one without renouncing the

other. *Bryant Heating v. United States Nat. Bank, supra*; *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961); *State v. Bank of Commerce*, 61 Neb. 22, 84 N.W. 406 (1900). For example, we stated in *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 260-61, 369 N.W.2d 96, 98 (1985):

> [A] party cannot proceed on a theory of recovery which is premised upon the existence of a contract and at the same time proceed alternatively on a theory which is premised on the lack of a contract. Consequently, one who has been induced to enter into an agreement by virtue of a material misrepresentation, that is to say, by virtue of fraud, may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to his or her position as it existed before entry into the contract. [Citation omitted.] *This is so because one remedy, damages, depends upon the existence of a contract, and the other, rescission, depends upon the concept that because of the fraud no contract came into existence.*

(Emphasis supplied.) See, also, *James v. Hogan, supra*; *Rasmussen v. Hungerford Potato Growers Ass'n*, 111 Neb. 58, 195 N.W. 469 (1923).

We agree that the remedy which Vowers & Sons seeks in this action is inconsistent with that which it asserted against Newell. Here, Vowers & Sons alleged that Strasheim breached a contract to purchase real estate, and prayed for loss of bargain damages, general damages, and consequential damages. In its action against Newell, Vowers & Sons sought to recover the same elements of damage based upon allegations that Newell's negligence in preparing the purported contract rendered it unenforceable. Vowers & Sons' claim against Strasheim is based upon an alleged breach of an enforceable contract, whereas its professional negligence claim against Newell depended upon proof that the same contract was unenforceable. Thus, the two remedies are inconsistent because Vowers & Sons could not logically prove one without disproving the other.

However, Vowers & Sons argues that the doctrine of election of remedies is inapplicable in this case because its claims were made against different parties. Our law on this point is unclear.

For instance, in 1902, without explicitly deciding whether the election of remedies doctrine applies when claims are made against different parties, this court held that a plaintiff was barred from asserting a remedy against a defendant when the plaintiff had prosecuted an action to judgment against a different defendant, requesting a different remedy. *Jones v. First Nat. Bank of Lincoln*, 3 Neb. (Unoff.) 73, 90 N.W. 912 (1902). However, in *Carson v. Greeley*, 107 Neb. 609, 187 N.W. 47 (1922), we held that no binding election had occurred for various reasons, including the fact that the two lawsuits were brought against different parties. Without referring to *Carson* or *Jones*, we stated in *Henley v. Live Stock Nat. Bank*, 127 Neb. 857, 863, 257 N.W. 244, 247 (1934), that the doctrine of election of remedies "may be applicable as well where the remedies are against different persons as where they are against the same person." Our decisions since *Henley* have not addressed this issue but have applied election of remedies only where inconsistent claims were made against the same party. *Farmers State Bank v. Germer*, 231 Neb. 572, 437 N.W.2d 463 (1989); *State ex rel. Schaub v. City of Scottsbluff*, 169 Neb. 525, 100 N.W.2d 202 (1960); *James v. Hogan*, 154 Neb. 306, 47 N.W.2d 847 (1951). Since a primary purpose of election of remedies is to protect defendants from multiple claims for redress of the same injury, we find merit in the argument that the doctrine is inapplicable to claims against different parties. Therefore, we hold that the doctrine of election of remedies is applicable only where inconsistent remedies are asserted against the same party or persons in privity with such a party. Language to the contrary in *Henley v. Live Stock Nat. Bank, supra*, and *Jones v. First Nat. Bank of Lincoln, supra*, is specifically disapproved.

Inconsistent claims against different parties may be barred by the doctrine of judicial estoppel, which we adopted in *Melcher v. Bank of Madison*, 248 Neb. 793, 539 N.W.2d 837 (1995). There, we stated:

> The doctrine of judicial estoppel holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. [Citations omitted.] The doctrine protects the integrity of the judicial pro-

> cess by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. [Citation omitted.] It has been said that unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist. [Citation omitted.] However, the doctrine is to be applied with caution so as to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement. [Citation omitted.] Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent results exists.

Id. at 798, 539 N.W.2d at 842.

The applicability of judicial estoppel in this case depends upon whether Vowers & Sons "successfully and unequivocally" asserted its professional negligence claim against Newell. In *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982), a case we relied upon in *Melcher* in adopting the doctrine of judicial estoppel, the court held that a settlement of a service-connected disability claim against the Veteran's Administration did not constitute a successful assertion of that claim so as to bar a subsequent claim against a private disability insurer whose policy excluded service-connected disabilities. The court reasoned that the "requirement that the position be successfully asserted means that the party must have been successful in getting the first court to accept the position," and that in the absence of such acceptance, the doctrine of judicial estoppel did not apply. 690 F.2d at 599. The court noted that "judicial acceptance" requires not that a party prevail on the merits, but "only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition." *Id.* at 599 n.5.

The record in the present case reflects that the action against Newell was dismissed with prejudice after the parties negotiated a settlement. There is no indication of any judicial acceptance of the claim that Newell was negligent as alleged by Vowers & Sons or that the court made any adjudication on the merits of such claim. Cf. *Sawyer v. State Surety Co.*, 251 Neb.

440, 558 N.W.2d 43 (1997). Thus, based upon the record before us, the prosecution and settlement of Vowers & Sons' suit against Newell do not operate as a bar to this action under the doctrine of judicial estoppel.

Strasheim contends that even if the district court erred in granting summary judgment on his election of remedies defense, he was entitled to summary judgment on the basis of a title insurance commitment which showed various liens against the property which was the subject of the sale, and his affidavit stating the date when he received the title insurance commitment and his intentions regarding the transaction. We do not consider the content of the affidavit because it is undated, unsworn, and unsigned and therefore does not comply with Neb. Rev. Stat. § 25-1334 (Reissue 1995). While the title insurance commitment showing an effective date of July 1, 1992, reflects significant liens against the property, Vowers' affidavit states that Vowers & Sons was "able and ready to convey said property" under the purchase agreement. Although it lacks specificity, this statement, when viewed in a light most favorable to Vowers & Sons, is sufficient to establish a genuine issue of material fact which precludes summary judgment in favor of Strasheim.

While we hold that Vowers & Sons is not barred as a matter of law from pursuing this action against Strasheim by virtue of its settlement with Newell, we note that the two claims appear to seek redress for the same injury. The measure of the seller's damages for breach of a contract to purchase real estate is the difference between the contract price and the fair market value of the property at the time of the breach. *Hahn v. International Management Services, Inc.*, 207 Neb. 229, 298 N.W.2d 140 (1980). This is also the measure of damages in an action by a property owner against a real estate agent alleging negligence in failing to prepare an enforceable purchase agreement, since the injury consists of the loss of the benefit of the sale which would otherwise have been realized but for the fact that the purchaser was not obligated to complete the purchase. *Tetherow v. Wolfe*, 223 Neb. 631, 392 N.W.2d 374 (1986).

Our determination that this action against Strasheim may proceed does not mean that Vowers & Sons would be entitled to

recover damages for the same injury twice. In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position he would have occupied if the contract had been performed, that is, to make the injured party whole. *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994); *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 502 N.W.2d 444 (1993). As a general rule, a party may not have double recovery for a single injury, or be made "more than whole" by compensation which exceeds the actual damages sustained. 25 C.J.S. *Damages* § 3 at 628 (1966). See, e.g., *Albee v. Maverick Media, Inc.*, 239 Neb. 60, 474 N.W.2d 238 (1991) (setoff for amount paid by third party necessary in order to prevent partial double recovery in breach of contract action); *E. K. Buck Retail Stores v. Harkert*, 157 Neb. 867, 62 N.W.2d 288 (1954) (absent special injury, stockholder not entitled to bring separate action for proportionate share of injury to corporation because subsequent recovery by corporation would result in double recovery for stockholder). Where several claims are asserted against several parties for redress of the same injury, only one satisfaction can be had. *Bryant Heating v. United States Nat. Bank*, 216 Neb. 107, 342 N.W.2d 191 (1983). Thus, to the extent that Vowers & Sons has received satisfaction from the settlement with Newell for injury and damage alleged in this action, any damages for which Strasheim would be potentially liable must be reduced pro tanto. See *id.*

VOWERS & SONS' MOTION FOR SUMMARY JUDGMENT

To support its motion for summary judgment, Vowers & Sons had the burden to show that no genuine issue of material fact existed and was required to produce sufficient evidence to demonstrate that it was entitled to judgment as a matter of law. See, *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998); *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997); *Eiche v. Blankenau*, 253 Neb. 255, 570 N.W.2d 190 (1997). As we stated in *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 538 N.W.2d 756 (1995), in order to recover for breach of contract a plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that actuate the

defendant's duty. See, also, *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996); *Production Credit Assn. v. Eldin Haussermann Farms*, 247 Neb. 538, 529 N.W.2d 26 (1995). While Vowers' affidavit contains a general statement that Vowers & Sons was prepared to convey the property pursuant to the purchase agreement, it offers no explanation as to how the outstanding liens shown on the title insurance commitment, which far exceeded the contract price, would be satisfied in order to permit conveyance of marketable title. Moreover, the affidavit contains no showing regarding any injury or damages sustained by Vowers & Sons as a result of the alleged breach of contract. Vowers & Sons therefore did not meet its initial burden of producing evidence which, if uncontroverted, would entitle it to judgment as a matter of law, and the district court did not err in denying Vowers & Sons' motion for summary judgment.

CONCLUSION

For the reasons stated, we conclude that the district court did not err in denying Vowers & Sons' motion for summary judgment. However, because we hold that the doctrines of election of remedies and judicial estoppel are inapplicable to this case and that genuine issues of material fact exist as to whether Strasheim is liable to Vowers & Sons for breach of contract, we conclude that the district court erred in entering summary judgment in favor of Strasheim. On the record before us, there is no basis for an award of attorney fees pursuant to § 25-824(2).

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DORIS M. MARTINDALE, APPELLANT, V.
DAVID H. WEIR, M.D., APPELLEE.
577 N.W.2d 287

Filed April 23, 1998. No. S-96-1176.

1. **Pretrial Procedure: Appeal and Error.** Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.

2. **Rules of the Supreme Court: Pretrial Procedure: Expert Witnesses.** Under Neb. Ct. R. of Discovery 26(e)(1) (rev. 1996), a party is under a duty seasonably to supplement his or her response with respect to any question directly addressed to the identity of each person expected to be called as an expert witness at trial, the subject matter on which he or she is expected to testify, and the substance of his or her testimony.
3. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach its own independent conclusion.
4. **Trial: Appeal and Error.** In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to the improper remarks no later than at the conclusion of the argument.
5. **Trial: Waiver: Appeal and Error.** A litigant may not waive an error, gamble on a favorable verdict, and upon obtaining an unfavorable result, assert the previously waived error.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

T.J. Hallinan, of Cobb & Hallinan, P.C., for appellant.

Raymond E. Walden and Mark E. Novotny, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

In this medical malpractice case, the district court entered judgment in accordance with the verdict in favor of the defendant-appellee, David H. Weir, M.D. In her challenge before the Nebraska Court of Appeals, the plaintiff-appellant, Doris M. Martindale, asserted that the district court erred in (1) excluding certain evidence and (2) failing to grant her a new trial. Under our authority to regulate the caseload of this court and that of the Court of Appeals, we, on our own motion, removed the matter to our docket. We affirm.

II. FACTS

During the course of performing laparoscopic surgery on Martindale, Weir punctured one of her arteries. Serious bleeding and subsequent complications resulted.

Martindale's averments included as a specific allegation of negligence: "Inserting the trocar to a depth contrary to recog-

nized standards . . . ." Martindale's expert, David S. Swan, M.D., offered to testify at trial that Weir used an improper angle of insertion and pushed the trocar to an improper depth. However, during the taking of his pretrial deposition, Swan stated that Weir deviated from the relevant standard of care only in employing an improper angle of insertion.

Weir objected on the ground that Swan's proffered trial testimony, that Weir also inserted the trocar to an improper depth, would present an undue surprise as postulating negligence on a different basis than disclosed previously. The district court limited Swan's testimony to the inappropriateness of the angle of insertion used by Weir.

In his closing argument, Weir urged:

> The bottom line would be regarding what [Martindale] has to prove in instruction 7 regarding the standard of care. I don't think there's been any proof by [Martindale] what the standard of care is.
>
> We have a physician coming in from Kentucky telling you what he thinks it is. We have physicians who practice and teach in this area tell you it's something different. The proof is every physician who has reviewed this case except . . . Swan—who has reviewed more than one hundred cases for plaintiffs—we think the angulation and the way . . . Weir describes this in both his operative report, it's on the film and the deposition is the way you do it.

III. ANALYSIS

1. Exclusion of Evidence

In the first assignment of error, Martindale contends that the district court wrongly refused to permit Swan to testify as to the depth to which the trocar was inserted.

We review this assignment under the rule that trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion. *Chief Indus. v. Hamilton Cty. Bd. of Equal.*, 228 Neb. 275, 422 N.W.2d 324 (1988). See, also, *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997).

Martindale argues that since the assertion that Weir negligently inserted the trocar to an inappropriate depth was

included in her specifications of negligence, Weir could not have been unfairly surprised, as he had adequate notice of her claim in that regard. However, as Weir argued to the district court, the problem is not with what was pled, but with the fact that Swan's deposition did not reflect that he would offer expert testimony in that area.

Martindale also argues that there was no surprise because Swan was the only medical expert identified as testifying to the standard of care. However, as Swan had been deposed and his answers in regard to the standard of care reflected his opinion that the angle was improper, but not that he felt the depth was improper, there was nothing which advised Weir that Swan's opinion had changed after he was deposed.

Neb. Ct. R. of Discovery 26(e)(1) (rev. 1996) provides that a party is under a duty

> seasonably to supplement his or her response with respect to any question directly addressed to
>
> . . . .
>
> (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he or she is expected to testify, and the substance of his or her testimony.

Since the question of how, in Swan's opinion, Weir had violated the standard of care in the medical procedure in question was directly put to Swan as an expert witness, Martindale was obligated to supplement Swan's answer if his opinion changed.

We therefore cannot say that the district court abused its discretion in limiting Swan's testimony as it did.

2. Closing Argument

In the second assignment of error, Martindale urges that Weir improperly appealed to local sentiment in an attempt to bolster his case and weaken her case.

In the context presented, the question raised by this assignment of error is one of law, in connection with which we as an appellate court are obligated to reach our own independent conclusion. *J.C. Penney Co. v. Balka, post* p. 521, 577 N.W.2d 283 (1998); *Stoneman v. United Neb. Bank, ante* p. 477, 577 N.W.2d 271 (1998).

Whatever may be the merits of Martindale's contention with respect to the nature of Weir's argument, she acknowledges that she neither objected to Weir's argument nor moved for a mistrial. She also recognizes that in *Wolfe v. Abraham*, 244 Neb. 337, 343, 506 N.W.2d 692, 697 (1993), we reaffirmed that "in order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to the improper remarks no later than at the conclusion of the argument." She urges, however, that this rule be abandoned, complaining that as the result of Weir's misconduct, she was confronted with a Hobson's choice in that if she had successfully objected and the district court had given a curative instruction, the jury's attention would have been focused on the "improper" comment; if, on the other hand, she had successfully objected after the argument but prior to a verdict and a mistrial had been granted, she would have been subjected to the stress and expense of another trial.

Be that as it may, there are a number of avenues for sanctioning a party and counsel who engage in improper argument. We are not prepared to permit a litigant to waive an error, gamble on a favorable verdict, and upon obtaining an unfavorable result, assert the previously waived error. *Wolfe, supra.*

IV. JUDGMENT

Since the record fails to sustain Martindale's assignments of error, we, as first noted in part I, affirm the judgment of the district court.

AFFIRMED.

J.C. PENNEY COMPANY, INC., APPELLEE, V. M. BERRI BALKA, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.

577 N.W.2d 283

Filed April 23, 1998. No. S-97-071.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Taxes.** The general theory behind the sales and use taxes is to impose a tax on each item of property, unless specifically excluded, at some point in the chain of com-

merce; if the item is purchased in Nebraska, the sales tax applies; if the item is purchased outside of Nebraska, the use tax applies.

3. **Taxes: Words and Phrases.** Where as a part of its business of selling products in Nebraska, an entity places its catalogs in the stream of commerce and directs to whom they are to be delivered and what should be done with catalogs which are not deliverable to the designated addressee, the entity exercises in Nebraska a right or power over the catalogs it causes to be prepared and owns, and therefore uses the catalogs in Nebraska, as the term "use" is defined in Neb. Rev. Stat. § 77-2702(20) (Cum. Supp. 1988).

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed.

Don Stenberg, Attorney General, and L. Jay Bartel for appellants.

William E. Peters, of Peters & Chunka, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

In seeking review by the Nebraska Court of Appeals, the respondent-appellant, State of Nebraska, through the Department of Revenue and the Tax Commissioner, M. Berri Balka, asserted, in summary, that the district court erred in reversing their assessment of a use tax against the petitioner-appellee, J.C. Penney Company, Inc. The parties thereafter petitioned to bypass the Court of Appeals. We granted the petitions and, finding merit in the assigned error, reverse the judgment of the district court.

II. SCOPE OF REVIEW

Resolution of the case depends upon the interpretation of a statute, a matter which presents a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Martindale v. Weir, ante* p. 517, 577 N.W.2d 287 (1998); *Hoiengs v. County of Adams, ante* p. 64, 574 N.W.2d 498 (1998).

III. FACTS

J.C. Penney is a Delaware corporation with its principal offices and place of business formerly located in New York,

New York, and now located in Dallas, Texas. It sells merchandise which it illustrates and describes in various catalogs, producing three major catalogs (spring/summer, fall/winter, and Christmas) and various smaller sale or specialty catalogs.

J.C. Penney's retail division operates retail stores in all 50 of the United States, including 24 stores in Nebraska. Its catalog division conducts a mail order catalog business and operates separately from the retail division. The catalog division maintains catalog sales locations within J.C. Penney retail stores and at separate locations not connected with a retail store. At the catalog sales locations, customers can order, pick up, and return catalog merchandise.

In order to sell its catalog merchandise, the catalog division sends catalogs to Nebraskans. The catalogs advertise merchandise that is identical to that sold in the retail stores, but also contain a selection of merchandise not available in the stores. In addition to picturing and describing the merchandise, the catalogs also contain ordering instructions, order forms, and shipping and delivery information. Customers may order catalog merchandise by utilizing and mailing the order form contained in the catalog, placing a telephone order from home, or visiting a catalog sales location and using the "special" telephone provided by the catalog division to call the distribution center, which is located outside Nebraska.

The catalog division in New York selected the persons to whom catalogs would be sent. The catalog division designed the catalogs in New York and sent the layouts to printers in Indiana, South Carolina, and Wisconsin. The catalogs sent to Nebraska during the relevant audit period were printed by R.R. Donnelley & Sons Company in Indiana and South Carolina and by Perry Printing in Wisconsin. Pursuant to its contract with R.R. Donnelley, the catalog division supplied the paper, shipping wrappers, and address labels for the catalogs, and R.R. Donnelley provided the ink and binding materials. The catalog division paid for the production, preparation, fabrication, printing, imprinting, and binding of catalogs that were delivered to Nebraska customers. With respect to the passage of title, the contract between J.C. Penney and R.R. Donnelley provided:

> [R.R.] Donnelley shall deliver completed work to carriers at [R.R.] Donnelley's plant of manufacture in accordance with [J.C.] Penney's shipping instructions. Title and possession shall pass to [J.C.] Penney upon delivery FOB trucks or railroad cars at such plant of manufacture. Except for manufacturing waste, title to all paper furnished by [J.C.] Penney in accordance with this Agreement shall, at all times, remain with [J.C.] Penney.

The catalogs at issue are "direct mail catalogs" which are sent directly to the homes of potential Nebraska customers, without charge to the recipient. J.C. Penney's catalog division determined, at its New York office, how these catalogs were to be shipped. The printer in Indiana delivered the majority of the catalogs it printed to a common carrier in Warsaw, Indiana, which then transported them to U.S. Post Office facilities in Nebraska, where the catalogs were sent by fourth-class mail directly to the addressees designated on the labels; shipped a small portion of the catalogs by fourth-class mail from the Warsaw Post Office to the addressees designated on the labels; and delivered the remaining catalogs to a common carrier in Warsaw, which then transported them to U.S. Post Offices in Nebraska where they were mailed, along with a detached address card, to Nebraska addressees indicated on the cards. The printers in South Carolina and Wisconsin mailed the small catalogs via third-class mail directly to the Nebraska addressees. J.C. Penney arranged for the transportation of all catalogs and paid the common carriers and the U.S. Post Office directly for all shipping costs and postal fees.

If a catalog could not be delivered to the designated addressee, the catalog division directed, based on the type of catalog involved, that the catalog either be delivered to the current resident or be returned to the catalog division. The addressees were free to use or discard the catalogs at will.

J.C. Penney has not paid a sales or use tax to any other state upon the producing, preparing, fabricating, processing, printing, imprinting, and binding of the catalogs upon which the department assessed a use tax in the instant case.

IV. ANALYSIS

The State urges that the district court erred in holding that J.C. Penney's distribution of direct mail catalogs sent via common carrier, the U.S. mail, or both to Nebraska residents did not constitute a "use" of tangible personal property subjecting the catalogs to a tax under Neb. Rev. Stat. § 77-2703 (Reissue 1990).

Section 77-2703(1) imposes a sales tax "upon the gross receipts from all sales of tangible personal property sold at retail in this state . . . ." Section 77-2703(2) imposes a use tax "on the storage, use, or other consumption in this state of tangible personal property purchased, leased, or rented from any retailer . . . for storage, use, or other consumption in this state . . . ." Neb. Rev. Stat. § 77-2702(20) (Cum. Supp. 1988) defines "use" as "the exercise of any right or power over tangible personal property incident to the ownership or possession of that tangible personal property . . . ."

The State claims not that J.C. Penney's actions constitute "storage" or "other consumption" of the catalogs in Nebraska, but that J.C. Penney is "using" the catalogs in Nebraska. Thus, the issue becomes whether J.C. Penney is exercising any right or power over the catalogs incident to the ownership or possession of that property in Nebraska.

Although the U.S. Supreme Court has not addressed this precise issue, it held in *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988), that Louisiana's imposition on a Louisiana corporation of a use tax upon direct mail catalogs printed out of state and mailed to residents in Louisiana did not violate the commerce clause. The Court accepted the Louisiana Court of Appeals' construction of Louisiana's tax statute and ruled only on the constitutional question. However, in discussing whether there was a "nexus" between the distribution and Louisiana, the Court noted:

> Holmes' contention that it lacked sufficient control over the catalogs' distribution in Louisiana to be subject to the use tax verges on the nonsensical. Holmes ordered and paid for the catalogs and supplied the list of customers to

> whom the catalogs were sent; any catalogs that could not be delivered were returned to it. Holmes admits that it initiated the distribution to improve its sales and name recognition among Louisiana residents. Holmes also has a significant presence in Louisiana, with 13 stores and over $100 million in annual sales in the State. [Citation omitted.] The distribution of catalogs to approximately 400,000 Louisiana customers was directly aimed at expanding and enhancing its Louisiana business.

486 U.S. at 32-33.

We therefore conclude that there is no federal constitutional impediment to Nebraska's imposing a use tax under the circumstances presented. The question simply is whether Nebraska has elected to do so.

The judicial opinions of other states have not reached a consensus. Among the cases refusing to impose a use tax under similar circumstances are *May Dept. Stores v. Director of Revenue*, 748 S.W.2d 174 (Mo. 1988); *Modern Merchandising v. Dept. of Revenue*, 397 N.W.2d 470 (S.D. 1986); *Mart Realty, Inc. v. Norberg*, 111 R.I. 402, 303 A.2d 361 (1973); *Sharper Image v Dep't of Treasury*, 216 Mich. App. 698, 550 N.W.2d 596 (1996), *appeal denied* 454 Mich. 867, 560 N.W.2d 636 (1997); *Department of Revenue v. J.C. Penney Co.*, 108 Wis. 2d 662, 323 N.W.2d 168 (Wis. App. 1982); *District of Columbia v. W. Bell & Co., Inc.*, 420 A.2d 1208 (D.C. App. 1980); *Bennett Bros., Inc. v. State Tax Com'n*, 62 A.D.2d 614, 405 N.Y.S.2d 803 (1978).

However, the State argues that *D. H. Holmes Co., supra*, marks a turning point after which every court considering this issue, with the exception of *Sharper Image, supra*, has held that delivering direct mail catalogs or other advertising materials printed out of state to state residents is a "use," subjecting the catalogs to use tax. For example, *Sharper Image Corp. v. Miller*, 240 Conn. 531, 692 A.2d 774 (1997); *American Exp. Travel v. Tax Com'n*, 128 Idaho 902, 920 P.2d 921 (1996); *J.C. Penney Co., Inc. v. Olsen*, 796 S.W.2d 943 (Tenn. 1990); *Service Merchandise v. DOR*, 188 Ariz. 414, 937 P.2d 336 (Ariz. App. 1996); *Talbots, Inc. v. Schwartzberg*, 928 P.2d 822 (Colo. App. 1996); *Collins v. J. C. Penney Co.*, 218 Ga. App. 405, 461

S.E.2d 582 (1995); *Comfortably Yours, Inc. v. Director, Div. of Taxation*, 272 N.J. Super. 540, 640 A.2d 862 (1994); *Sharper Image Corp. v. Comptroller of the Treasury*, 1993 WL 226248 (Md. Tax Feb. 18, 1993).

We have written that

> [t]he general theory behind the sales and use taxes is to impose a tax on each item of property, unless specifically excluded, at some point in the chain of commerce. [Citation omitted.] If the item is purchased in Nebraska, the sales tax applies. If the item is purchased outside of Nebraska, the use tax applies.

Interstate Printing Co. v. Department of Revenue, 236 Neb. 110, 119, 459 N.W.2d 519, 526 (1990).

Here, as a part of its business of selling products in Nebraska, J.C. Penney placed its catalogs in the stream of commerce and directed to whom they were to be delivered and what should be done with catalogs which were not deliverable to the designated addressee. Under those circumstances, we must conclude that J.C. Penney exercised in Nebraska a right or power over the catalogs it caused to be prepared and owned. It therefore used the catalogs in Nebraska, as the term "use" is defined in § 77-2702(20).

We are not unmindful that in the process of adopting the 1991 revisions to the Nebraska Revenue Act of 1967, the Legislature rejected language which would have expressly included in the definition of "other consumption" the delivery of "catalogs and other advertising materials, within this state to a person other than the purchaser . . . ." First Reading, L.B. 773, Revenue Committee, 92d Leg., 1st Sess. (Jan. 23, 1991); Legislative Journal, 92d Leg., 1st Sess. 1370 (Mar. 27, 1991). However, that circumstance does not alter the fact that J.C. Penney's activities with respect to its catalogs fall within the purview of use, as defined by the relevant statute.

V. JUDGMENT

Accordingly, as first noted in part I, the judgment of the district court is reversed.

REVERSED.

BIG JOHN'S BILLIARDS, INC., A NEBRASKA CORPORATION, APPELLEE, V. M. BERRI BALKA, STATE TAX COMMISSIONER, AND STATE OF NEBRASKA, DEPARTMENT OF REVENUE, APPELLANTS.

577 N.W.2d 294

Filed April 23, 1998. No. S-97-146.

1. **Jurisdiction: Judgments: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.
2. **Actions: Jurisdiction.** The absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
3. **Administrative Law: Jurisdiction: Final Orders.** For a district court to have jurisdiction over an administrative agency's decision, that decision must be final.
4. **Summary Judgment: Final Orders: Appeal and Error.** An order granting summary judgment is a final, appealable order, but a summary judgment granted without authority is no order at all.
5. **Administrative Law: Summary Judgment: Due Process: Notice.** In the absence of a statutory grant, an administrative agency does not have the authority to grant summary judgment in a contested case, as contested cases otherwise require notice and an opportunity for a full and fair hearing.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Appeal dismissed.

Don Stenberg, Attorney General, and L. Jay Bartel for appellants.

Sheldon J. Harris and Brent M. Kuhn, of Harris, Feldman Law Offices, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

The State of Nebraska, Department of Revenue (Department), and M. Berri Balka, the State Tax Commissioner, appeal the district court's decision reversing the commissioner's summary judgment order assessing sales tax on hourly fee pool tables. We dismiss because the commissioner is without authority to grant summary judgment and, thus, the commissioner's order was not final. The district court did not have jurisdiction.

BACKGROUND

Big John's Billiards, Inc. (Big John's), a Nebraska corporation, owns and operates entertainment centers equipped with pool tables, some of which are coin operated and some of which are paid for on an hourly fee basis. Big John's was licensed by the State of Nebraska to operate mechanical amusement devices pursuant to the Mechanical Amusement Device Tax Act (the Act), Neb. Rev. Stat. §§ 77-3001 to 77-3011 (Reissue 1990), which license was renewed annually for a fee of $250 for the operation of five or more machines. Apparently, assuming the hourly fee pool tables were covered by the Act, Big John's did not charge sales tax on the fees paid by customers using those tables.

The Department conducted an audit of Big John's and issued a deficiency assessment for Nebraska sales and consumer's use tax against Big John's for its failure to collect sales tax on the hourly fee tables. Big John's protested the deficiency assessment before the commissioner, and both parties filed motions for summary judgment. A hearing was held and briefs were submitted on the motions. The commissioner granted the Department's motion for summary judgment, noting that there was no dispute as to the relevant facts, and denied Big John's motion for summary judgment.

Big John's appealed to the district court, which reversed the commissioner's decision. The district court concluded that the hourly fee pool tables must be governed by the Act, otherwise the Act would violate Neb. Const. art. III, § 18, which prohibits special legislation. This conclusion was based upon the district court's determination that there is no substantial difference between the two types of pool tables and that where no substantial difference exists, classification is unconstitutional.

ASSIGNMENTS OF ERROR

The Department and the commissioner assert that the district court erred in (1) concluding that Big John's hourly fee pool tables fell within the definition of a "mechanical amusement device" under the Act and that the gross receipts generated from fees charged by Big John's to customers for use of such pool tables were therefore not subject to Nebraska sales tax and (2)

concluding that there was no substantial difference between coin-operated pool tables and hourly fee pool tables for purposes of Neb. Const. art. III, § 18.

SCOPE OF REVIEW

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998).

ANALYSIS

We do not reach the assignments of error because Big John's argues that the Department was without authority to enter an order of summary judgment, citing *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997), and *Jolly v. State*, 252 Neb. 289, 562 N.W.2d 61 (1997). We must consider this issue regardless of whether it was assigned because it is a jurisdictional question, and the absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *County of Sherman v. Evans*, 252 Neb. 612, 564 N.W.2d 256 (1997).

For a district court to have jurisdiction over an administrative agency's decision, that decision must be final. Neb. Rev. Stat. § 84-917 (Reissue 1994). An order granting summary judgment is a final, appealable order, *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996), but a summary judgment granted without authority is no order at all, see *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990) (holding that sentence imposed without authority is void). Therefore, if the Department's summary judgment order was granted without authority, the Department's decision was not final, and the district court was without jurisdiction to review that decision under the Administrative Procedure Act. If the district court lacked jurisdiction, then this court lacks jurisdiction. See *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995). Thus, we must determine whether the Department had the authority to grant summary judgment in order to determine whether we have jurisdiction to hear this appeal.

In *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev., supra*, we noted that administrative agencies have only that authority explicitly granted by statute. Accordingly, in the absence of a statutory grant, an administrative agency does not have the authority to grant summary judgment in a contested case, as contested cases otherwise require notice and an opportunity for a full and fair hearing. *Stoneman v. United Neb. Bank, ante* p. 477, 577 N.W.2d 271 (1998). Neither the Administrative Procedure Act nor chapter 77 of the Nebraska Revised Statutes, covering revenue and taxation issues, authorizes the Department to grant summary judgment. In the absence of any such authority, we must conclude that the Department's summary judgment order in the instant case was void ab initio. There was no final order. Therefore, this court is without jurisdiction to hear this appeal, and we do not reach either of the assignments of error.

CONCLUSION

This court lacks jurisdiction to hear this appeal because the commissioner lacks the authority to grant summary judgment, and thus, the commissioner's decision was not final. Therefore, the appeal must be dismissed.

APPEAL DISMISSED.

IN RE INTEREST OF GLORIA F., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. WALTER R., APPELLANT.

577 N.W.2d 296

Filed April 23, 1998. No. S-97-729.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and give weight to the fact the lower court observed the witnesses and accepted one version of the facts over another.
2. **Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the lower court.
3. **Juvenile Courts: Parental Rights.** Generally, a dispositional proceeding is a judicial determination concerning a juvenile's relationship to her or his parents following an adjudication under Neb. Rev. Stat. § 43-247 (Cum. Supp. 1996).

4. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the lower court.
5. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given a plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Statutes.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, or unambiguous out of a statute.
7. **Juvenile Courts: Jurisdiction.** A juvenile court is not required to wait until disaster has befallen a minor child before the court may acquire jurisdiction. If it is reasonable to assume that injury will occur absent action by the court, then the court may assume jurisdiction and act accordingly.
8. **Juvenile Courts: Rules of Evidence.** Strict rules of evidence are not applied to dispositional hearings.
9. ____: ____. Both preadjudication and postadjudication detention hearings are dispositional; thus, Neb. Rev. Stat. § 43-283 (Reissue 1993) applies, and relaxed rules of evidence may be followed.
10. **Juvenile Courts: Proof.** Neb. Rev. Stat. § 43-254 (Cum. Supp. 1996) requires the State to prove by a preponderance of the evidence that custody of a juvenile should remain with the Nebraska Department of Health and Human Services pending adjudication.

Appeal from the Separate Juvenile Court of Douglas County: WADIE THOMAS, JR., Judge. Affirmed.

Jeffrey A. Wagner, of Legal Aid Society, Inc., for appellant.

Karen S. Kassebaum, Deputy Douglas County Attorney, and Christine P. Costantakos, guardian ad litem, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

Walter R., the father of Gloria F., a female child 12 years of age, appeals from an order of the separate juvenile court of Douglas County, contesting an order of detention and placement with the Nebraska Department of Health and Human Services. The assigned errors can be combined as follows: The juvenile court erred in the admission of certain evidence, the detention order was not supported by sufficient evidence, and

the detention order violated various sections of the Constitutions of the State of Nebraska and the United States.

The parental rights of the natural mother had been previously terminated. See *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Gloria has been in foster care since March 1993. The petition to terminate appellant's parental rights was filed on July 11, 1997, and the detention order appealed from was issued June 30.

At the detention hearing, evidence was introduced of the paternity decree finding appellant to be the father of Gloria and finding that Gloria was conceived when her mother was 12 years of age. Further evidence established that appellant had never requested visitation with Gloria or offered or paid any support and that Gloria expressed revulsion concerning appellant directed at his sexual congress with her mother when the mother was of a young age.

The caseworker expressed the opinion that placement with appellant, a virtual stranger, was not in the best interests of Gloria and that appellant's past abuse of Gloria's mother exposed Gloria to an unacceptable risk.

Appellant contends the separate juvenile court erred in (1) granting the continued detention order, because the State failed to demonstrate reasonable efforts had been made to return Gloria to the parental home; (2) allowing the caseworker to testify regarding statements in her case file via the business record exception; and (3) granting the continued detention order, because the hearing deprived appellant of his due process rights.

Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and give weight to the fact the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Joshua M. et al., supra.* To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the lower court. *Farr v. Designer Phosphate & Premix Internat.*, 253 Neb. 201, 570 N.W.2d 320 (1997).

Appellant claims there was insufficient evidence to warrant the juvenile court's order granting continued detention. He bases this claim on the assertion that continued detention orders should be granted only where both Neb. Rev. Stat. § 43-254 (Cum. Supp. 1996) and Neb. Rev. Stat. § 43-1315 (Reissue 1993) are satisfied. Section 43-254 provides as follows:

> Pending the adjudication of any case, if it appears that the need for placement or further detention exists, the juvenile may be (1) placed or detained a reasonable period of time on order of the court in the temporary custody of either the person having charge of the juvenile or some other suitable person . . . .
>
> If a juvenile has been removed from his or her parent, guardian, or custodian pursuant to subdivision (3) of section 43-248, the court may enter an order continuing detention or placement only upon a written determination that continuation of the juvenile in his or her home would be contrary to the welfare of such juvenile and that reasonable efforts were made, prior to placement, to prevent or eliminate the need for removal and to make it possible for the juvenile to return to his or her home.

Section 43-1315 provides:

> In reviewing the foster care status of a child and in determining its order for disposition, the court shall continue disposition outside the home only upon a written determination that return of the child to his or her home would be contrary to the welfare of such child and that reasonable efforts have been made to make it possible for the child to return to his or her home. In making this determination, the court shall consider the following criteria, including, but not limited to:
>
> (1) The goals of the foster care placement and the appropriateness of the foster care plan established pursuant to section 43-1312;
>
> (2) The services which have been offered to reunite the family; and
>
> (3) When the return of the child to his or her home is not likely, the reasonable efforts which have been made or should be made to provide for other methods of care.

Appellant does not dispute that § 43-254 governs the determination of whether detention orders should be granted. However, appellant argues § 43-254 must be satisfied together with § 43-1315 because (1) detention orders are "dispositional" and (2) § 43-1315 addresses the evidentiary standard required to sustain dispositional orders. Appellant argues the State did not comply with § 43-1315, because the State failed to offer evidence that reasonable efforts had been made to return Gloria to her home or that placing Gloria in appellant's home would be contrary to her welfare. Citing the Nebraska Court of Appeals' holding in *In re Interest of Joshua M. et al.*, 4 Neb. App. 659, 548 N.W.2d 348 (1996), the State contends appellant's argument lacks merit because preadjudication detention orders, such as the order in question, are not dispositional in nature.

Generally, a dispositional proceeding is a judicial determination concerning a juvenile's relationship to her or his parents following an adjudication under Neb. Rev. Stat. § 43-247 (Cum. Supp. 1996). *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). The State agrees that dispositional orders concern the parental relationship following adjudication, yet, citing *In re Interest of Joshua M. et al., supra*, the State argues that unlike postadjudication detention orders, preadjudication detention orders are not dispositional.

However, *In re Interest of Joshua M. et al., supra*, does not stand for the proposition the State suggests. Rather, in *In re Interest of Joshua M. et al.*, the Court of Appeals distinguished preadjudication and postadjudication detention orders only to determine whether postadjudication detention orders are final and appealable. Moreover, in *In re Interest of R.G.*, 238 Neb. at 424, 470 N.W.2d at 793, we stated:

> [A] proceeding concerning the temporary placement of a juvenile pending adjudication is likewise dispositional in that, by its nature, the ruling involves a nonpermanent placement of a juvenile pending further judicial action. Thus, a hearing to determine who shall have custody of a juvenile pending an adjudication is in that sense dispositional . . . .

In light of our holding in *In re Interest of R.G., supra*, and the State's erroneous interpretation of *In re Interest of Joshua M. et*

al., supra, we reject the State's contention and agree with appellant insofar as that preadjudication and postadjudication detention orders are dispositional in nature.

Even though preadjudication and postadjudication detention orders are dispositional in nature, we must still determine whether § 43-1315 applies to all dispositional orders. This issue presents a question of statutory interpretation. Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the lower court. *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996). In the absence of anything to the contrary, statutory language is to be given a plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997). In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, or unambiguous out of a statute. *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997).

Section 43-1315 begins with the phrase "In reviewing the foster care status of a child *and in determining its order for disposition* . . . ." (Emphasis supplied.) Appellant urges this court to construe the reference to the term "disposition" to mean that any order considered dispositional must comply with § 43-1315. We do not read § 43-1315 so broadly. Rather, affording a plain and ordinary meaning, we read the beginning clause of § 43-1315 as meaning that when a court of competent jurisdiction reviews the status of a foster care placement, and in reaffirming or directing another disposition of the child, the court should consider the factors set forth in § 43-1315. Neb. Rev. Stat. § 43-1313 (Reissue 1993); § 43-1315. Considering the plain, ordinary meaning of the statute establishes that § 43-1315 merely articulates the criteria and requirements to be considered by a court when determining whether a foster care arrangement is appropriate. Thus, § 43-1315 applies to foster care status review hearings only.

We now examine whether sufficient evidence exists to support the continued detention order. See § 43-254. In this regard, appellant argues there was insufficient credible evidence indicating Gloria would be in danger if placed in appellant's custody. However, in *In re Interest of Joshua M. et al.*, 251 Neb. 614, 622, 558 N.W.2d 548, 556 (1997), we said a juvenile court is not required to "'"wait until disaster has befallen a minor child before the court may acquire jurisdiction. If it is reasonable to assume that injury will occur absent action by the court, then the court may assume jurisdiction and act accordingly."'" As such, identifying specific evidence of harm or risk of harm is unnecessary.

Appellant further argues the exhibits offered and the testimony proffered during the detention hearing do not provide sufficient facts to warrant the continued detention order. The exhibits were offered to demonstrate only that appellant is the father of Gloria, that the mother's parental rights were terminated, that the Nebraska Supreme Court affirmed the original judgment terminating the mother's parental rights, and that Gloria was placed in foster care on March 26, 1993. Appellant argues that none of these exhibits assist the State in meeting its burden of proof. We agree. However, the exhibits were offered only to establish factual and chronological information, not as proof that the continued detention order should be granted. Therefore, the juvenile court did not err in admitting the exhibits into evidence.

Appellant next argues the caseworker's testimony should not have been considered by the court because her testimony was based on inadmissible hearsay evidence contained in Gloria's case file. Appellant specifically objected to the caseworker's testimony where she expressed concern that appellant might repeat the same behavior with Gloria because he had impregnated Gloria's mother when the mother was only 12 years of age. Despite appellant's objection, the juvenile court allowed the caseworker to testify regarding the information contained in the case file, stating, "She can testify to it as a business record, so the objection is overruled." Regarding the court's ruling, appellant argues the business record exception is an improper basis on which to admit the caseworker's testimony, because the

caseworker lacked personal knowledge of the statements in the case file.

Strict rules of evidence are not applied to dispositional hearings. Neb. Rev. Stat. § 43-283 (Reissue 1993). We have established that both preadjudication and postadjudication detention hearings are dispositional; thus, § 43-283 applies, and relaxed rules of evidence may be followed. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). Even though relaxed rules of evidence may be employed, the proceedings must still be fundamentally fair. *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990).

However, even if we were to determine that the caseworker's testimony was inadmissible hearsay and that the business record exception was inapplicable, any error on the part of the juvenile court is not fatal to the court's determination. Admitting the caseworker's testimony is harmless, since Janet Peterson, the foster care case manager, also testified regarding the risk of placing Gloria with appellant because he had previously engaged in sexual contact with a 12-year-old. As this court stated in *In re Interest of R.A.*, 226 Neb. 160, 167, 410 N.W.2d 110, 115 (1987), *overruled on other grounds*, *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987), "[A]ny error in receiving the exhibits was not fatal to the juvenile court's determination [because] [t]he court had before it other evidence, in the form of testimony and exhibits . . . sufficient to sustain the order of termination." Even if the caseworker's testimony were excluded, the court would still be cognizant of the risks involved with placing Gloria in appellant's custody. Therefore, we need not determine whether the caseworker's testimony was inadmissible or whether the business record exception applies.

Finally, in determining whether sufficient evidence exists to sustain the juvenile court's order, we note that continued detention can be granted only where the State has met the requirements of § 43-254. Section 43-254 requires the State to prove by a preponderance of the evidence that custody should remain with the Nebraska Department of Health and Human Services pending adjudication. See *In re Interest of R.G., supra.* In analyzing this question, the issue is whether allowing Gloria to live

with her father is contrary to her welfare. See *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). We find that it is.

Gloria lived with her biological mother until her mother's parental rights were terminated. See *In re Interest of Joshua M. et al., supra.* Gloria has now been in foster care for nearly 5 years. Throughout this time, appellant has made no effort to contact or communicate with Gloria. The evidence also establishes that appellant impregnated Gloria's mother when he was 35 years of age and she was 12 years of age. At the time of the detention hearing, Gloria was 12 years old. Both the caseworker and the case manager, as well as the guardian ad litem, expressed concern that appellant posed a physical and psychological threat to Gloria given appellant's past conduct and Gloria's current age. Moreover, after being informed of the circumstances surrounding her own birth, Gloria apparently expressed disgust with appellant and stated she did not wish to know him. See *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996) (stating that child's wishes are not controlling, but should not be disregarded). Given the facts presented at the detention hearing and the temporary nature of the detention order, we agree with the juvenile court that continued detention is warranted.

In his final assignment of error, appellant argues he was denied due process because the juvenile court granted continued detention without requiring a showing of reasonable efforts pursuant to § 43-1315. Since § 43-1315 does not apply to all dispositional orders, the State was not required to show reasonable efforts. Appellant's final assignment of error lacks merit.

We find that appellant's assignments of error lack merit and that the juvenile court's order granting continued detention was supported by sufficient evidence. We affirm.

AFFIRMED.

EUGENE J. VESKERNA, APPELLANT, V. CITY OF WEST POINT, NEBRASKA, A POLITICAL SUBDIVISION, AND ROAD GEMS, INC., A NEBRASKA NONPROFIT CORPORATION, APPELLEES.

578 N.W.2d 25

Filed May 1, 1998. No. S-96-971.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Recreation Liability Act.** The purpose of Neb. Rev. Stat. §§ 37-1001 to 37-1008 (Reissue 1993) is to encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.
3. **Recreation Liability Act: Words and Phrases.** For purposes of Neb. Rev. Stat. §§ 37-1001 to 37-1008 (Reissue 1993): (1) The term "land" includes roads, water, watercourses, private ways and buildings, structures, and machinery or equipment thereon when attached to the realty, and (2) the term "owner" includes tenant, lessee, occupant, or person in control of the premises.
4. **Recreation Liability Act: Legislature: Intent.** The Legislature did not intend for a court to look to the subjective intent of an injured plaintiff in using public land to determine whether or not the Recreation Liability Act would bar an action.
5. **Statutes: Presumptions: Legislature: Intent.** In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result.
6. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Reversed and remanded for further proceedings.

Lawrence H. Yost, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellant.

Todd B. Vetter, of Gatz & Fitzgerald, and Jeffrey L. Stoehr, of Stoehr & Searson, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

This case arose out of an automobile-pedestrian accident which occurred in West Point, Nebraska, in October 1992. Appellant, Eugene J. Veskerna, sued appellees, City of West Point, Nebraska (West Point), and Road Gems, Inc., for negli-

gence in failing to properly and adequately barricade Main Street so as to preclude and prevent the motoring public from having access to Main Street; in moving, removing, or permitting removal of the barricades; in failing to warn pedestrians generally, and particularly appellant, that Main Street had been opened to vehicular traffic; and in failing to warn vehicle operators that Main Street was still being utilized by pedestrians during an antique automobile show. Appellant was struck by the vehicle of a third party, Elwin E. Erickson, while observing one of the antique automobiles on display. Erickson was not involved in the auto show and was driving down Main Street through the auto show area; either he had somehow gone around the barricades or the barricades were not in place. The district court for Cuming County, Nebraska, granted each appellee's motion for summary judgment on the basis that the Recreation Liability Act (Act), Neb. Rev. Stat. §§ 37-1001 to 37-1008 (Reissue 1993), provided appellees statutory immunity, and appellant timely appealed. On our own motion, we removed the matter to this court under our authority to regulate the caseloads of the Nebraska Court of Appeals and this court. We reverse, and remand for further proceedings.

BACKGROUND

Appellant was injured on October 4, 1992, while attending an automobile show staged by Road Gems. The show was staged in West Point with the approval and aid of West Point. Appellant was injured when he was struck by a private vehicle, not associated with the auto show, driven by Erickson.

The injury occurred at approximately 5:22 p.m. on Main Street. The evidence established that West Point had closed Main Street for an "Oktoberfest" festival, of which the auto show was a part. West Point, with the assistance of Road Gems, erected barricades to prevent motorists from using Main Street, and these barricades were to remain in place until the end of the auto show. There is some question as to what time the auto show was to end and whether the barricades were still in place at the time of the accident. West Point did not charge Road Gems a fee for the use of Main Street for its auto show, nor was the public charged a fee to view the automobiles. The facts are undisputed

that appellant was on Main Street to view the automobiles in the auto show.

Following discovery, each appellee moved for summary judgment. The district court, in granting each appellee's motion, held that the Act provided statutory immunity to West Point as a municipal corporation providing its land, Main Street, to the public free of charge for recreational purposes. The district court further held that Road Gems was an "occupant" for purposes of the Act due to its status as West Point's permittee. The district court further held that whether barricades were in place at the time of the accident was immaterial because § 37-1002 of the Act exempts the owner and occupier from any duty to warn the public of potential dangers present on the property. Appellant timely filed this appeal.

ASSIGNMENTS OF ERROR

Appellant assigns that the district court erred in (1) sustaining each appellee's motion for summary judgment based upon the Act and (2) ruling that a city street owned by West Point may be converted into a recreational area for purposes of limiting liability under the Act.

STANDARD OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Brams Ltd. v. Elf Enters.*, 253 Neb. 932, 573 N.W.2d 139 (1998); *Mandolfo v. Chudy*, 253 Neb. 927, 573 N.W.2d 135 (1998); *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb. 694, 573 N.W.2d 747 (1998).

ANALYSIS

The primary issue for review is appellant's contention that the district court improperly applied the Act so as to limit appellees' liability for his injuries. The Act was enacted in 1965 for the stated purpose of "encourag[ing] owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon." § 37-1001. No question is raised in this appeal as to whether the

activity of witnessing an auto show is a recreational purpose as defined by § 37-1008(3), nor is any question raised concerning § 37-1008(4), regarding whether or not a fee was charged for entry upon West Point's land, and these issues will not be discussed. Rather, appellant's primary concern is with subsections (1) and (2) of § 37-1008. These subsections of the Act read: "For purposes of sections 37-1001 to 37-1008: (1) The term land includes roads, water, watercourses, private ways and buildings, structures, and machinery or equipment thereon when attached to the realty; (2) the term owner includes tenant, lessee, occupant, or person in control of the premises." § 37-1008. There is no question that West Point is the owner of Main Street for purposes of § 37-1008(2).

Although Main Street was purportedly closed to vehicular traffic, several businesses along the street remained open to the public. Under the rationale used by the district court, a party who was struck while crossing the street to go to a restaurant could maintain an action against West Point, provided he was not attending the auto show. Conversely, an injured party attending the auto show, such as appellant herein, could not maintain an action against West Point, because his presence on the street would be for a recreational purpose and thus barred by the Act. The Legislature did not intend for a court, nor is this court prepared, to look to the subjective intent of an injured plaintiff in using public land to determine whether or not the Act would bar an action. In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result. *Slagle v. J.P. Theisen & Sons*, 251 Neb. 904, 560 N.W.2d 758 (1997); *In re Interest of Jaycox*, 250 Neb. 697, 551 N.W.2d 9 (1996). As such, we cannot presume that the Legislature intended to create separate classes of plaintiffs based upon the individual subjective intent of said plaintiffs in using the property.

The case at bar amounts to nothing more than an attempt by appellees to temporarily narrow the use to which already public land is put so as to relieve themselves of liability for injuries that may befall members of the public. Such a situation is clearly not intended by the Act. In construing a statute, a court must look to the statute's purpose and give to the statute a rea-

sonable construction which best achieves that purpose, rather than a construction which would defeat it. *In re Interest of Jaycox, supra*; *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). The stated purpose of the Act is to encourage landowners to make their land available to the public. Main Street was by its very nature already available to the public. Merely changing the use to which public lands are put cannot change the liability of the owner to members of the public who use the property. As such, the district court erred in sustaining each appellee's motion for summary judgment on the basis of the Act.

CONCLUSION

By its plain language, the Act was not intended to relieve landowners of liability based merely on the subjective intent of those members of the public who use the land. Furthermore, the land upon which appellant was injured was already public land and temporarily changing the stated intended use cannot exempt West Point from its duty to maintain Main Street. As such, we reverse the decision of the district court granting each appellee's motion for summary judgment and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

TRENT WORTMAN, BY AND THROUGH HIS NEXT FRIEND AND MOTHER, GLORIA WORTMAN, APPELLEE, V. DANNA UNGER, APPELLANT.

578 N.W.2d 413

Filed May 1, 1998. No. S-96-1225.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Prejudgment Interest: Actions.** With respect to a cause of action accruing after its effective date, prejudgment interest cannot be awarded to a litigant who has failed to comply with the requirements of Neb. Rev. Stat. § 45-103.02 (Cum. Supp. 1996).
3. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction that would defeat it.

4. **Statutes: Legislature: Intent.** A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.
5. **Prejudgment Interest: Claims: Actions.** An offer to settle a claim pursuant to Neb. Rev. Stat. § 45-103.02 (Cum. Supp. 1996) may be made either before or after the commencement of an action asserting the claim.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Daniel L. Lindstrom and Jeffrey H. Jacobsen, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellant.

James J. Paloucek, of Norman & Paloucek Law Offices, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

The parties, Trent Wortman (Wortman), by and through his next friend and mother, Gloria Wortman, and Danna Unger, settled this personal injury case with a stipulated judgment subject to judicial determination of the amount of prejudgment and postjudgment interest, if any. The sole issue on appeal is whether a written settlement offer communicated on Wortman's behalf prior to the commencement of this action complied with Neb. Rev. Stat. § 45-103.02 (Cum. Supp. 1996) so as to entitle Wortman to prejudgment interest computed from the date of the offer. The district court for Lincoln County held that it did. We agree and therefore affirm.

FACTS

The facts are not disputed. On June 17, 1995, Unger was driving a pickup truck in which Wortman was a passenger, when the truck rolled over on a county road in Red Willow County, Nebraska. As a result of the accident, Wortman suffered a severe spinal injury which resulted in permanent quadriplegia. At the time of the accident, Unger was insured by State Farm Mutual Automobile Insurance Company (State Farm).

On February 2, 1996, Wortman's attorney sent a letter to Deb O'Malley, a State Farm claims representative, offering to settle

Wortman's claim against Unger for $1.2 million and a waiver of State Farm's claim for reimbursement of payments made under its medical payment coverage. The letter was sent by certified mail, return receipt requested, and received by O'Malley on February 5. The letter recited that it was being sent "in order to comply with the requirements of Neb. Rev. Stat. § 45-103.02 (Cum.Supp. 1994) setting forth the procedure for obtaining prejudgment interest." However, the letter did not specifically state that it was an "offer to allow judgment." Wortman's attorney requested a reply within 60 days.

When this offer was not accepted, Wortman filed a petition in the district court for Lincoln County on May 2, 1996, alleging that he sustained injuries and damage as a result of the June 17, 1995, accident which were caused by Unger's negligence. The petition included a claim for prejudgment interest, based upon an allegation that the February 2, 1996, settlement offer was sent "for purposes of complying with the service provisions of Neb. Rev. Stat. § 45-103.02 (1994 Cum.Supp.)" and was not accepted.

On October 9, 1996, approximately 6 months after Wortman's petition was filed, Wortman and Unger filed a written stipulation which stated:

> The parties stipulate that, for purposes of determining entitlement to prejudgment interest pursuant to Neb. Rev. Stat. § 45-103.02 (1994 Cum.Supp.) in this lawsuit, the service on February 5, 1996, of the letter from [Wortman's attorney] to Deb O'Malley dated February 2, 1996, a copy of which is attached to the plaintiff's Petition, by certified mail, return receipt requested, was the equivalent of that offer being made in writing and being served upon the defendant on February 5, 1996, by certified mail, return receipt requested.

On the same day, Wortman's attorney sent a letter to Unger's attorney which stated in part:

> My clients have authorized me to make a proposal for resolution of this matter. This proposal is being provided to you by certified mail, return receipt requested, in order to comply with the provisions of Neb. Rev. Stat. § 45-103.02 (1994 Cum. Supp.). My clients will allow judgment to be entered in this case in the principal amount

> of $1.4 million, the taxable costs of the case, and any interest (prejudgment and/or postjudgment) to which they would be entitled upon judgment being entered in the principal amount of $1.4 million. . . . Our position is that, once judgment is entered in the principal amount of $1.4 million, the offer for settlement contained in the February 2, 1996, letter to Deb O'Malley entitles my clients to prejudgment interest on $1.2 million from February 2, 1996, until the date the judgment is entered and that postjudgment interest will accrue after that until the judgment is paid. . . . If we are unable to agree on entitlement to interest, we are willing to let the district court decide what, if any, interest award is appropriate upon judgment being entered in the principal amount of $1.4 million.

This letter was sent by facsimile as well as "certified mail, return receipt requested, as required by § 45.103.02 . . . ."

In a letter dated October 15, 1996, Unger's attorney agreed to accept Wortman's offer to allow judgment to be taken in the principal amount of $1.4 million and the taxable costs of the case, subject to the condition that Wortman's claimed entitlement to prejudgment and postjudgment interest would be submitted to the court for determination. On October 23, Wortman and Unger filed a stipulation for judgment to be entered against Unger in the amount of $1.4 million taxable costs, and "[p]rejudgment and/or postjudgment interest, if any, to which [Wortman] is entitled upon entry of judgment in the amount of $1,400,000.00 and costs." Wortman moved for prejudgment interest, based upon Unger's failure to accept his February 2 settlement offer. Following a hearing on November 4, the district court held that Wortman had complied with § 45-103.02 and was entitled to prejudgment interest computed from February 2. Pursuant to this finding and the stipulation of the parties, the district court then entered judgment in favor of Wortman and against Unger in the amount of $1.4 million, taxable costs, prejudgment interest in the amount of $57,413.26, and postjudgment interest. Unger appealed, and pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals, we removed the matter to our docket on our own motion.

ASSIGNMENT OF ERROR

Unger contends that the district court erred in awarding prejudgment interest to Wortman pursuant to § 45-103.02.

STANDARD OF REVIEW

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Abboud v. Papio-Missouri River NRD*, 253 Neb. 514, 571 N.W.2d 302 (1997); *Bank of Papillion v. Nguyen*, 252 Neb. 926, 567 N.W.2d 166 (1997); *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997).

ANALYSIS

Wortman's award of prejudgment interest is based upon § 45-103.02, which provides:

> (1) Except as provided in section 45-103.04, interest as provided in section 45-103 shall accrue on the unpaid balance of unliquidated claims from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the rendition of judgment if all of the following conditions are met:
>
> (a) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;
>
> (b) The offer is made not less than ten days prior to the commencement of the trial;
>
> (c) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and
>
> (d) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.
>
> (2) Except as provided in section 45-103.04, interest as provided in section 45-104 shall accrue on the unpaid balance of liquidated claims from the date the cause of action arose until the rendition of judgment.

We have held that with respect to a cause of action accruing after its effective date, prejudgment interest cannot be awarded

to a litigant who has failed to comply with the requirements of this statute. *IBP, inc. v. Sands*, 252 Neb. 573, 563 N.W.2d 353 (1997); *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995); *Schlake v. Jacobsen*, 246 Neb. 921, 524 N.W.2d 316 (1994); *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993); *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990). In each of these cases, there was no evidence of compliance with any of the requirements of § 45-103.02.

In this case, it is undisputed that the offer to settle for $1.2 million was made in writing and served by certified mail, return receipt requested, as required by § 45-103.02(1)(a), and that a copy of the offer and proof of delivery were subsequently filed with the court as required by § 45.103.02(1)(c). Unger contends, however, that the offer did not comply with the statute in other respects and that such noncompliance precludes an award of prejudgment interest. Our examination of this contention is governed by the rule that in construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction that would defeat it. *Slagle v. J.P. Theisen & Sons*, 251 Neb. 904, 560 N.W.2d 758 (1997); *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996). Moreover, a sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. *State v. Kincaid*, 235 Neb. 89, 453 N.W.2d 738 (1990); *Bayer v. Father Flanagan's Boys' Home*, 219 Neb. 824, 366 N.W.2d 760 (1985); *Wiseman v. Keller*, 218 Neb. 717, 358 N.W.2d 768 (1984). The parties agree that the "purpose of the prejudgment interest statute is to promote settlement efforts outside a trial setting and to prevent frivolous delay." Brief for appellant at 13. Accord, brief for appellee at 8.

Unger argues that the February 2, 1996, settlement offer did not comply with § 45-103.02(1)(a) because it did not explicitly offer " 'to allow judgment to be taken,' " brief for appellant at 9, and that even if this phrase had been included, it was ineffective because there was no pending action at the time Wortman communicated the offer. However, the February 2 letter included four references to § 45-103.02 and clearly reflected that it was

intended as a settlement offer made pursuant thereto. By its specific reference to the statute, the letter clearly placed Unger on notice that acceptance of the proposal would require her to allow a judgment to be taken in the amount of the demand and that failure to do so could result in liability for prejudgment interest. Therefore, we conclude that Wortman's February 2 settlement offer complied with § 45-103.02, notwithstanding the absence of the phrase "allow judgment to be taken."

There is no specific statutory requirement that a settlement offer pursuant to § 45-103.02 must be made during the pendency of litigation in order to serve as the basis for recovery of prejudgment interest. In *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991), we noted in dicta that in the context of § 45-103.02, an "offer of settlement of a lawsuit assumes that an action has been filed." 237 Neb. at 54, 464 N.W.2d at 775. However, in *Luedke v. United Fire & Cas. Co.*, 252 Neb. 182, 561 N.W.2d 206 (1997), in which we held that uninsured motorist benefits could not be reduced by workers' compensation benefits received by the policyholder, we directed the district court to enter a judgment which exceeded a settlement offer made prior to the filing of the action and, further, directed an award of prejudgment interest pursuant to § 45-103.02. While it is true that *Luedke* did not squarely present the issue of whether an offer of settlement communicated prior to the filing of a lawsuit complied with § 45-103.02 so as to permit a subsequent award of prejudgment interest, our holding implicitly answered the question in the affirmative, and we now hold that to be a correct interpretation of the law.

Interpreting the scope of § 45-103.02 narrowly to include only settlement offers made during the pendency of lawsuits would be contrary to the statutory purpose of encouraging prompt resolution of disputes. If a settlement offer made pursuant to § 45-103.02 is accepted before the filing of an action asserting the claim, the parties may "allow judgment to be taken" by filing a petition, voluntary appearance, and stipulation for consent judgment in the amount agreed upon; or, the parties may use the procedure for judgment by confession set forth in Neb. Rev. Stat. § 25-1309 et seq. (Reissue 1995). Therefore, we hold that an offer to settle a claim pursuant to

§ 45-103.02 may be made either before or after the commencement of an action asserting the claim. Language contained in *Braesch v. Union Ins. Co., supra*, suggesting otherwise is expressly disapproved.

Next, Unger argues that the February 2, 1996, settlement offer did not comply with § 45-103.02(1)(d) because it requested a reply within 60 days rather than 30 days as specified by the statute. We disagree. The fact that Unger was given more time to evaluate Wortman's settlement offer than the statute required does not support a contention that Wortman failed to comply with the statute.

Finally, we reject Unger's argument that no prejudgment interest is due by virtue of the fact that Wortman's claim was eventually resolved by a stipulated judgment as opposed to a trial on the merits. Section 45-103.02 clearly states that a party is entitled to interest on the unpaid balance of unliquidated claims "from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the rendition of judgment" if the settlement offer is made in compliance with statutory conditions. The statute does not differentiate between a judgment reached by agreement and one rendered following trial. This construction of § 45-103.02 should not, contrary to Unger's suggestion, discourage parties from settling claims. To the contrary, an award of prejudgment interest as a consequence of settling later rather than sooner is consistent with the essential purpose of § 45-103.02, which is to encourage prompt resolution of disputes.

We find no error in the award of prejudgment interest by the district court and therefore affirm its judgment.

AFFIRMED.

LARRY FOILES, APPELLEE, V. MIDWEST STREET ROD ASSOCIATION OF OMAHA, INC., A NEBRASKA CORPORATION, AND CHAMPIONSHIP AUTO SHOWS, INC., A MICHIGAN CORPORATION, APPELLANTS.

578 N.W.2d 418

Filed May 1, 1998. No. S-96-1269.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
2. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
3. **Judgments: Appeal and Error.** On appeal, judgments are considered in a light most favorable to the successful party, and every evidentiary conflict is resolved in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Trial: Judgments: Evidence: Appeal and Error.** Where neither party requests that the trial court make specific findings of fact and conclusions of law, if there is a conflict in the evidence, the appellate court in reviewing the judgment rendered will presume that the controverted facts were decided in favor of the successful party, and the findings will not be disturbed unless clearly wrong.
5. **Judgments.** A general finding that a judgment should be for a certain party warrants the conclusion that the trial court found in favor of that party on all triable issues.
6. **Actions: Fraud: Proof.** In order to maintain an action for fraudulent misrepresentation, a plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result.
7. **Fraud: Intent: Proof.** Intent to deceive is not an indispensable element of a cause of action for fraud based on misrepresentation.
8. **Fraud: Liability.** A party may be liable for misrepresentation when a representation was false when made and the party knew that it was false or made it recklessly and without knowledge of its truth or falsity.
9. **Fraud.** A person is justified in relying upon a representation made to him as a positive statement of fact, when an investigation would be required to ascertain its falsity.
10. **Attorney Fees: Appeal and Error.** An appellate court may award attorney fees on appeal whether or not fees were requested or ordered in the trial court.
11. **Attorney Fees: Words and Phrases.** For purposes of Neb. Rev. Stat. § 25-824(2) (Reissue 1995), "frivolousness" is defined as being a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position.
12. **Actions.** Any doubt whether a legal position is frivolous should be resolved in favor of the one whose legal position is in question.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Barbara Lohr Van Sant and Tami R. Weissert, of Schmid, Mooney & Frederick, P.C., for appellants.

Joseph A. Jordano and Michael J. Leahy, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellee.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Larry Foiles sued Midwest Street Rod Association of Omaha, Inc. (Midwest), and Championship Auto Shows, Inc. (Championship Auto), for damages he incurred when his trailer was stolen from a trailer parking lot at the 39th Annual World of Wheels exhibition in April 1994. Foiles alleged three theories of recovery: bailment, negligence, and fraudulent misrepresentation. The district court entered judgment in favor of Foiles in the amount of $7,173.16, and Midwest and Championship Auto appeal.

SCOPE OF REVIEW

In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997).

In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Id.*

On appeal, judgments are considered in a light most favorable to the successful party, and every evidentiary conflict is resolved in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. See *id.*

Where neither party requests that the trial court make specific findings of fact and conclusions of law, if there is a conflict in the evidence, the appellate court in reviewing the judgment rendered will presume that the controverted facts were decided in favor of the successful party, and the findings will

not be disturbed unless clearly wrong. *Henkle & Joyce Hardware Co. v. Maco, Inc.*, 195 Neb. 565, 239 N.W.2d 772 (1976).

FACTS

Foiles was in Omaha, Nebraska, in April 1994 for the 39th Annual World of Wheels exhibition held at the Civic Auditorium. Midwest and Championship Auto promoted and operated the event, which was sanctioned by the International Specialty Car Association. Prior to the show, Foiles received instructions which stated: "Traveling Exhibitors . . . Trailer parking will be provided at no charge in the city owned lot, underneath the Interstate at the rear of the Auditorium located between 19th and 20th Streets. . . ." Foiles was provided a map of the Civic Auditorium and the surrounding streets. The map designated a specific parking lot for trailer parking which was north of the Civic Auditorium under the Interstate ramps.

Foiles testified that he had never visited Omaha prior to April 1994 and that he was unfamiliar with the Civic Auditorium. Upon his arrival at the Civic Auditorium, Foiles was directed by individuals wearing white T-shirts upon which an auto club insignia was visible. It was stipulated that members of Midwest were attired in this fashion and that these individuals were agents of both Midwest and Championship Auto. After unloading his motorcycle and display materials in the auditorium, Foiles drove his pickup truck and trailer outside with the intention of parking along the curb.

Foiles attempted to park his pickup and trailer along the curb adjacent to the Civic Auditorium; however, representatives of Midwest and Championship Auto told Foiles that he could not park at that location. He was directed to park in a designated trailer parking lot farther north on 19th Street. Before leaving for the lot, Foiles inquired whether the lot was secure. He was told by agents of Midwest and Championship Auto that the lot had 24-hour security.

Foiles parked his pickup and trailer at the trailer parking lot, but upon exiting his pickup, he was told that the lot was for trailers only and that he would have to disconnect the pickup and trailer and park his pickup elsewhere. Foiles unhitched the trailer from the pickup and attached the trailer to a nearby post

with a chain he had used to hold his cargo in place en route to the show. While at the lot, Foiles again asked about its security and was told that " '[w]e have 24-hour security. You have nothing to worry about.' "

Foiles attended the car show, and while inside the auditorium, he observed uniformed security officers patrolling the arena. On the morning of April 9, 1994, Foiles went to the trailer parking lot and discovered that his trailer and the supplies he had left in the trailer had been stolen. At trial, another participant in the show testified that his trailer had been vandalized during the show and that he had been told by Midwest's agents that the lot was secure.

Foiles sued Midwest and Championship Auto to recover the damages he incurred as a result of the loss of his trailer. The district court did not make any specific findings of fact, but issued a general verdict in favor of Foiles. Midwest and Championship Auto timely appealed, and pursuant to our power to regulate the caseloads of the appellate courts of this state, we moved the case to our docket.

ASSIGNMENTS OF ERROR

In summary, Midwest and Championship Auto allege that the district court erred (1) in granting relief based upon an implied bailment, (2) in granting relief based upon fraudulent misrepresentation, and (3) in granting relief based upon negligence.

ANALYSIS

Neither party requested that the district court submit written findings of fact or conclusions of law. Thus, the district court issued a general verdict in favor of Foiles which stated as follows: "Upon review of the testimony and briefs submitted herein, the Court enters judgment for the plaintiff against the defendants in the sum of $7,173.16 and costs."

Where neither party requests that the trial court make specific findings of fact and conclusions of law, if there is a conflict in the evidence, the appellate court in reviewing the judgment rendered will presume that the controverted facts were decided in favor of the successful party, and the findings will not be disturbed unless clearly wrong. *Henkle & Joyce Hardware Co. v. Maco, Inc.*, 195 Neb. 565, 239 N.W.2d 772

(1976). A general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in favor of that party on all triable issues. See, *Peterson v. Kellner*, 245 Neb. 515, 513 N.W.2d 517 (1994); *Russell v. Luevano*, 234 Neb. 581, 452 N.W.2d 43 (1990).

Foiles alleged three theories of recovery: fraudulent misrepresentation, implied bailment, and negligence. Since the court entered a general verdict finding in favor of Foiles, we presume that Foiles prevailed on each theory alleged. In order to succeed upon appeal, Midwest and Championship Auto must establish that the district court was clearly wrong as to each theory of recovery.

Therefore, we first address the theory of fraudulent misrepresentation and consider each of the necessary elements to determine whether the district court was clearly wrong. In order to maintain an action for fraudulent misrepresentation, a plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result. *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997).

Foiles established that after depositing his equipment in the Civic Auditorium, an agent of Midwest and Championship Auto directed him to the trailer parking lot and informed him that the lot had 24-hour security. At the lot, another agent of Midwest and Championship Auto told Foiles that the lot was secure and would be patrolled by security 24 hours per day. The district court was not clearly wrong in finding that agents of Midwest and Championship Auto made a representation to Foiles.

Midwest and Championship Auto admitted at trial that security was not provided for the trailer parking lot and that their agents' statements were either false or recklessly made. This evidence satisfies the second and third elements of fraudulent misrepresentation—that the representation was false and that, when made, was known to be false or made recklessly without knowledge of its truth as a positive assertion. Intent to deceive

is not an indispensable element of a cause of action for fraud based on misrepresentation. *Id.* A party may be liable for misrepresentation when a representation was false when made and the party knew that it was false or made it recklessly and without knowledge of its truth or falsity. *Id.*

The final three elements are that the representation was made with an intention that the plaintiff should rely upon it, that the plaintiff did reasonably so rely, and that the plaintiff suffered damage as a result. See *id.* Midwest and Championship Auto claim that it was not reasonable for Foiles to rely upon representations made by their agents because Foiles was an "experienced business person and show participant." See brief for appellants at 14. Whether it was reasonable for Foiles to rely upon the representations is a question of fact which will be overturned on appeal only if the court's finding is clearly wrong. See *Evergreen Farms v. First Nat. Bank & Trust*, 250 Neb. 860, 553 N.W.2d 728 (1996) (finding that issue of fraudulent misrepresentation was question of fact).

A person is justified in relying upon a representation made to him as a positive statement of fact, when an investigation would be required to ascertain its falsity. *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996). Foiles testified that he observed security guards on patrol inside the Civic Auditorium and that two persons dressed in white T-shirts and wearing Midwest name tags and insignias specifically told him that the trailer parking lot had 24-hour security. In order to determine if the representation made to him was false, Foiles would have had to investigate these statements. Therefore, we cannot say that the district court was clearly wrong in determining that Foiles reasonably relied upon the representations made to him by Midwest and Championship Auto's agents.

Midwest and Championship Auto also argue that there is no evidence that they intended the information provided by their agents to influence Foiles. We disagree. Foiles testified that when an agent informed him about the trailer parking lot and pointed him toward the lot, he expressed concerns that the lot was dark and that he was not certain that his trailer would be safe. Foiles stated that the agent "just kind of waved . . . off [my concerns,] saying, 'It's safe. We have 24-hour security. You don't

need to worry.' " Another agent of Midwest and Championship Auto also told Foiles that the lot had 24-hour security and that he should not worry about it.

In viewing the evidence and making every reasonable inference deducible from the evidence in favor of Foiles, we conclude that the district court was not clearly wrong in finding that Midwest and Championship Auto had knowingly or recklessly made false representations with the intent that Foiles rely upon those representations and that Foiles did in fact rely upon the representations to his detriment.

Since Midwest and Championship Auto have not shown that the district court was clearly wrong in finding in favor of Foiles on the theory of fraudulent misrepresentation, we do not need to consider whether the court was clearly wrong as to the other theories of recovery. The district court's general verdict in favor of Foiles is affirmed.

We next consider Foiles' claim that he is entitled to attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995) because Midwest and Championship Auto's appeal is frivolous. An appellate court may award attorney fees on appeal whether or not fees were requested or ordered in the trial court. *First Nat. Bank v. Chadron Energy Corp.*, 236 Neb. 199, 459 N.W.2d 736 (1990). Foiles argues that because it is almost impossible for Midwest and Championship Auto to prevail on appeal, their claim is frivolous.

For purposes of § 25-824(2), "frivolousness" is defined as being "a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position." *U S West Communications v. Taborski*, 253 Neb. 770, 787, 572 N.W.2d 81, 93 (1998). Any doubt whether a legal position is frivolous should be resolved in favor of the one whose legal position is in question. *Surratt v. Watts Trucking*, 249 Neb. 35, 541 N.W.2d 41 (1995). The fact that Midwest and Championship Auto face a difficult standard of review on appeal does not mean that their appeal is frivolous. We find no evidence to suggest that this appeal was frivolous, and we decline to award attorney fees to Foiles on the grounds that the appeal was frivolous.

AFFIRMED.

WHITE, C.J., not participating.

EUGENE J. VESKERNA, APPELLANT, V. ELWIN E. ERICKSON, APPELLEE.

577 N.W.2d 736

Filed May 1, 1998. No. S-97-099.

1. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction.
3. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
4. **Motor Vehicles: Pedestrians: Highways: Right-of-Way.** Every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give an audible signal when necessary.
5. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Reversed and remanded for a new trial.

Lawrence H. Yost and Timothy M. Schulz, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellant.

Christopher M. Ferdico and Randall L. Goyette, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

This case arises out of an automobile-pedestrian accident which occurred in West Point, Nebraska, in October 1992. The case was tried to a jury, which rendered a verdict in favor of appellee, Elwin E. Erickson. The case arises out of the same set of facts as its unconsolidated companion, *Veskerna v. City of*

West Point, ante p. 540, 578 N.W.2d 25 (1998). On our own motion, we removed the matter to this court under our authority to regulate the caseloads of the Nebraska Court of Appeals and this court. We reverse, and remand the cause for a new trial.

FACTUAL BACKGROUND

Appellant, Eugene J. Veskerna, was in West Point, Nebraska, in October 1992 to view an antique automobile show. The city of West Point had closed Main Street in order to allow it to be used as a pedestrian walkway for the display of vehicles. Barricades were to be used to close Main Street to normal vehicular traffic. Appellee and his wife had traveled to West Point from their home in Lyons, Nebraska, to have dinner. In traveling to the restaurant, appellee was forced to turn onto Main Street due to obstructions blocking alternate routes. Appellee saw no barricades or signs warning him that an auto show was in progress, or that regular traffic was barred from Main Street. Furthermore, the accident took place at approximately 5:22 p.m., raising doubts about whether the auto show was finished; however, there were still a few lingering antique vehicles and pedestrians at the show.

Turning onto Main Street, appellee noticed the antique cars and pedestrians and realized that he should not be driving there. Appellee drove very slowly down Main Street, stopping once to allow pedestrians to cross. Appellee testified that he saw at least one other vehicle traveling on Main Street in the opposite direction. Appellee testified that as he was driving down Main Street, he observed appellant admiring one of the automobiles. Appellee stated that just as the front end of his car passed appellant, appellant stepped back into his car. At the time of the accident, appellant did not see appellee's vehicle. Appellant further stated that it was possible that he backed into appellee's vehicle because his attention was focused on the auto show.

At the close of the evidence, both parties renewed motions for directed verdicts, which were denied. At the jury instruction conference, appellant objected to several of the instructions intended to be given by the court and provided requested instructions. Appellant's objections revolved around his argument that the street was closed to regular vehicular traffic, and

the instructions, in his opinion, did not reflect the uniqueness of the situation. In response to an objection by appellee to an instruction regarding speed, the following dialog was had between the court and counsel:

> THE COURT: Well, I think, again, this reflects the law, at least those statutes. This is an unusual case and I think this closely reflects it as it can and it's accurate under the circumstances of this case.
>
> MR. YOST [counsel for appellant]: I agree it's unusual, Judge, and we suggest that unusual cases require unusual instructions, and you're giving us the usual instructions.
>
> THE COURT: In some respects I am; some I'm leaving others out. The ones that fit are being used; the ones that don't apply, I'm not going to create any additional law on this one.

Appellant further objected to the giving of a verdict form which allowed for the jury to use comparative negligence to allocate liability, which objection the court overruled. The jury returned a verdict for appellee using Verdict Form No. 1, which they were instructed to return should appellant fail to meet his burden of proving negligence. Appellant's motion for a new trial was overruled, and he timely appealed to this court.

ASSIGNMENTS OF ERROR

Consolidated for discussion, appellant assigns that the district court erred in (1) overruling appellant's motion for a directed verdict on the issue of appellee's liability; (2) failing to give the jury appellant's following requested instructions: No. 4, which stated that Main Street had been lawfully closed to motor vehicle traffic and temporarily converted to a pedestrian walkway; No. 5, which stated that as a pedestrian lawfully using Main Street as a walkway, appellant had only a duty to exercise reasonable care for his own safety and had no duty of lookout, control of his body, or right-of-way regarding unauthorized motor vehicle traffic; No. 6, which stated that all drivers shall avoid negligently hitting any pedestrian upon any street and shall give an audible signal when necessary; and No. 7, which stated that if appellee, prior to the accident, had reason to know his vehicle had intruded into a pedestrian walkway or that he was operating his vehicle in a pedestrian area, then at that time,

appellee had a duty to exercise caution, and failure to exercise caution would be negligence; (3) giving the following jury instructions: No. 7, which defines the issues and makes no mention of the area being converted into a pedestrian walkway; No. 10, which stated that a person may assume that every other person will use reasonable care and obey the law until the contrary reasonably appears; No. 11, which stated that negligence is doing something that a reasonably careful person would not do under similar circumstances; No. 12, which stated that drivers are negligent if they do something a reasonably careful driver in the same situation would not have done or failed to do something a reasonably careful driver in the same situation would have done; and No. 13, which defines reasonable care of a driver and also stated that no pedestrian shall suddenly leave a curb or other place of safety, walk, or run into the path of a vehicle, and the right of a pedestrian to use a street is equal to that of the driver; (4) giving the jury Verdict Form No. 3, which provided that the jury could compare the negligence of both parties should both parties carry their burdens of proof; (5) treating this case, through the totality of its instructions, as if this was a usual automobile-pedestrian case despite appellant's allegation of special circumstances; (6) failing to find, as a matter of law, that the street in question had been converted into a pedestrian mall; (7) instructing the jury that a pedestrian already in a place of safety could be guilty of negligence; and (8) overruling appellant's motion for a new trial.

STANDARD OF REVIEW

When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *German v. Swanson*, 250 Neb. 690, 553 N.W.2d 724 (1996). To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is

warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction. *Tapp v. Blackmore Ranch, Inc., ante* p. 40, 575 N.W.2d 341 (1998); *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998); *Fales v. Books*, 253 Neb. 491, 570 N.W.2d 841 (1997); *Kent v. Crocker*, 252 Neb. 462, 562 N.W.2d 833 (1997). Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Fales v. Books, supra*; *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997); *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996).

ANALYSIS

DIRECTED VERDICT

Appellant's first assigned error deals with the trial court's failure to direct a verdict in his favor on the issue of liability. Appellant's contention is that the facts of the case clearly show that appellant was a pedestrian rightfully where he should be and that appellee should not have been driving on Main Street. In support of this contention, appellant cites to Neb. Rev. Stat. § 60-6,109 (Reissue 1993) (formerly Neb. Rev. Stat. § 39-644 (Reissue 1988)) for the proposition that "every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give an audible signal when necessary . . . ." Appellant contends that this statute, coupled with appellee's testimony that he realized he was driving during the auto show and that he should exit from Main Street, suggest that the district court erred in denying his motion for a directed verdict.

The problem with such an argument is twofold. First, the statute raised by appellant raises a question of fact. It is clearly left to a jury to determine whether, under a given set of facts, an audible signal is necessary. As such, a directed verdict would not be proper without a determination as to the necessity of the audible signal.

Second, although appellant raises evidence which supports his contention that appellee knew he should not be driving on Main Street during the auto show, there was evidence to prevent the direction of a verdict as to liability. Appellee testified that

he saw at least one other vehicle on Main Street while he was traveling on it. There was also a fact question as to whether or not the auto show was completed at the time of this accident. Finally, appellant testified that no barricades warned him of the auto show, nor did any signs instruct him that Main Street was closed to automobile traffic. As such, there was sufficient contradictory evidence that reasonable minds could draw a number of different conclusions, and a directed verdict would not be proper. *Traphagan v. Mid-America Traffic Marking, supra*; *Reavis v. Slominski, supra*; *German v. Swanson, supra.*

JURY INSTRUCTIONS

Appellant's second and third assigned errors revolve around several jury instructions given by the trial court and objected to by appellant, and the failure of the court to give several of appellant's requested instructions. In reviewing jury instructions, we are mindful that jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Fales v. Books, supra*; *Hoover v. Burlington Northern RR. Co., supra*; *Sedlak Aerial Spray v. Miller, supra.*

Appellant assigns as error the giving of several jury instructions, among which the most problematic are instructions Nos. 7 and 13. Instruction No. 7 states in part:

> In defense to the plaintiff's claim, the defendant claims that the plaintiff himself was negligent in one or more of the following ways:
>
> 1. He failed to maintain a proper lookout;
>
> 2. He failed to exercise reasonable control over his body;
>
> 3. He failed to yield the right of way to the defendant.

Instruction No. 13 states in part:

> 3. No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to stop.
>
> 4. Unless otherwise provided by law, the right of pedestrians to use the street is equal to that of drivers. Among other things, this means that both pedestrians and drivers must act as reasonably careful persons would with respect to their own safety and the safety of others.

The above jury instructions were objected to by appellant at the jury instruction conference and form the basis of this appeal. It is appellant's contention that the trial court completely ignored the special circumstances of the case in formulating its instruction to the jury. Even when read in their entirety, the instructions indicate to the jury that appellant had a burden not to place himself in harm's way. Such an inference is not reasonably deducible from the evidence. Appellant clearly had an expectation of safety throughout the entirety of Main Street, due to its conversion to a pedestrian mall on the day in question. Appellant could not reasonably expect to be struck by a vehicle which was not authorized to be in the street at the time of the accident. As such, appellant could not be said to owe a duty to yield the right-of-way to appellee. Instruction No. 7 raises the question of whether appellant yielded the right-of-way to appellee. Appellant, because this was a blocked-off street and had become a pedestrian walkway, had no right-of-way. As to instruction No. 13, that portion stating that no pedestrian shall suddenly leave a curb or place of safety is inapplicable, as appellant was in a place of safety standing in the middle of the auto show. The second portion of this instruction is also erroneous in that appellee did not have an equal right to the use of this blocked-off street. Instructions Nos. 7 and 13 place a duty of reasonable care upon appellant which is improper in light of the evidence adduced at trial.

In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997); *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996); *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995). Based upon the above arguments, appellant has clearly met his burden of showing prejudice in the court's instruction of the jury. As such, appellant has shown prejudicial error meriting reversal. With this in mind, we do not address appellant's remaining assignments of error and reverse the decision of the lower court and remand the cause for a new trial.

CONCLUSION

Although the trial court properly attempted to tailor its instructions to the evidence that was adduced at trial, the instructions given prejudiced appellant in that they failed to adequately allocate appellee's burden of caution and put too great a duty of care upon appellant. Appellant has clearly met his burden of showing that he was prejudiced by the given instructions and that the cause merits reversal.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. CALVIN J. WHITE, APPELLANT.

577 N.W.2d 741

Filed May 8, 1998. No. S-96-984.

1. **Pleadings.** An issue presented regarding a denial of a plea in bar is a question of law.
2. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.
3. **Criminal Law: Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
4. **Constitutional Law: Double Jeopardy.** The Nebraska Supreme Court has not construed Nebraska's double jeopardy clause to provide any greater protections than those guaranteed by the U.S. Constitution.
5. **Convictions: Lesser-Included Offenses.** A conviction of a lesser-included offense is an implied acquittal of the greater offense when the jury is instructed as to both.
6. **Criminal Law: Lesser-Included Offenses: Proof.** The same-elements test from *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), is an acceptable test in resolving the issue of whether a lesser offense is merged into a greater offense by reason of identity of elements.
7. **Double Jeopardy: Legislature: Intent.** The assumption underlying the *Blockburger* rule is that the legislature ordinarily does not intend to punish the same offense under two different statutes.
8. **Criminal Law.** If two crimes are the same offense for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions.
9. **Criminal Law: Statutes.** The general overriding principle of statutory construction as it relates to a penal statute is that the penal statute is to be strictly construed.
10. ____: ____. A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence.

11. ____: ____. Penal statutes are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
12. **Statutes: Judicial Construction: Legislature: Intent: Presumptions.** Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.
13. **Criminal Law: Homicide.** The crime of first degree murder, as defined in Neb. Rev. Stat. § 28-303 (Reissue 1995), constitutes one offense even though there may be alternate theories by which criminal liability for first degree murder may be charged and prosecuted in Nebraska.
14. **Criminal Law: Homicide: Double Jeopardy: New Trial.** When a defendant is impliedly acquitted at trial of the offense of first degree murder, the Double Jeopardy Clause bars the State from reprosecuting that defendant at a subsequent proceeding, under a different theory of criminal liability, for the offense of first degree murder.
15. **Criminal Law: Trial: New Trial: Appeal and Error.** Reversal based upon trial error does not bar a retrial of a criminal defendant.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Reversed and remanded for further proceedings.

Robin W. Hadfield, of Nebraska Commission on Public Advocacy, and Vicky L. Johnson, Fillmore County Public Defender, for appellant.

Don Stenberg, Attorney General, and Barry Waid for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, and STEPHAN, JJ., and FAHRNBRUCH, J., Retired.

GERRARD, J.

This case presents the question whether, upon retrial after reversal of a second degree murder conviction, the State is barred by the Double Jeopardy Clause from reprosecuting Calvin J. White for the crime of first degree felony murder after White had originally been charged with, and tried for, first degree premeditated murder but convicted by a jury of second degree murder. Because we conclude that White was impliedly acquitted of first degree premeditated murder at his first trial and the Double Jeopardy Clause bars the State from prosecuting White for felony murder at a subsequent trial, we reverse, and remand.

BACKGROUND

On January 27, 1992, White was originally charged with first degree premeditated murder, use of a firearm to commit a felony, theft of an automobile, and other crimes unrelated to this appeal, in connection with the December 27, 1991, shooting death of Patricia Cool. White was tried for these crimes in July 1992, and the jury was also instructed with respect to the lesser-included offense of second degree murder. The jury returned a verdict finding White guilty of second degree murder, use of a firearm to commit the murder, and theft of an automobile, and judgment was entered thereon.

Having had his convictions for second degree murder, use of a firearm to commit the murder, and theft of an automobile affirmed on direct appeal in *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993) (*White I*), White subsequently filed a motion for postconviction relief which was denied in the district court. On February 16, 1996, this court reversed the district court's denial of postconviction relief on the conviction for second degree murder and use of a firearm to commit the murder because the jury was not instructed that malice is an element of second degree murder, as required by *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), and the cause was remanded for a new trial. *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996) (*White II*). The conclusion of *White II* stated that the cause was remanded "for a new trial on the second degree murder and use of a firearm charges in accordance with this opinion." *Id.* at 390, 543 N.W.2d at 731. The mandate of this court simply stated that the judgment was "reversed and remanded for a new trial."

After the cause was remanded for a new trial, the State, in an amended information, charged White with (1) felony murder, (2) second degree murder, (3) use of a firearm to commit a felony, and (4) being a habitual criminal. White, in an amended plea in bar, claimed that because he was impliedly acquitted of first degree premeditated murder by virtue of being found guilty of second degree murder, he was being placed in jeopardy twice for the same crime when the State filed a felony murder charge against him in a subsequent proceeding. White also asserted in the amended plea in bar that the amended information charging him with felony murder violated this court's mandate in *White*

II in that the mandate directed the district court to retry White for the crime of second degree murder. The district court overruled White's amended plea in bar, and White appeals.

ASSIGNMENTS OF ERROR

Restated, White asserts that the district court erred in overruling the amended plea in bar because the State's amended information charging him with felony murder violates (1) this court's mandate in *White II* in that the mandate directed the district court to retry White for the crime of second degree murder and (2) the Double Jeopardy Clauses of the Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution. White also contends that the district court violated his right to due process under the 14th Amendment to the U.S. Constitution and article I, § 3, of the Nebraska Constitution by overruling the amended plea in bar.

STANDARD OF REVIEW

An issue presented regarding a denial of a plea in bar is a question of law. *State v. Belmarez, ante* p. 467, 577 N.W.2d 264 (1998); *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998). Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Marshall, supra.*

ANALYSIS

Although it is the second assignment of error, we will first discuss White's double jeopardy claim because it is the dispositive issue in this appeal. The 5th Amendment to the U.S. Constitution, which is made applicable to the states through the 14th Amendment, provides in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Neb. Const. art. I, § 12, provides: "No person shall . . . be twice put in jeopardy for the same offense." The Double Jeopardy Clause of the Fifth Amendment protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Howell, ante* p. 247, 575 N.W.2d 861 (1998). This court has not construed Nebraska's double jeopardy clause

to provide any greater protections than those guaranteed by the U.S. Constitution. *Id.*

White asserts that if the State is allowed to go forward with its felony murder charge, he will be subjected to a second prosecution for the same offense after acquittal. Initially, we must determine whether White was actually acquitted of first degree premeditated murder at his first trial.

The U.S. Supreme Court specifically addressed this question in *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). In *Green v. United States*, the defendant was charged with arson and first degree felony murder. At trial, the jury was authorized to find Green guilty of arson and either first degree felony murder or, alternatively, second degree murder, i.e., killing with malice aforethought. The jury found Green guilty of arson and second degree murder; however, the second degree murder conviction was reversed on appeal. Green was then tried again for felony murder and was convicted. On appeal, the Supreme Court was presented with the issue of whether the conviction for felony murder at the second trial constituted a double jeopardy violation. The Court recognized that at the first trial the jury was dismissed without rendering an express verdict on the first degree murder charge, but that the jury had been given a full opportunity to return its verdict. The Court concluded, therefore, that the situation was no different than if the jury had expressly rendered a "not guilty" verdict on the felony murder charge and that the Double Jeopardy Clause should have prevented the State from retrying Green on that charge at the second trial.

We are presented with a directly analogous situation in the instant case. At White's July 1992 trial, the jury was instructed on the crimes of first degree premeditated murder and the lesser-included offense of second degree murder. The jury returned a verdict finding White guilty of second degree murder. Because the jury was given a full opportunity to return a verdict in this case, the conviction of second degree murder and silence with respect to first degree premeditated murder constitute at least an implied acquittal of the latter charge. White cannot be tried again for first degree premeditated murder.

The more difficult question that arises is whether first degree premeditated murder is the "same offense" as felony murder for purposes of determining whether White's implied acquittal of premeditated murder will bar the subsequent prosecution for felony murder. The State contends that premeditated murder and felony murder are not the same offense because each contains an element not contained in the other. In making this contention, the State urges us to apply the same-elements test from *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). In accordance with the *Blockburger* test, if each offense contains an element that is not contained in the other, they are not the same offense and there is no double jeopardy bar to a successive prosecution. *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). There can be no dispute that premeditated murder and felony murder do not contain the same "elements" to support a conviction for first degree murder. Premeditated murder requires a purposeful killing and premeditated and deliberate malice, *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995), none of which are required for felony murder, *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982). The very basis of felony murder is the underlying felonious act or attempted felonious act that results in a killing, *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982), which is not required for premeditated murder. Additionally, felony murder requires an intent to commit a felony, whereas premeditated murder does not. *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995) (felony murder requires intent to commit felony; premeditated murder requires intent to kill).

However, we reject the *Blockburger* test as the controlling principle in this case for two reasons. First, *Blockburger* is an acceptable test in resolving the issue of whether a lesser offense is merged into a greater offense by reason of identity of elements. In *Brown v. Ohio*, 432 U.S. 161, 168, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977), the Supreme Court stated that "[t]he greater offense is . . . by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." The Court added that "the sequence [of the greater and lesser offenses] is

immaterial." *Id.* However, the Supreme Court has never applied the *Blockburger* test in a case where the accused has been charged with committing the same crime in alternative ways, e.g., first degree premeditated murder and first degree felony murder.

Second, the *Blockburger* test is deemed by the Supreme Court to be only a rule of statutory construction. *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). The central focus of double jeopardy analysis is the determination of legislative intent.

> [T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

Brown v. Ohio, 432 U.S. at 165. See, also, *Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). If the legislature intends to create two separate offenses and allow punishment for both, then it has the power to do so. It is the legislature, and not the prosecution, which establishes and defines offenses. See *id.*

"The assumption underlying the *Blockburger* rule is that [the legislature] ordinarily does not intend to punish the same offense under two different statutes." *Ball v. United States*, 470 U.S. 856, 861, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985). In this case, we are not comparing two different statutes; premeditated murder and felony murder are both defined in the same statute, Neb. Rev. Stat. § 28-303 (Reissue 1995). In determining whether successive prosecutions violate the Double Jeopardy Clause when there has been a single violation of a single statute, the U.S. Supreme Court has expressly declined to apply the *Blockburger* test. *Sanabria v. United States, supra.*

Likewise, in considering whether dual convictions and sentences for first degree murder for one killing amounted to double jeopardy, the Supreme Court of Colorado declined to apply the *Blockburger* test. *People v. Lowe*, 660 P.2d 1261 (Colo.

1983). The Colorado court used two methods in determining that the dual convictions and sentences could not stand. First, " '[t]he Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct *except to the extent authorized by state law*.' " (Emphasis supplied.) *Id.* at 1267 (quoting *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)). Next, to determine whether state law authorized the dual convictions and sentences, the court applied rules of statutory construction:

> [T]he [U.S.] Supreme Court has adopted the rule of lenity as a tool of statutory construction. . . . The rule requires that courts resolve ambiguities in a penal code in the defendant's favor. . . . The rule of lenity is a corollary of the rule of statutory construction that requires penal statutes to be construed against the government. . . . The rule of lenity applies not only to interpretations of the substantive prohibitions, but also to the penalties they impose. . . .
>
> We have likewise recognized the rule of lenity as a tool to be used in interpreting penal statutes. Colorado criminal statutes are to be strictly construed in favor of the accused.

(Citations omitted.) *People v. Lowe*, 660 P.2d at 1267-68.

The Colorado court then went on to examine the first degree murder statute to determine whether the statute created one offense or multiple offenses:

> Section 18-3-102, C.R.S.1973 (1978 Repl.Vol. 8 & 1982 Supp.), provides:
>
> ". . . (1) A person commits the crime of murder in the first degree if:
>
> "(a) After deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person; or
>
> "(b) Acting either alone or with one or more persons, he commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault in the first or second degree . . . and, in the course of or in furtherance of the crime that he is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone; or

"(c) By perjury or subornation of perjury he procures the conviction and execution of any innocent person; or

". . . .

"(3) Murder in the first degree is a class 1 felony."

People v. Lowe, 660 P.2d at 1268 n.8. The Colorado court held that premeditated murder and felony murder were separate theories of the offense of first degree murder. "Murder after deliberation and felony murder are not denominated by the [Colorado statute] as separate and independent offenses, but only ways in which criminal liability for first-degree murder may be charged and prosecuted." *People v. Lowe*, 660 P.2d at 1269. Because the Colorado legislature did not clearly express an intent to allow conviction of more than one kind of first degree murder where there was only one person killed, strict construction prohibited dual convictions and punishments, which would have amounted to multiple punishments for the same offense. *People v. Lowe, supra.*

Several other jurisdictions have also held that premeditated murder and felony murder are the same offense. See, e.g., *People v. Zeitler*, 183 Mich. App. 68, 454 N.W.2d 192 (1990) (multiple murder convictions for one killing violate constitutional guarantee against double jeopardy); *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988) (premeditated murder and felony murder are merely two forms of same crime: first degree murder); *Wooten-Bey v. State*, 308 Md. 534, 520 A.2d 1090 (1987), *cert. denied* 481 U.S. 1057, 107 S. Ct. 2199, 95 L. Ed. 2d 853 (although premeditated murder and felony murder do not have identical elements, generally for purposes of double jeopardy provisions against successive trials or multiple punishments, they are deemed same offense); *State v. Powell*, 34 Wash. App. 791, 664 P.2d 1 (1983) (state legislature intended to specify alternative means of committing single offense); *State v. McCowan*, 226 Kan. 752, 602 P.2d 1363 (1979), *cert. denied* 449 U.S. 844, 101 S. Ct. 127, 66 L. Ed. 2d 53 (1980) (first degree murder statute does not create two different offenses, merely two theories for proving same offense); *State v. Gilroy*, 199 N.W.2d 63 (Iowa 1972) (sentences for premeditated murder and for felony murder imposed as result of one homicide amounted to double punishment); *Gray v. State*, 463 P.2d 897,

911 (Alaska 1970) ("[a]lthough there are several ways of committing first degree murder, it is still only one crime; and only one sentence can be imposed"). But see, *People v. Wilson*, 43 Cal. App. 4th 839, 50 Cal. Rptr. 2d 883 (1996) (allowing retrial of defendant on premeditated murder theory after reversal of conviction for felony murder); *Chao v. State*, 604 A.2d 1351 (Del. 1992) (intentional murder and felony murder are not same offense, therefore separate convictions and sentences are permissible).

Although *People v. Lowe*, 660 P.2d 1261 (Colo. 1983), and many of the cases cited from other jurisdictions involved multiple punishments for first degree murder imposed in one trial and the instant case involves successive prosecutions, the distinction is immaterial to our analysis. If two crimes are the same offense for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions. *Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). "Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings." *Brown v. Ohio*, 432 U.S. 161, 166, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

With the foregoing in mind, we set out to interpret Nebraska's first degree murder statute. Section 28-303 provides, in pertinent part:

> A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary . . . .

We have consistently held that the general overriding principle of statutory construction as it relates to a penal statute is that the penal statute is to be strictly construed. *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985); *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980). A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence. *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997); *State v. Sundling*, 248 Neb. 732, 538 N.W.2d 749

(1995). Additionally, penal statutes are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Robbins, supra*; *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996), *cert. denied* 519 U.S. 927, 117 S. Ct. 293, 136 L. Ed. 2d 213.

We have previously determined that premeditated murder and felony murder are two different methods of committing a single offense. That conclusion provided the basis for our holding that when a defendant is charged in the alternative with premeditated murder and felony murder, a jury need not be unanimous under which theory it convicts the defendant. *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991). In *State v. Buckman*, 237 Neb. at 942, 468 N.W.2d at 593, we concluded that

> it matters not if some jurors arrive at a guilty verdict based on proof of premeditation and some arrive at the same conclusion based on the commission of a felony by defendant. . . . Each juror need only be convinced beyond a reasonable doubt that defendant committed the crime of first degree murder as defined in our statute.

Similarly, in *State v. White*, 239 Neb. 554, 557, 477 N.W.2d 24, 25-26 (1991), we referred to *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), *rehearing denied* 501 U.S. 1277, 112 S. Ct. 28, 115 L. Ed. 2d 1109, and the conclusion in that case that there is "widespread acceptance of the two mental states [of premeditated and felony murder] as alternative means of satisfying the mens rea element of the single crime of first degree murder."

In the case at bar, the evidence could establish that the single act of killing was committed both after deliberation and in the perpetration of one of the enumerated felonies in § 28-303. White was initially charged, in 1992, with first degree premeditated murder. After the cause was remanded for a new trial, the State now seeks to charge White with, inter alia, felony murder. The conduct prohibited by § 28-303 is first degree murder. Premeditated murder and felony murder are not denominated in Nebraska's statutes as separate and independent offenses, but only ways in which criminal liability for first degree murder

may be charged and prosecuted. Therefore, the difference in the charges between the first trial and the retrial is a difference in the State's *theory* of how White committed the single offense of first degree murder.

The Legislature has not manifested any clear intent that a defendant could be convicted of more than one kind of first degree murder where there is but one victim. Our past construction of first degree murder as one offense capable of proof by several theories is sensible and serves the overarching penal goals of deterrence and retribution. To hold that premeditated murder and felony murder are separate offenses does not significantly further the goals of the statute because neither retribution nor deterrence would be served by imposing multiple death or life sentences for a single killing. We are guided by the rule that where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996); *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). Therefore, we hold that the crime of first degree murder, as defined in § 28-303, constitutes one offense even though there may be alternate theories by which criminal liability for first degree murder may be charged and prosecuted in Nebraska.

Consequently, we determine that when a defendant is impliedly acquitted at trial of the offense of first degree murder, the Double Jeopardy Clause bars the State from reprosecuting that defendant at a subsequent proceeding, under a different theory of criminal liability, for the offense of first degree murder. To hold otherwise would mean that in cases involving only one death, the State could potentially bring successive prosecutions for felony murder until the State eventually obtained a conviction or until it ran out of underlying felonies on which to base the felony murder charge. We agree with other courts that have made the observation that it would indeed be a strange system of justice that would permit two sentences to be imposed for the killing of one person. See, *People v. Lowe*, 660 P.2d 1261 (Colo. 1983); *Gray v. State*, 463 P.2d 897 (Alaska 1970). It would be no less strange to allow a prosecution for the same offense after

an acquittal or conviction based on a different theory of criminal liability.

Our holding that the Double Jeopardy Clause bars the State from retrying White for the crime of first degree murder does not prevent the State from proceeding with a new trial on the vacated second degree murder conviction and the related charge of use of a firearm to commit a felony. Reversal for trial error, such as incorrect jury instructions and ineffective assistance of counsel, implies nothing with respect to the guilt or innocence of White. Rather, it is only a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect. *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995), *cert. denied* 516 U.S. 1008, 116 S. Ct. 563, 133 L. Ed. 2d 488. Reversal based upon trial error does not bar a retrial of a criminal defendant. *Id.; State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995), *cert. denied* 516 U.S. 915, 116 S. Ct. 304, 133 L. Ed. 2d 209. As a result of our holding, we do not consider White's other assignments of error.

CONCLUSION

For the foregoing reasons, we conclude that the district court erred in overruling White's amended plea in bar. We, therefore, reverse the order of the district court and remand this cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., not participating.

BONNIE J. MARSHALL, PERSONAL REPRESENTATIVE OF THE ESTATE OF THOMAS J. MARSHALL, DECEASED, APPELLANT, V. DAWSON COUNTY PUBLIC POWER DISTRICT, APPELLEE.

578 N.W.2d 428

Filed May 8, 1998. No. S-96-1136.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Public Utilities: Electricity: Negligence.** A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.
3. ____: ____: ____. Power companies are not insurers and are not liable for damages in the absence of negligence.
4. ____: ____: ____. Unless a public utility has actual knowledge of a dangerous condition, the public utility has no duty to inspect or maintain power wires or appliances before supplying electrical power when those wires or appliances are owned or controlled by the customer.

Appeal from the District Court for Gosper County: JOHN J. BATTERSHELL, Judge. Affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Steven E. Guenzel, of Barlow, Johnson, Flodman, Sutter, Guenzel & Eske, for appellee.

Patrick W. Healey, of Healey & Wieland Law Firm, for amicus curiae Nebraska Rural Electric Association.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

Following the death of her husband due to electrocution, the appellant, Bonnie J. Marshall, as personal representative of the estate of Thomas J. Marshall, brought a claim pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1991 & Cum. Supp. 1994), against the appellee, Dawson County Public Power District (DCPPD). Marshall alleged that her husband was electrocuted due to the failure of DCPPD to inspect wiring on a boat dock not owned by DCPPD and to warn Thomas Marshall of dangerous wiring on the boat dock. The district court determined that DCPPD did not have a duty to inspect the wiring on the boat dock and granted summary judgment to DCPPD. We conclude there is no duty on the part of a public utility to inspect lines owned or controlled by its customers unless the public utility has actual notice of a dangerous condition. We affirm.

BACKGROUND

In 1989, Bonnie and Thomas Marshall purchased a cabin located at Johnson Lake. The Mallard Beach Association, an association of cabin owners at Johnson Lake, maintained a dock on the lake. Members of the association were assessed dues to pay for upkeep of the dock and worked together to keep the dock in repair. Members of the association removed the dock from the lake each fall and placed it back in the lake each spring. The dock was equipped with a system of lights powered by electricity. DCPPD supplied power to the dock through a line that was attached to a meter pole 6 feet from the dock. There is no dispute between the parties that the electric line up to the meter was owned by DCPPD, while the lines past the meter, including the electric lines on the dock, were not DCPPD's property. Rather, the electric wiring past the meter is referred to by both parties as being "the customer's," who is presumably the Mallard Beach Association.

On July 8, 1993, a severe storm passed through the Johnson Lake area, moving several sections of the dock out of alignment and damaging service to the meter pole. As a result, two linemen from DCPPD replaced the powerline running to the meter pole. When the linemen performed the repair, they observed there was no load on the electrical system. Specifically, they saw what appeared to be a residential electric fuse box attached to the meter pole with the disconnect switch set to the "off" position. In addition, the meter included a plug outlet that had nothing plugged into it, and no lines were leading out of the service boxes below the meter. Because a line was not connected or plugged into the service box and the disconnect switch was off, the linemen perceived no risk associated with reenergizing the system and they proceeded to do so. The linemen did not look at or go onto the dock because they saw no reason to do so. The record reflects that the linemen were not trained in the National Electric Code because power distribution does not fall under the scope of that code. Rather, it is the wiring beyond the customer's meters, such as the wiring on the boat dock, that is governed by the National Electric Code.

On July 25, 1993, Thomas Marshall assisted other members of the Mallard Beach Association in realigning the damaged

sections of the dock. While working on the dock, Thomas Marshall came in contact with electricity from the dock lighting and was electrocuted. An electrical inspector for the State of Nebraska inspected the dock's wiring on August 19, found violations of the National Electric Code, determined that the dock wiring was "proximately dangerous" to human life, and issued a disconnect notice for the electrical service to the dock.

Marshall filed the instant action pursuant to §§ 13-901 to 13-926, alleging that DCPPD was negligent in failing to inspect the dock and warn of the danger. DCPPD's answer did not allege that any of the exceptions to coverage of the Political Subdivisions Tort Claims Act in § 13-910 applied. At the summary judgment hearing, Marshall offered into evidence exhibit 8. Exhibit 8 purported to be an expert opinion regarding what the linemen could have or should have seen regarding the condition of the wiring on the dock if they had looked at it. The district court refused to admit exhibit 8 because the opinion was beyond the expertise of the witness and was not relevant. The court then determined that DCPPD did not have a duty to inspect the electric wiring on the dock and granted summary judgment in favor of DCPPD.

ASSIGNMENTS OF ERROR

In summary, Marshall assigns that the district court erred in (1) determining that DCPPD did not have a duty to inspect the dock and warn of the electrical hazards on the dock, (2) granting summary judgment to DCPPD, and (3) failing to admit exhibit 8 into evidence.

STANDARD OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998); *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998).

ANALYSIS

Marshall contends that DCPPD had a duty to inspect the dock and warn of the dangerous nature of its wiring because the dangerous nature of the wiring would have been readily apparent had the linemen looked at the dock. Essentially, Marshall contends that DCPPD should have known that the wiring on the dock was defective and, in light of this, should have refused to reenergize the lines or should have warned Thomas Marshall of the danger. DCPPD contends that it does not have a duty to inspect a customer's wiring unless it has actual notice of a danger.

A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines. *Engleman v. Nebraska Public Power Dist.*, 228 Neb. 788, 424 N.W.2d 596 (1988); *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987). However, power companies are not insurers and are not liable for damages in the absence of negligence. *Engleman v. Nebraska Public Power Dist., supra*; *Tiede v. Loup Power Dist., supra*. It is well settled that unless a public utility has actual knowledge of a dangerous condition, the public utility has no duty to inspect or maintain power wires or appliances before supplying electrical power when those wires or appliances are owned or controlled by the customer. *Central Power & Light Co. v. Romero*, 948 S.W.2d 764 (Tex. App. 1996); *Carter v. Bangor Hydro-Elec. Co.*, 598 A.2d 739 (Me. 1991); *Upton v. Magnolia Elec. Power Ass'n*, 511 So. 2d 939 (Miss. 1987); *Jenks v. Hill*, 504 F. Supp. 1130 (W.D. Okla. 1981); *Summers v. Union Elec. Co.*, 565 S.W.2d 677 (Mo. App. 1978); *New Mexico Electric Service Co., Montanez*, 89 N.M. 278, 551 P.2d 634 (1976); *Kroger v. Omaha Public Power District*, 523 F.2d 161 (8th Cir. 1975) (applying Iowa law); *Naki v. Hawaiian Elec. Co.*, 50 Haw. 416, 442 P.2d 55 (1968); *Martin v. Northern States Power Co.*, 245 Minn. 454, 72 N.W.2d 867 (1955); *Delaney v. Town of Etowah*, 182 Tenn. 386, 187 S.W.2d 531 (1945); *Oesterreich v. Claas*, 237 Wis. 343, 295 N.W. 766 (1941).

In the instant case, it is undisputed that the wiring beyond the meter pole, including the wiring on the dock, was owned and controlled by the customer and not by DCPPD. It is also undis-

puted that DCPPD did not have actual knowledge or notice of any defects in the wiring on the dock. Marshall's allegation that DCPPD "should have known" of the dangerous wiring because it would have become obvious if the linemen had looked at the dock is not sufficient to create a duty of inspection on the part of DCPPD. See, e.g., *Jenks v. Hill, supra* (constructive knowledge is insufficient where public utility has no independent duty to inspect, maintain, or repair). Accordingly, DCPPD did not have a duty to inspect or maintain the wiring of the dock, and summary judgment was appropriate.

Having determined that there was no duty on the part of DCPPD to inspect the dock, we also determine that the refusal of the trial court to admit into evidence exhibit 8, an exhibit purporting to give an opinion of what the linemen could have or should have seen had they inspected the dock, was appropriate. The order of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF NEBRASKALAND LEASING & ASSOCIATES, DOING BUSINESS AS NEBRASKALAND MOVING & STORAGE. NEBRASKALAND LEASING & ASSOCIATES, DOING BUSINESS AS NEBRASKALAND MOVING & STORAGE, APPELLANT AND CROSS-APPELLEE, V. BORLEY MOVING AND STORAGE, INC., ET AL., APPELLEES AND CROSS-APPELLANTS, AND ALLIED VAN LINES, INC., ET AL., APPELLEES.

578 N.W.2d 28

Filed May 8, 1998. No. S-96-1318.

1. **Public Service Commission: Appeal and Error.** In an appeal from the Public Service Commission, an appellate court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence establishes that the order in question is not unreasonable or arbitrary.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court reaches its own conclusions.
3. **Statutes: Constitutional Law.** A litigant who invokes the provisions of a statute may not challenge its validity nor seek the benefit of such statute and in the same action and at the same time question its constitutionality.
4. **Public Service Commission: Appeal and Error.** In reviewing a decision of the Public Service Commission, it is not the province of an appellate court to weigh or

resolve conflicts in the evidence or the credibility of the witnesses; rather, an appellate court will sustain the decision of the commission if there is evidence in the record to support its findings.

5. ____: ____. If there is evidence to sustain the findings of the Public Service Commission, an appellate court cannot substitute its judgment for that of the commission.
6. ____: ____. Determinations by the Public Service Commission are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by an appellate court in the absence of a showing that the action of the commission was arbitrary or unreasonable.
7. **Public Service Commission.** In determining public convenience and necessity, the deciding factors are (1) whether the operation will serve a useful purpose responsive to a public demand or need, (2) whether this purpose can or will be served as well by existing carriers, and (3) whether it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.
8. **Public Service Commission: Appeal and Error.** The issues of public convenience and necessity are ordinarily issues of fact, and where there is evidence in the record to sustain the Public Service Commission's order, an appellate court cannot find the order unreasonable and arbitrary.
9. **Public Service Commission.** When an applicant has been illegally conducting business under a mistaken belief that its operations were legal and has done so for a sufficient period of time, the color of right principles of law apply; if, however, the applicant knew that its operations were illegal, then the color of right principles do not apply.
10. ____. General fears of potential diversion, as contrasted with specific evidence indicating probable harm, do not constitute proof that harm will result to competitive carriers because of an application.

Appeal from the Nebraska Public Service Commission. Affirmed.

John M. Boehm for appellant.

Heidi Hornung Scherr, of Scudder Law Firm, P.C., for appellees Borley Moving and Storage et al.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

The Nebraska Public Service Commission denied the applicant-appellant, Nebraskaland Leasing & Associates, a certificate of public convenience and necessity to operate as a com-

mon carrier of household goods in Nebraska intrastate commerce. In challenging the denial to the Nebraska Court of Appeals, Nebraskaland (1) questioned the constitutional validity of the regulatory scheme imposed by Neb. Rev. Stat. §§ 75-301 through 75-322 (Reissue 1990 & Supp. 1995) and (2) asserted that the commission's factual findings are erroneous. Certain of the protestants-appellees, i.e., Borley Moving and Storage, Inc.; A-1 Metro Movers; Chieftain Van Lines, Inc.; and Andrews Van Lines, Inc., have cross-appealed, claiming the commission erred in finding that Nebraskaland is fit, willing, and able to perform the services proposed. Under our authority to regulate the caseloads of this court and the Court of Appeals, we, on our own motion, removed the matter to our docket. We affirm.

II. SCOPE OF REVIEW

In an appeal from the Public Service Commission, an appellate court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence establishes that the order in question is not unreasonable or arbitrary. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). However, as to questions of law, an appellate court reaches its own conclusions. *State v. Hill, ante* p. 460, 577 N.W.2d 259 (1998).

III. FACTS

Nebraskaland, in business since 1985, operates mostly as an interstate carrier of household goods, but also performs local and intrastate moves within Nebraska. It has been conducting its intrastate business since 1989 pursuant to a lease with Husker Express, Inc. While the lease agreement is entitled "**EQUIPMENT LEASE AGREEMENT**," Nebraskaland operates as if it is leasing Husker Express' authority, notwithstanding that the agreement provides: "THIS EQUIPMENT LEASE SHALL NOT CONSTITUTE A LEASE OF AUTHORITY AND SHALL NOT BE CONSIDERED AS SUCH BETWEEN THE PARTIES."

Husker Express does not conduct any household goods moving, and since 1989 has referred all of its household goods business to Nebraskaland. Nebraskaland attracts its intrastate mov-

ing business by yellow pages advertising and receives referrals for intrastate moves from Paul Arpin Van Lines, Nebraskaland's national carrier. Intrastate moves conducted pursuant to its lease with Husker Express make up approximately 15 percent of Nebraskaland's business.

Nebraskaland owns three tractor-trailers and three straight trucks, but uses only two of the tractor-trailers when conducting business under its lease with Husker Express. Nebraskaland conducts intrastate moves on weekends without charging extra, conducts intrastate moves on holidays, and has a 500-pound minimum weight requirement. It performed approximately 40 intrastate moves from 1989 through 1996.

Nebraskaland performs intrastate moves for Concordia College. It also conducts furniture repossessions for Nebraska Furniture Mart. However, because it does not hold a certificate of public convenience and necessity for intrastate moves, Nebraskaland only picks up the furniture in Lincoln and stores it in its warehouse until Nebraska Furniture Mart sends one of its trucks from Omaha to pick it up. Mel Mullennax, a Nebraska Furniture Mart employee in charge of recovering merchandise, testified that he supports the granting of a certificate to Nebraskaland and would retain its services for intrastate moves. He also testified that Nebraska Furniture Mart has declined to hire other carriers because their rates are too high. However, Mullennax admitted that if Nebraskaland published a tariff that required it to charge the same rate as other carriers, Nebraska Furniture Mart would not hire Nebraskaland.

Terrie Hartshorn, a Nebraskaland employee, telephoned Andrews Van Lines in Norfolk on June 27, 1996, and asked if it would be able to perform a move from Norfolk to Chadron on July 5. She was told that Andrews Van Lines was totally booked until August. Todd Hartshorn, another Nebraskaland employee, telephoned protestant-appellee Pioneer Moving & Storage, Inc., on June 25, asked if it could move 4,000 pounds from Lincoln to Imperial on July 4 and 5, and was told that it could not do so until July 8. He also called protestant-appellee Ford Van Lines, Inc., on June 25 to ask the same question and was told that it could possibly pick up the goods on July 5 and deliver them on July 6, but that it would cost extra because July 6 was on a

weekend. Todd Hartshorn called A-1 Metro Movers on June 25 with the same question and was told that it was booked until July 8. He also posed the same question to protestant-appellee Benson Transfer & Storage Company, which responded that there was no way it could do so and that it would need 1 month's notice. Borley Moving and Storage, when asked if it could perform a move on July 4 and 5 from Grand Island to Chadron, responded that it could not. Todd Hartshorn also asked protestant-appellee Gordon Moving & Storage Co., Inc., on June 25 if it could move 4,000 pounds from Omaha to Chadron on July 4 and 5 and was told that it could do so on July 8 at an 8,000-pound minimum rate.

Todd Hartshorn spoke with Andrews Van Lines on June 26, 1996, asked if it could move 4,000 pounds from Lincoln to Imperial on July 4 and 5, and was told that it could possibly do so on July 5. He called Chieftain Van Lines on June 27, asking if it could move 2,000 pounds intrastate on July 6 and 7, and was told that it could not. He called protestant-appellee Buck's Moving & Storage on June 27, asked if it could move 2,000 pounds intrastate on July 6 and 7, and was told that it had an 8,000-pound minimum and could not do so.

Borley Moving and Storage is engaged in the moving and storage of household goods and has authority to conduct intrastate moves in Nebraska and interstate moves in 11 midwestern states. It transported 128 intrastate shipments in 1995, making up 24.1 percent of its total revenue for 1995, and 24 in the first quarter of 1996. Borley Moving and Storage hires additional employees during the summer months to handle the increased seasonal demand. It does not generally conduct moves on weekends or on holidays.

According to its president and owner, Clayton Andrews, Andrews Van Lines runs just under 100 trucks, is in the business of household goods moving, operates in 50 states and 21 foreign countries, and performs intrastate moves of household goods in Nebraska. It conducts moves on the weekends and holidays and has 10 trucks licensed in Nebraska dedicated to intrastate hauls. Moreover, it has 70 more trucks available to be licensed in Nebraska if the demand increases. However, Andrews testified that he does not have enough business for the

10 trucks already licensed. Andrews Van Lines made over $96,000 in intrastate moves in Nebraska in 1995 and over $32,000 during the first quarter of 1996. Andrews testified that only about 2 percent of his company's total revenue is from intrastate moves.

Benson Transfer & Storage performs intrastate moves of household goods in Nebraska and has six trucks licensed for such business in Nebraska. It performs moves on weekends, but not on holidays. It hires additional employees during the summer months to handle the increased seasonal demand. Benson Transfer & Storage performed 26 intrastate moves in Nebraska in 1995, generating $58,276.30 in revenue. Only 4 to 5 percent of its revenue comes from intrastate shipments.

A-1 Metro Movers performs intrastate moves of household goods within Nebraska and has seven trucks licensed for such business. It performed 14 intrastate moves in Nebraska in 1995 and 4 during the first quarter of 1996. About 7 to 8 percent of its revenue is from intrastate Nebraska moves. A-1 Metro Movers conducts moves on the weekends, but not on holidays.

Ford Van Lines, Inc., operates worldwide, performs intrastate moves of household goods in Nebraska, and has 15 trucks licensed with the commission. It performed 33 intrastate shipments in 1995, generating about $81,000, and 8 in the first quarter of 1996, generating about $20,000. Revenue generated from intrastate household moves accounts for about 3 percent of Ford Van Lines' total revenue. It has performed moves on weekends and on holidays. Harlan H. Wiederspan, president of Ford Van Lines, testified that in his view there are more than enough intrastate household goods carriers in Lincoln and that the demand for intrastate moves in the Lincoln market has always been met. It is also his opinion that if Nebraskaland were granted authority, it would have an impact on Ford Van Lines' intrastate business, despite the fact that Nebraskaland has been operating under a leasing agreement.

Buck's Moving & Storage serves the entire State of Nebraska and has six trucks licensed with the commission. It performed over 100 intrastate shipments in 1995, generating $204,210.60. Income generated from intrastate moves makes up about 25 percent of its total revenue. Buck's Moving & Storage has per-

formed moves on holidays and weekends, but prefers not to. Norman Buck, its president, testified that he has always been able to meet customer needs and that the existing carriers are meeting the current need.

Chieftain Van Lines has interstate authority for 47 states and intrastate authority in Nebraska and Iowa, and has 8 trucks registered with the commission. It hires additional employees during the summer months to handle the increased seasonal demand. Despite advertising in the yellow pages and by direct mail, Chieftain Van Lines has not conducted an intrastate move since 1994. Dennis Leslie, its vice president, explained that when it does receive inquiries for intrastate moves, the prospective customers, after receiving a quote, comment that another company can do the move for less, and do not call back. Leslie explained that Chieftain Van Lines cannot lower its rates because it is bound by the commission's rules and regulations and tariff.

A representative of Apartment Movers of Lincoln, which has intrastate authority, stated that the company conducted 6 intrastate moves in 1995 and 12 in 1994 and that "[t]here is [sic] just not that many moves out there."

In denying Nebraskaland's application, the commission found:

> The proposed services are not required by public convenience and necessity because [Nebraskaland's] proposed operation will not serve a useful purpose responsive to public demand or need, public demand or need is currently being met by existing carriers and future demand or need will be met by existing carriers, and public demand or need cannot be served by [Nebraskaland] in a manner without endangering or impairing the operations of existing carriers.

IV. ANALYSIS OF APPEAL

1. Constitutionality of Regulatory Scheme

In the first assignment of error in its appeal, Nebraskaland questions the regulatory scheme imposed by §§ 75-301 through 75-322 and asks that these statutes regulating "household good[s] carriers in Nebraska" be declared unconstitutional. In the alternative, Nebraskaland asks that the court direct the com-

mission "to grant the certificate requested." Brief for appellant at 48.

Provocative as the claim of constitutional infirmity may be, it must be remembered that Nebraskaland initiated this proceeding by filing an application pursuant to § 75-310, requesting that the commission issue a certificate of public convenience and necessity pursuant to § 75-311. The inconsistency in the positions taken by Nebraskaland in this assignment of error is precluded by the rule that a litigant who invokes the provisions of a statute may not challenge its validity nor seek the benefit of such statute and in the same action and at the same time question its constitutionality. *State ex rel. Bellino v. Moore, ante* p. 385, 576 N.W.2d 793 (1998); *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993); *In re Dissolution of School Dist. No. 22*, 216 Neb. 89, 341 N.W.2d 918 (1983).

Thus, Nebraskaland may not in this action challenge the constitutionality of §§ 75-301 through 75-322.

2. Factual Findings

In claiming that the commission erred in its factual findings, Nebraskaland asserts that the commission wrongly found that (a) Nebraskaland did not present any evidence showing a public demand or need for its services and that the public demand or need is being met by existing carriers, and (b) granting the application would place in jeopardy the intrastate operations of the existing carriers.

(a) Public Demand or Need

In regard to the matter of public demand or need, the relevant issue is not whether the commission erred in finding that Nebraskaland presented no evidence showing such for its services, but whether there is evidence supporting the commission's finding that Nebraskaland's proposed services are not required by public convenience and necessity.

We begin by recalling that in reviewing a decision of the commission, it is not the province of an appellate court to weigh or resolve conflicts in the evidence or the credibility of the witnesses; rather, an appellate court will sustain the decision of the commission if there is evidence in the record to support its findings. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504

(1994). If there is evidence to sustain the findings of the commission, an appellate court cannot substitute its judgment for that of the commission. *Id.* Determinations by the commission are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by an appellate court in the absence of a showing that the action of the commission was arbitrary or unreasonable. *Id.*

Section 75-311 provides, in relevant part:

> A certificate shall be issued to any qualified applicant authorizing the whole or any part of the operations covered by the application if it is found after notice and hearing that (a) the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of sections 75-301 to 75-322 and the requirements, rules, and regulations of the commission under such sections and (b) the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, passenger or household goods, is or will be required by the present or future public convenience and necessity. Otherwise the application shall be denied.

In determining public convenience and necessity, the deciding factors are (1) whether the operation will serve a useful purpose responsive to a public demand or need, (2) whether this purpose can or will be served as well by existing carriers, and (3) whether it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest. *In re Application of Kilthau*, 236 Neb. 811, 464 N.W.2d 162 (1991). The issues of public convenience and necessity are ordinarily issues of fact, and where there is evidence in the record to sustain the commission's order, an appellate court cannot find the order unreasonable and arbitrary. *Id.*

Of the three public convenience and necessity factors, not all need to be addressed, because an affirmative response to the second factor negates the need for any consideration of the first factor. Regarding public demand or need, the question of adequacy of service of existing carriers is implicit in the issue of whether public convenience and necessity demand the service of an additional carrier in the field. The existence of an ade-

quate and satisfactory service by motor carriers already in the area completely negates public need and demand for added service by another carrier. *In re Application of Kilthau, supra.*

Nebraskaland first argues that the protestants' testimony should be given little weight. In doing so, Nebraskaland cites to *Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission*, 203 Neb. 176, 181, 277 N.W.2d 693, 696 (1979), in which we, addressing protests to a liquor license, stated that "protests to be effective must be of some substance. Here, stripped of form, they were all authored and signed by citizens involved in the liquor business, competitors if you will, who simply didn't want any competition. The claim that there were too many licenses . . . has a hollow ring . . . ." We have also characterized evidence proffered by protestants-competitors in the liquor arena as "not being probative." *Marting v. Nebraska Liquor Control Comm.*, 250 Neb. 134, 144, 548 N.W.2d 326, 331 (1996).

While it is true that the protestants in the instant case had a financial interest in having Nebraskaland's application denied, they did provide relevant evidence about the nature of their own businesses and their ability and willingness to meet the demand for intrastate transportation. The obvious way to prove the existence of an adequate and satisfactory service by motor carriers already in the area is to question the existing carriers. Also, unlike an application for a liquor license, an application for a certificate of public convenience and necessity to transport household goods intrastate in Nebraska is not likely to draw protest from anyone other than existing carriers.

The evidence presented by the protestants demonstrates that the existing carriers are willing and able to meet the public demand and need for intrastate moves in Nebraska. Three of the protestants testified that they hire additional employees to handle the seasonal increase in business during the summer. Andrews testified that he does not receive enough intrastate business to keep his 10 trucks designated for that purpose busy. Wiederspan and Buck both testified that the existing authorized intrastate carriers are meeting the demand for intrastate moves. Finally, Leslie testified that despite advertising in the yellow pages and by direct mail, Chieftain Van Lines has not received any intrastate business since 1994.

It is also true, as Nebraskaland notes, that the public demand or need is in part being met because Nebraskaland is involved in serving that demand or need through its lease agreement with Husker Express. However, as the commission observed, if Nebraskaland receives a certificate, Husker Express' "authority will continue to be available to the public."

Nebraskaland nonetheless argues that the commission should have considered that Nebraskaland was operating under "color of right" and that it was therefore entitled to a presumption that public convenience and necessity require a continuance of its operations.

We begin our review of this aspect of Nebraskaland's appeal by noting that § 75-309 makes it "unlawful for any common . . . carrier . . . to engage in any intrastate operations on any public highway in Nebraska unless there is in force with respect to such common carrier a certificate of public convenience and necessity . . . issued by the commission which authorizes such operations." However, § 75-318(2) allows any regulated motor carrier or person to lease, among other things, the certificates of another regulated motor carrier, provided the commission approves the lease.

The evidence shows that Nebraskaland has been engaging in intrastate operations in Nebraska without a certificate of public convenience and necessity of its own and that although Nebraskaland acted as if it had been leasing Husker Express' authority, it has not leased Husker Express' certificate of public convenience and necessity.

In urging that it should therefore be permitted to continue its operations, Nebraskaland relies upon *Dilts Trucking, Inc. v. Peake, Inc.*, 197 Neb. 459, 249 N.W.2d 732 (1977). There, Dilts had been transporting anhydrous ammonia intrastate in Nebraska since 1972 without an intrastate certificate. However, Dilts had held a certificate of public convenience from the Interstate Commerce Commission since 1969 to transport anhydrous ammonia and honestly, but erroneously, believed that its operations were covered by that certificate. In April 1975, the commission herein informed Dilts that it was involved in intrastate commerce and that it must obtain the appropriate certificate. Dilts immediately stopped its operations and applied for

the certificate. The commission found that Dilts was fit, willing, and able to properly perform the services proposed and conform to the commission's rules and regulations, but denied its application on the ground that it failed to meet its burden of proof regarding public convenience and necessity. The commission also ruled that it was not a proper color of right case and that Dilts' illegal operations could not go unnoticed and unpenalized.

On appeal, Dilts maintained that the commission erred in failing to find that the present and future convenience and necessity required a grant of its application, arguing that the situation presented a color of right case. We wrote that

> different rules are applied in "color of right" cases than in ordinary applications for certificates of public convenience and necessity. If the [c]ommission erred in its conclusion that Dilts was not a "color of authority" case and neglected or refused to apply the law applicable to such cases, then it would appear that the [c]ommission erred in the determination of what law was applicable in the instant case, and its order would be illegal and entitle the applicant to a further hearing before the [c]ommission for a reconsideration of the evidence in the light of the correct principles of law.

Id. at 466-67, 249 N.W.2d at 737. We reiterated that

> *in cases such as now before the court, where the applicant seeks to obtain a lawful certificate to continue in a business which it has been operating under color of authority, we do not think [the standard analysis for determining the issue of public convenience and necessity] controls. . . .*
>
> *" 'Successful operation in the past creates a presumption that public convenience and necessity require a continuance of such operation.'* [Citation omitted.]"

(Emphasis in original.) *Id.* at 469-70, 249 N.W.2d at 738-39.

We held that the commission should have treated the matter as a color of right case, inasmuch as while Dilts was operating without a certificate, it was without knowledge that it was operating without the proper authority. In reversing the judgment and remanding the matter for further proceedings, we ruled that the commission's action

> was illegal, arbitrary, and unreasonable in light of the fact that it did not consider the application in accordance with

> applicable principles of law, which are that an applicant who has been operating under color of authority need not make the same showing that an applicant who has never operated must make, and that there is a presumption that the proposed service is or will be required by the present or future public convenience and necessity.

Id. at 471-72, 249 N.W.2d at 739.

The color of right doctrine can apply even where an applicant has been operating without any certificate at all. For example, in *Groenewold v. Building Movers, Inc.*, 197 Neb. 187, 247 N.W.2d 629 (1976), we affirmed the decision of the commission granting a certificate to a mover of houses and other buildings who had been conducting such moves without a certificate. The applicant in *Groenewold* did not realize that a certificate was required when he conducted his illegal moves. We held that it was proper to consider evidence of past illegal operations of the applicant as evidence of public convenience and necessity where there is not willful and intentional violation.

In *Gentry Real Estate Co. v. King's Limousine Service, Inc.*, 201 Neb. 761, 272 N.W.2d 359 (1978), the applicant had operated a luxury limousine service without a certificate for as long as 2 to 3 years prior to applying for a certificate. The applicant knew that a certificate was required, but failed to apply for one because of the cost and because " 'nobody seemed to be making any, many fusses about it.' " *Id.* at 765, 272 N.W.2d at 361. We held that *King's Limousine Service, Inc.*, was "not a 'color of right' or 'color of authority' case because it is clear King was not operating under any misunderstanding as to the extent of his right or authority to provide the services in question, and he freely admitted he operated without authority to do so." *Id.* at 768, 272 N.W.2d at 363. Similarly, in *In re Application of Slack*, 234 Neb. 704, 709, 452 N.W.2d 538, 541-42 (1990), we held that the color of authority doctrine was not applicable, as the applicants "were operating with no authority[, and] the evidence shows that the applicants were aware that authority was required to haul fertilizer and anhydrous ammonia . . . ."

The above cases demonstrate that when an applicant has been illegally conducting business under a mistaken belief that its operations were legal, the color of right principles of law apply.

The applicant also must have been doing so for a sufficient period of time. *In re Application of Amsberry, Inc.*, 220 Neb. 353, 370 N.W.2d 109 (1985). However, if the applicant knew that its operations were illegal, then the color of right principles do not apply.

In the instant case, the commission found that Nebraskaland's "prior operations were not being conducted under color of authority" and that they "have no probative value on the issue of public demand or need because they are either tacitly illegal or reflect the operations of another carrier whose authority will continue to be available to the public."

The only testimony in the record regarding this issue suggests that Nebraskaland believed that it had been leasing Husker Express' authority. Also, the testimony indicates that Husker Express has been relaying all of its Nebraska intrastate business to Nebraskaland. However, in view of the lease provisions noted in part III, the commission could certainly conclude that Nebraskaland did not honestly misinterpret the agreement as a lease of Husker Express' authority.

To support its contention that the existing companies are not meeting the public demand, Nebraskaland offered the testimony of the Hartshorns, as detailed in part III. In summary, the Hartshorns testified concerning 10 telephone calls they made to existing Nebraska intrastate carriers whereby the Hartshorns asked the carriers if the carriers could perform an intrastate move. In each instance, the carrier was given about 1 week's notice, and all of the requested dates included at least one date falling on the 1996 Fourth of July weekend. Of the 10 inquiries, 5 carriers responded that they could not perform the move, 3 responded that they could perform the move 3 or 4 days after the requested dates, 1 said that it could possibly perform the move 1 day after the requested date at an increased rate due to the weekend, and 1 responded that it could possibly perform the move on 1 of the requested dates. This evidence falls short of showing that there is a public demand or need for another carrier.

(b) Jeopardy of Other Carriers

In challenging the commission's finding that granting Nebraskaland's application would place in jeopardy the

intrastate operations of the existing carriers, Nebraskaland argues that the commission's finding is erroneous because Nebraskaland has already been operating as an intrastate carrier of household goods.

Nebraskaland has been conducting intrastate moves since 1989 pursuant to its lease agreement with Husker Express; already advertises for intrastate moves; and receives referrals for intrastate moves from its national carrier, Paul Arpin Van Lines. While there is no evidence that Husker Express will begin conducting household moves if Nebraskaland is granted its own authority, Husker Express' authority will nonetheless continue to be available to the public, and nothing would stop Husker Express from operating pursuant to its certificate. The commission should not have to assume that Husker Express will retain its certificate and do nothing with it.

In *Moore's Transfer, Inc. v. Nebraska Public Service Commission*, 198 Neb. 491, 497, 253 N.W.2d 313, 316 (1977), we wrote that "[g]eneral fears of potential diversion, as contrasted with specific evidence indicating probable harm, do not constitute proof that harm will result to competitive carriers because of an application." In that case, "there was no evidence of record to indicate what service the existing carriers could provide, as the application was unopposed." *Id.* at 494, 253 N.W.2d at 315. In the instant case, while there is ample evidence of the services existing carriers could provide, there is no specific evidence indicating probable harm, only general fears of potential diversion.

Although the addition of another certificate into the pool of available carriers would allow for more competition, there is no competent evidence supporting the commission's finding that granting a certificate would place in jeopardy the intrastate operations of the existing carriers. The testimony of Dennis R. Bauder, owner of Borley Moving and Storage, and that of Andrews regarding potential harm to their businesses assume that granting a certificate will result in the complete and total loss of their intrastate business. The question posed to Buck assumes that granting the certificate will necessarily result in the loss of intrastate business to Buck's Moving & Storage. William Cronstrom, vice president and general manager of A-1

Metro Movers, testified that granting the certificate would have an impact on its operations because it "obviously would handle less shipments . . . ." When asked if granting the certificate would impact Ford Van Lines' operations, Wiederspan answered, "[C]ertainly, it would. They are right here in Lincoln. Once they get authority, even though they are already doing it, they will be able to solicit easier, and they will be able to get more business than they are getting now." When asked if granting the certificate would impact Chieftain Van Lines' operations, Leslie answered, "I could not say." But none of the protestants provided specific evidence demonstrating how granting Nebraskaland's application would place them in jeopardy.

Thus, in this regard, the commission erred. However, in view of the evidence supporting the commission's finding that the public demand is currently being met by the existing carriers and that future demand or need will be met by such carriers, the error is harmless.

V. RESOLUTION OF CROSS-APPEAL

The foregoing determinations make it unnecessary to consider the cross-appeal.

VI. JUDGMENT

As first noted in part I, the decision of the commission is affirmed.

AFFIRMED.

COX CABLE OF OMAHA, INC., A FOREIGN CORPORATION, APPELLEE, V. NEBRASKA DEPARTMENT OF REVENUE AND M. BERRI BALKA, TAX COMMISSIONER OF THE STATE OF NEBRASKA, APPELLANTS.
578 N.W.2d 423

Filed May 8, 1998. No. S-97-083.

1. **Statutes: Appeal and Error.** Statutory interpretation presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Administrative Law: Statutes: Legislature.** Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has not taken any action to change such interpretation.

3. **Statutes.** Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning.
4. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered it its plain, ordinary, and popular sense.
5. ____: ____: ____. When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with directions.

Don Stenberg, Attorney General, and L. Jay Bartel for appellants.

Norman H. Wright, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

On June 30, 1992, the Nebraska Department of Revenue (Department) issued a notice of deficiency determination to Cox Cable of Omaha, Inc. (Cox), for sales and consumer's use tax for the period from May 1, 1988, through May 31, 1991. Cox filed a timely petition for redetermination contesting portions of the deficiency determination. On December 13, 1994, M. Berri Balka, the Tax Commissioner of the State of Nebraska, issued an order sustaining the Department's deficiency determination and dismissing Cox's petition for redetermination. Cox appealed, and the district court for Lancaster County reversed the Tax Commissioner's order. The Department and the Tax Commissioner now appeal the district court's order to this court. We conclude that the Tax Commissioner correctly construed the applicable statutory provisions governing the assessment of the use tax and, therefore, reverse the judgment of the district court and remand the cause with directions to affirm the order of the Tax Commissioner.

FACTS

Cox is licensed by the Federal Communications Commission and is authorized by the city of Omaha to operate a franchise providing community antenna television service (cable television) in the Omaha metropolitan area. Cox's cable television programming emanates from satellite dishes and antennas and is distributed through fiber optics and coaxial cable to a distribution plant. In order for a subscriber to receive cable service, Cox must install a "house drop" connecting the distribution plant to the subscriber's house. The installation of a house drop requires the use of personal property such as coaxial cable, fittings, rubber boots, and tape, as well as rods, wires, straps, and blocks used for grounding.

Cox employees install some of the house drops, but Cox also hires independent contractors to perform installations during peak volume periods. These contractors are not themselves licensed to provide cable television services; however, regardless of whether a Cox employee or an independent contractor installs the house drop, the work performed is identical. Cox provides the materials used in the installations and pays sales tax on them. Cox compensates the contractors on a piece-rate basis for each type of installation performed.

Cable subscribers are assessed a standard installation charge when their service is initiated; however, the installation charge bears little relationship to the actual cost Cox incurs in installing the service. This is due, in part, to the variance in the amount of work required to install the service. For instance, some homes already have a house drop because a prior or current owner subscribed to cable and then disconnected the service. In these cases, very little work is required to reinstall the service, and Cox pays less for the installation. However, if an entire house drop must be installed at a location, the contractor will receive more compensation. In addition, Cox sometimes reduces or waives new subscribers' installation charges as a marketing strategy, further reducing the correlation between the installation charge and the actual cost of installation.

In a letter dated June 30, 1992, the Department issued Cox a notice of deficiency determination for sales and consumer's use tax for the period from May 1, 1988, through May 31, 1991.

Cox filed a timely petition for redetermination protesting the deficiency determination. Specifically, Cox protested the portion of the deficiency determination holding that the charges Cox paid to independent contractors for the installation of tangible personal property in conjunction with furnishing cable television services were subject to consumer's use tax.

On December 13, 1994, the Tax Commissioner issued an order sustaining the Department's deficiency determination and dismissing Cox's petition for redetermination. Cox appealed the Tax Commissioner's decision to the district court for Lancaster County, which reversed the decision based upon its finding that cable television installation services are subject to the use tax only when performed by the entity which furnishes the actual cable service pursuant to a franchise or permit granted by a county, city, or village. The Department and the Tax Commissioner appealed from this order, and we moved the case to our docket on our motion, pursuant to our authority to regulate the dockets of the Nebraska Court of Appeals and this court.

ASSIGNMENT OF ERROR

The Department and the Tax Commissioner assert that the district court erred in holding that charges paid by Cox to independent contractors for the connection and installation of cable television services provided by Cox were not subject to use tax.

STANDARD OF REVIEW

Statutory interpretation presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *PLPSO v. Papillion/LaVista School Dist.*, 252 Neb. 308, 562 N.W.2d 335 (1997); *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

ANALYSIS

To determine whether Cox is obligated to pay a consumer's use tax on amounts which it paid to third-party contractors, we must apply the following statute, which was in effect during the audit period:

> (1) There is hereby imposed a tax of two percent upon . . . the gross receipts of every person engaged . . . as a

> community antenna television service operator or any person involved in the connecting and installing of the services defined in subdivision (4)(b) . . . (iv) of section 77-2702 . . . .
>
> . . . .
>
> (2) A use tax is hereby imposed . . . on any transaction the gross receipts of which are subject to tax under subsection (1) of this section . . . for storage, use, or other consumption in this state at the rate set as provided in subsection (1) of this section on the sales price of the property
>
> . . . .

Neb. Rev. Stat. § 77-2703 (Reissue 1990). Subsection (2)(a) of § 77-2703 states that if a taxpayer pays sales tax on a transaction, his or her liability for use tax is extinguished. Thus, § 77-2703(1) imposes a sales tax on the gross receipts of certain transactions, including the installation of cable television, while § 77-2703(2) imposes an equivalent use tax on the gross receipts of transactions that are not subject to sales tax. In the present case, the Department asserts that Cox is liable for use taxes under § 77-2703(2). However, because the use tax described in § 77-2703(2) is defined by reference to the sales tax described in § 77-2703(1), it is necessary to refer to § 77-2703(1) in construing the use tax provisions at issue in this case.

Neb. Rev. Stat. § 77-2702(4)(b) (Cum. Supp. 1988) is also relevant to the present case. The statute in effect during the relevant period provided in pertinent part:

> (b) Gross receipts of every person engaged . . . as a community antenna television service operator or any person involved in the connecting and installing of services defined in subdivision (4)(b) . . . (iv) of this section shall mean:
>
> . . . .
>
> (iv) In the furnishing of community antenna television service, the gross income received from the furnishing of such community antenna television service as regulated under sections 18-2201 to 18-2205.
>
> Gross receipts shall also mean gross income received from the provision, installation, construction, servicing, or

> removal of tangible personal property used in conjunction with the furnishing, installing, or connecting of . . . community antenna television service specified in subdivision (4)(b)(iv) of this section.

§ 77-2702(4). An amendment to this statute in 1989 added the term "or 23-383 to 23-388" immediately following the reference to "sections 18-2201 to 18-2205." See § 77-2702(4)(b)(iv) (Reissue 1990). Neb. Rev. Stat. §§ 23-383 to 23-388 (Reissue 1997) govern the regulation of cable television service by counties, while Neb. Rev. Stat. §§ 18-2201 to 18-2205 (Reissue 1997) govern the regulation of such services by cities and villages. These statutes make it unlawful for any person not holding a permit or franchise to construct, install, operate, or maintain a cable television service. See §§ 18-2202 and 23-384.

Since 1986, when the Legislature amended § 77-2703 to tax cable television services and the installation of cable television, the Department has construed § 77-2703 to mean that charges for installing or connecting cable television services are taxable to the consumer of the services, including any party who contracts to have such services performed by another. Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has not taken any action to change such an interpretation. *Metropolitan Utilities Dist. v. Balka*, 252 Neb. 172, 560 N.W.2d 795 (1997). See, also, *Monahan v. School Dist. No. 1*, 229 Neb. 139, 425 N.W.2d 624 (1988).

While we afford a degree of deference to the Department's construction of the applicable statutes, we are also guided by our own well-established principles of statutory construction. Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning. *Kellogg Company v. Herrington*, 216 Neb. 138, 343 N.W.2d 326 (1984). In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered it its plain, ordinary, and popular sense. *In re Estate of Nuesch*, 252 Neb. 610, 567 N.W.2d 113 (1997); *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997); *Boss v.*

Fillmore Cty. Sch. Dist. No. 19, 251 Neb. 669, 559 N.W.2d 448 (1997). In addition, when considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *In re Interest of Powers*, 242 Neb. 19, 493 N.W.2d 166 (1992).

It is undisputed that the services performed by independent contractors in connecting and installing house drops are in all material respects identical to the services performed by Cox employees when they connect and install house drops and that the independent contractors are not themselves authorized to provide cable television services. We agree with the finding of the district court that "[t]he independent contractors . . . are clearly involved in connecting the wires used to carry the cable television transmission to the consumer's television set and receive income from such involvement." However, we disagree with the district court's determination that § 77-2703(1) "clearly applies only to persons that are involved in the installation of cable services as a franchised entity."

The tax imposed by § 77-2703(1) is on the gross receipts of cable television service operators "or any person involved in the connecting and installing" of regulated television services. Section 77-2703(1) clearly reflects an intent to tax not only the receipts of cable television service operators, but also the receipts of persons who are not franchised entities but perform services involving the connection and installation of regulated television services. Similarly, § 77-2702(4)(b)(iv) defines "gross receipts" to include not only gross income from furnishing regulated cable television service, but also gross income from the installation and construction of tangible personal property "used in conjunction with" the installation or connection of regulated cable television services. If the Legislature had intended to tax only the gross receipts attributable to connection and installation services performed by the holder of a franchise or permit, it could have so stated. The Legislature's use of broader language reflects that it intended the scope of the tax to extend beyond the receipts of the franchised entity to other persons or entities who derive revenue from performing services

which involve the "installing" or "connecting" of regulated television services. Therefore, we hold that the tax imposed by § 77-2703 extends to the independent contractors' gross receipts derived from services which they performed in installing house drops pursuant to their contractual agreements with Cox.

This statutory construction does not conflict with the regulatory statutes prohibiting the installation of cable television services by persons not holding a franchise or permit to provide cable television services. See §§ 18-2202 and 23-384. Whether it utilizes its own employees or independent contractors, Cox retains the overall responsibility for the installation of house drops. When Cox elects to use independent contractors, the independent contractors are required to perform the installation services in conformity with Cox's guidelines and standards in order to receive payment. When such contractors provide these services, they become "involved" in the connection and installation of regulated television services, and their gross receipts from such involvement become subject to the use tax which Cox, as the consumer of their services, becomes liable to pay.

We are not persuaded by Cox's argument that the amounts which it pays to contractors who connect and install house drops are not subject to use tax because Cox cannot directly pass such amounts on to consumers. As noted above, we construe the applicable statutes as imposing a tax on any transaction involving the use of personal property in the connection and installation of regulated cable television service, including both services provided by the franchised entity and services provided by one who contracts with the franchised entity to provide such services. Under this statutory scheme, the extent to which the franchised entity may be able to recover use taxes paid on contracted services by passing the taxes on to its subscribers is irrelevant to the issue of whether the use tax can be imposed.

Based upon our holding in *T-V Transmission v. County Bd. of Equal.*, 215 Neb. 363, 338 N.W.2d 752 (1983), Cox argues that cable television wires and house drops are fixtures rather than tangible personal property and that the Legislature "did not intend Neb. Rev. Stat. § 77-2702(b) to apply to the labor costs

involved in the installation of fixtures." Brief for appellee at 17. In *T-V Transmission*, we held that for purposes of property tax assessment, installed house drops for cable television transmission constituted fixtures to the realty and not tangible personal property upon which an entity providing cable television service could be taxed. This decision has no application to the issue before us in this case, which is whether the use tax applies to the amounts which Cox pays to independent contractors for utilizing cable, wires, clips, and other personal property to connect Cox's cable television distribution system to the homes of its subscribers.

In summary, we conclude that the amounts which Cox paid during the period from May 1, 1988, through May 31, 1991, to independent contractors for the installation and connection of house drops are subject to the consumer's use tax. Therefore, we reverse the judgment of the district court and remand the cause with directions to affirm the order of the Tax Commissioner.

REVERSED AND REMANDED WITH DIRECTIONS.

RYAN P. DELGADO, APPELLEE AND CROSS-APPELLANT, V. ALVIN ABRAMSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES FOR THE STATE OF NEBRASKA, AND THE DEPARTMENT OF MOTOR VEHICLES FOR THE STATE OF NEBRASKA, APPELLANTS AND CROSS-APPELLEES.

578 N.W. 2d 833

Filed May 8, 1998. No. S-97-166.

1. **Administrative Law: Motor Vehicles: Appeal and Error.** An appellate court's review of a district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record.
2. **Motor Vehicles: Records: Statutes.** The requirements for driving abstract records are governed by statute.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning. In addition, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.
4. **Motor Vehicles: Licenses and Permits: Revocation: Proof.** Under Neb. Rev. Stat. § 60-4,104 (Reissue 1993), the order of the director of the Nebraska Department of Motor Vehicles revoking an operator's license is prima facie evidence of the facts stated therein.

5. **Motor Vehicles: Licenses and Permits: Convictions.** When an operator's license is revoked by an order of conviction or pursuant to Neb. Rev. Stat. §§ 60-4,182 to 60-4,186 (Reissue 1993), points against the operator's driving record accumulated by reason of a conviction bringing the total number of points to 12 or more and all prior points are disregarded.
6. **Motor Vehicles: Licenses and Permits.** Points are assessed against a driver's record as of the date of a violation.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed.

Don Stenberg, Attorney General, and Paul N. Potadle for appellants.

Dorothy A. Walker, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

The director of the Department of Motor Vehicles for the State of Nebraska revoked Ryan P. Delgado's operator's license for a period of 3 years because Delgado had accumulated a total of 12 or more points within any 2-year period for the second time within a 5-year period. Delgado appealed the revocation to the district court, contending that the points assessed against his driving record were calculated improperly. The district court determined that the amended transcript of the license revocation proceedings before the director was not sufficient to support the order of revocation. The district court determined that the amended transcript did not contain abstract of conviction reports as required by Neb. Rev. Stat. §§ 60-497, 60-497.01, and 60-497.03 (Reissue 1993). The district court vacated the director's order on that basis. The director and the Department of Motor Vehicles for the State of Nebraska (hereinafter referred to collectively as director) appeal, and Delgado cross-appeals. We conclude that the amended transcript was sufficient to sustain the director's order revoking Delgado's license and that the points were correctly calculated. Accordingly, we reverse.

BACKGROUND

On August 3, 1995, the director revoked Delgado's driver's license for a period of 6 months because Delgado had accumu-

lated a total of 12 or more points within a 2-year period. Delgado's license was reinstated on March 4, 1996. On October 31, the director again revoked Delgado's license for a period of 3 years because Delgado had for the second time in any 5-year period accumulated a total of 12 or more points in any 2-year period. The convictions leading to both license revocations were as follows:

6-Month Revocation — August 3, 1995

Citation Date	Judgment Date	Offense	Points
09/19/1993	09/28/1993	Speeding	3
04/14/1994	04/28/1994	Speeding	3
05/01/1994	06/28/1994	Violate Stop Sign	1
12/13/1994	12/16/1994	Speeding	3
03/28/1995	07/28/1995	Speeding	3
3-Year Revocation — October 31, 1996			
05/08/1995	07/28/1995	Speeding	3
05/10/1995	07/28/1995	Negligent Driving	3
05/06/1996	05/30/1996	Speeding	3
10/08/1996	10/28/1996	Speeding	3

Delgado appealed the revocation of his license to the district court, contending that the director incorrectly considered the citations he received in May 1995 when calculating the number of points he had accumulated pursuant to Neb. Rev. Stat. §§ 60-4,183 and 60-4,186 (Reissue 1993). Pursuant to Neb. Rev. Stat. § 60-4,105 (Cum. Supp. 1996), the director prepared a transcript of the proceedings related to Delgado's license revocation, which was subsequently supplemented and amended.

The transcript contained the order of the director revoking Delgado's license, photocopies of abstracts of conviction for some of Delgado's convictions, and several computer printouts of Delgado's driving record showing the rest of Delgado's convictions. The computer printouts consisted of driving records and abstracts kept by the director and came from the director's computers. The computer documents were certified by the director as being correct and contained information regarding the dates citations were given, the dates of judgments, the

offenses, the courts involved, and the number of points charged. Delgado contended that the transcript was not sufficient to sustain the revocation of his license because some of the information regarding his convictions was in the form of computer printouts rather than in the form of abstract of conviction reports as required by § 60-497.03.

The district court determined that the amended transcript was not sufficient to sustain the director's revocation of Delgado's license because the transcript did not contain abstracts of conviction for all of Delgado's convictions. The district court further concluded that the computer printouts could not be termed "electronic abstract[s] of conviction" in order to be acceptable under § 60-497.03. Accordingly, the district court vacated the director's order revoking Delgado's license. The director appeals, and Delgado cross-appeals.

ASSIGNMENTS OF ERROR

The director assigns that the district court erred in determining that the amended transcript was insufficient because it failed to contain abstract of conviction reports. On cross-appeal, Delgado assigns that the district court erred in failing to determine that the director improperly considered points Delgado accumulated due to tickets he received in May 1995 when the director revoked Delgado's license for the second time.

STANDARD OF REVIEW

An appellate court's review of a district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record. *Huddleson v. Abramson*, 252 Neb. 286, 561 N.W.2d 580 (1997); *Clayton v. Nebraska Dept. of Motor Vehicles*, 247 Neb. 49, 524 N.W.2d 562 (1994).

ANALYSIS

DIRECTOR'S APPEAL

The director contends that the amended transcript was sufficient to support the order revoking Delgado's license because the transcript contained computer printouts showing Delgado's driving record and because under §§ 60-497, 60-497.01, and 60-497.03, abstracts of conviction may be transmitted electronically. Delgado argues that the district court was correct in

determining that the amended transcript was insufficient to support the order of revocation because the transcript did not contain abstract of conviction reports as required by §§ 60-497, 60-497.01, and 60-497.03. In particular, Delgado contends that the record does not show that the electronic printouts contain information sent by the district court in an approved format as required by § 60-497.03 and that because the printouts are working records of the director, they cannot be considered as electronically transmitted abstracts of conviction pursuant to § 60-497.03.

The requirements for driving abstract records are governed by statute. *Jacobson v. Higgins*, 243 Neb. 485, 500 N.W.2d 558 (1993). Statutory language is to be given its plain and ordinary meaning. In addition, this court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997); *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997).

When the revocation of an operator's license is appealed, § 60-4,105 requires the director to prepare a transcript of the proceedings relating to the revocation. This transcript is then filed by the driver in district court.

Neb. Rev. Stat. § 60-4,104 (Reissue 1993) states:

> A copy of the order of the director suspending or revoking any operator's license or the privilege of operating a motor vehicle, duly certified by the director and bearing the seal of the Department of Motor Vehicles, shall be admissible in evidence without further proof and *shall be prima facie evidence of the facts therein stated in any proceeding, civil or criminal*, in which such suspension or revocation is an issuable fact.

(Emphasis supplied.)

Section 60-497.01(1) requires the courts to transmit to the director an abstract of the court record in every case in which a person is convicted of violating the Nebraska Rules of the Road. Section 60-497.03 reads in part as follows:

> To enable the director punctually and economically to perform his or her ministerial duties in revoking or suspending operators' licenses and to insure uniformity in the

> keeping of records of operators' licenses suspended or revoked by the courts of the state, the director shall authorize electronic transmission of abstract-of-conviction reports. The director in consultation with the State Court Administrator shall prescribe the standard format of abstract-of-conviction reports.

Section 60-4,183 requires the director to summarily revoke an operator's license when, as disclosed by the records of the director, the person has accumulated a total of 12 or more points within a period of 2 years.

In the instant case, the order of the director revoking Delgado's license due to the accumulation of 12 or more points was in the transcript. Under § 60-4,104, such an order is prima facie evidence of the facts stated therein, thus shifting the burden to Delgado to rebut the correctness of that order.

The computer abstract of Delgado's driving record provides the dates Delgado received citations, the dates of judgments, the offenses, the courts, and the number of points assessed. Thus, the transcript contains the information needed in order for a court to determine whether or not Delgado's license was properly revoked. In addition, Delgado does not contend that the information in the computer abstract is incorrect. The interpretation of §§ 60-497.01 and 60-497.03 that Delgado asks us to adopt would ignore the fact that the burden is on Delgado to show that the revocation of his license was in error. Because the transcript provides sufficient information to determine whether the revocation of Delgado's license was appropriate, and the accuracy of that information is not disputed, Delgado has not met this burden. Accordingly, the conclusion of the district court that the amended transcript was insufficient to sustain the revocation of Delgado's license and its order entered therein are reversed.

DELGADO'S CROSS-APPEAL

On cross-appeal, Delgado contends that the director incorrectly considered the citations he received in May 1995 when revoking his license on October 31, 1996, for the second time. Delgado argues that because the director learned Delgado had exceeded 12 points within a 2-year period on July 28, 1995, all

points Delgado had accumulated due to his July 28 convictions and all earlier convictions must be disregarded by the director when he makes any subsequent revocation.

Section 60-4,183 provides in part:

> Whenever it comes to the attention of the director that any person has, as disclosed by the records of the director, accumulated a total of twelve or more points within any period of two years . . . the director shall (1) summarily revoke the operator's license of such person . . . .
>
> . . . .
>
> Such revocation shall be for a period of six months from the date of the signing of the order of revocation . . . .

Section 60-4,186 provides that any person whose license has been revoked a second time within 5 years shall have his or her license revoked for a period of 3 years. Neb. Rev. Stat. § 60-4,182(13) (Cum. Supp. 1996) requires that points be assessed against the driving record of the operator as of the date of the violation resulting in the conviction. Neb. Rev. Stat. § 60-4,185 (Reissue 1993) states:

> When the operators' license of such person is revoked or suspended for a period of at least six months by the order of conviction or as provided by sections 60-4,182 to 60-4,186, points accumulated by reason of the conviction containing such order of revocation, or the conviction bringing the total number of points charged to such person to twelve or more, and all prior points accumulated, shall be disregarded so far as any subsequent revocation is concerned.

In the instant case, Delgado urges this court to adopt an interpretation of §§ 60-4,183 and 60-4,185 that would make the date the director learned of an accumulation of 12 or more points the measuring date for when points will be disregarded for subsequent revocations. However, such an interpretation ignores the plain meaning of §§ 60-4,185 and 60-4,182(13). These statutes provide that only points accumulated by reason of the conviction bringing the total number of points to 12 or more and all prior points are disregarded. More importantly, points are assessed against a driver's record as of the date of the violation, not the date when the director becomes aware of the violation.

Applying the statutes to Delgado's case, his conviction on July 28, 1995, for the citation received on March 28 gave Delgado a total of 13 points as of March 28. Thus, the points accumulated for the March 28 citation and all earlier points are disregarded. The points assessed to Delgado for the May 1995 citations occurred subsequently and are not disregarded. Accordingly, the director correctly determined the points that applied toward Delgado's second license revocation, and the cross-appeal is without merit.

REVERSED.

CAPORALE, J., concurring.

I recognize that the constitutionality of Neb. Rev. Stat. § 60-497.03 (Reissue 1993) has not been put in issue. However, I humbly suggest that such circumstance does not relieve us of our obligation to avoid even the appearance of impropriety. See Neb. Code of Jud. Cond., Canon 2 (rev. 1992).

It seems to me that § 60-497.03 impermissibly purports to impose upon an employee of the judicial department, the State Court Administrator, a duty more appropriately belonging to an executive department attorney. See, Neb. Const. art. II, § 1 (unless specifically provided otherwise, member of one of three distinct departments of government is prohibited from exercising power properly belonging to either of other departments); *In re Interest of Constance G., ante* p. 96, 575 N.W.2d 133 (1998). While the record does not reveal whether the administrator in fact consulted with the Director of Motor Vehicles as contemplated by § 60-497.03, and for that reason I must acquiesce in the majority's judgment, a reasonable motorist might nonetheless well reason that such was done and question how such consultation influenced the judgment of this court.

I respectfully submit that we ought to make clear that this court will give any statute purporting to assign executive or legislative duties to its employees the same deference it has given Neb. Rev. Stat. § 24-212 (Reissue 1995), purporting to require its reporter to show the name of the judge writing an opinion; that is, none. See, e.g., *State ex rel. NSBA v. Valgora, ante* p. 267, 576 N.W.2d 468 (1998); *DeBacker v. Brainard*, 183 Neb. 461, 161 N.W.2d 508 (1968); *Dobesh v. Associated Asphalt Contractors*, 137 Neb. 1, 288 N.W. 32 (1939), *judgment*

vacated 137 Neb. 342, 289 N.W. 369. After all, if any institution of government ought to make clear that it does not go along to get along, it is the judiciary.

IN RE APPLICATION OF GAIL COLLINS-BAZANT FOR ADMISSION TO THE NEBRASKA STATE BAR ON EXAMINATION.

578 N.W.2d 38

Filed May 15, 1998. No. S-34-970002.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** The appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission is considered de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
3. **Rules of the Supreme Court: Attorneys at Law: Waiver.** The Nebraska Supreme Court has the power to waive the application of its own rules regarding the admission of attorneys to the Nebraska bar.
4. **Rules of the Supreme Court: Attorneys at Law: Waiver: Proof.** Following the denial of an application and a hearing before the Nebraska State Bar Commission, the Nebraska Supreme Court will consider a waiver of Neb. Ct. R. for Adm. of Attys. 5C (rev. 1996) to allow a graduate of a foreign law school based on the English common law to take the Nebraska bar examination upon proof that the education he or she received was equivalent to that for a juris doctorate available at an ABA-approved law school.
5. **Rules of the Supreme Court: Attorneys at Law: Waiver: Proof: Costs.** When a foreign-educated attorney seeks a waiver in order to sit for the Nebraska bar examination, the burden at all times will be on the applicant to affirmatively show that the education he or she received was equivalent to that of an ABA-approved law school, and the applicant will be responsible for the costs of providing such information.

Original action. Application granted.

Gail Collins-Bazant, pro se.

Michael G. Lessmann for Nebraska State Bar Commission.

WHITE, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

This case requires us to decide whether we will grant a waiver to Neb. Ct. R. for Adm. of Attys. 5C (rev. 1996) to allow

a graduate of a non-American Bar Association (ABA)-approved foreign law school to take the Nebraska bar examination.

BACKGROUND

Gail Collins-Bazant (Collins) is a Canadian attorney seeking permission to sit for the Nebraska bar examination. This is the second appearance of Collins before this court. In 1997, Collins brought an original action seeking admission to the Nebraska bar without examination on the basis of the North American Free Trade Agreement (NAFTA). We concluded that Collins' arguments for admission were without merit, but did not address whether Collins would be eligible to sit for the bar examination or whether she had attained educational qualifications equal to those required by rule 5. See *In re Application of Collins*, 252 Neb. 222, 561 N.W.2d 209 (1997). Rule 5 requires that all applicants must have received their first professional degree from a law school approved by the ABA. The ABA does not evaluate law schools outside the United States.

Following her first appearance before this court, Collins applied to the Nebraska State Bar Commission (Commission) for admission to the Nebraska bar upon examination. The Commission denied Collins' application, and Collins requested a hearing. A hearing was held before the Commission, during which Collins presented evidence regarding the quality and nature of her legal education and experience. The Commission again denied Collins' application, and Collins appeals to this court. The official letter denying Collins the opportunity to sit for the bar is not in the record. However, it is apparent from the record and from the brief of the Commission that the Commission was of the opinion that Collins could take the bar examination only if the existing rules were waived in Collins' case and that the Commission did not have the authority to grant such a waiver.

Collins is a Canadian citizen and a resident alien of the United States. Collins graduated from the Memorial University of Newfoundland with a bachelor of arts degree in 1976 and from the University of Saskatchewan Law School with a bachelor of laws degree in 1981. The bachelor of laws degree is a graduate degree earned after 3 years of legal studies. The University of Saskatchewan Law School is fully accredited for

the purposes of bar admission in all Canadian provinces and is approved by the Canadian Bar Association.

Just as in the United States, the study of law in Canada is based on the English common law, and law school applicants must take the law school admission test. Collins studied law under a 3-year program and took courses much like those a law student in the United States would take. For example, Collins' first-year law school curriculum consisted of two terms of torts, two terms of property, two terms of criminal law, two terms of contracts, one term of legal systems and process, and one term of legal writing. During her second and third years, Collins took courses in constitutional law, trusts, family law, administrative law, evidence, civil procedure, criminal procedure, commercial transactions, professional responsibility, tax law, company law, oil and gas law, international law, wills and estates, debtor-creditor law, conflicts, and remedies. Collins also took a course in comparative federalism, which included a study of American constitutional law. Peter MacKinnon, the dean of law at the University of Saskatchewan, read the ABA Law School Educational Program Standards and stated that he believes the University of Saskatchewan program currently meets the ABA standards and met those standards during the time Collins attended law school there.

In Canada, new attorneys are required to work under a senior solicitor for approximately 1 year in a "period of articles," also known as an "articles of clerkship," and to pass a set of examinations before being admitted to the bar. Following a 9-month articles of clerkship in 1981, Collins was admitted as a barrister and solicitor in the Province of Newfoundland. Collins then completed an articles of clerkship in Saskatchewan and was admitted as a barrister and solicitor in that province in 1984. From April 1982 to December 1983, Collins worked full time as a staff solicitor for the Court of Queen's Bench of Saskatchewan, on the rules revision committee, where she did legal research and writing. As part of her work, Collins studied the rules of civil procedure from other English common-law jurisdictions, including the United States.

Between 1984 and 1989, Collins was employed in private practice and with the Saskatchewan Legal Aid Commission. In

1989, Collins returned to Newfoundland, where she was employed as a crown attorney prosecuting all levels of criminal cases. Collins moved to the United States in 1995, but returned to Newfoundland for a period of time to continue her work as a crown attorney. As a result, Collins was employed as a crown attorney until 1997. Collins retains licensing privileges and is in good standing with both the Province of Newfoundland and the Province of Saskatchewan. The record reflects that no complaints or disciplinary actions have been taken against her. Collins had an article published in the Saskatchewan Law Review and a table published in the textbook "Sentencing in Newfoundland."

Since 1995, Collins has resided in Norfolk, Nebraska, with her husband. Collins is a resident alien of the United States, and her husband is a U.S. citizen. Between February and July 1996, Collins worked nearly every day on a volunteer basis in the Madison County Attorney's office in order to become more familiar with the laws of Nebraska and of the United States. While at the county attorney's office, Collins assisted with a case that resulted in her being presented with an award from the U.S. Postal Inspection Service. In addition, Collins wrote and obtained a grant in order for the county attorney's office to establish a victim witness unit. The Madison County Attorney testified that Collins did good work and that he supports her application. The record contains nine letters from Canadian judges and coworkers of Collins' recommending that she be allowed to take the Nebraska bar examination.

ASSIGNMENTS OF ERROR

Collins contends that the Commission erred in denying her application to sit for the Nebraska bar examination, that rule 5 should either be interpreted to allow her to take the bar examination or be waived, and that rule 5 violates the 14th Amendment to the U.S. Constitution and NAFTA.

STANDARD OF REVIEW

This court will consider the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before the Commission. Neb. Ct. R. for Adm. of Attys. 15 (rev. 1996).

ANALYSIS

Collins contends that the Commission either misinterpreted or should have waived rules promulgated by this court requiring an applicant for admission to the Nebraska bar to have graduated from a law school accredited by the ABA. In the alternative, Collins argues that rule 5 violates the 14th Amendment to the U.S. Constitution and NAFTA.

Interpretation of Rules for Admission of Attorneys

Collins urges this court to interpret rule 5 in a manner that would allow an applicant for admission to the Nebraska bar who is a graduate of a foreign law school to take the bar examination if the applicant has attained educational qualifications equivalent to those a student would obtain at an ABA-approved law school.

The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. *In re Application of Collins*, 252 Neb. 222, 561 N.W.2d 209 (1997); *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996). See Neb. Const. art. II, § 1, and art. V, §§ 1 and 25. Rule 5 allows applicants to be admitted without examination if they have been admitted to the bar of another state, territory, or district of the United States, have attained educational qualifications at least equal to those required for admission by examination to the bar of Nebraska, and have passed an examination equivalent to the Nebraska bar examination. See rule 5A(1)(a), (b), and (c). Rule 5 also allows attorneys licensed in another state, territory, or district of the United States who have been actively engaged in the practice of law for 5 of the preceding 7 years to be admitted without examination if they have attained educational qualifications at least equal to those required for admission by examination to the Nebraska bar. See rule 5A(2)(a) and (b). All other applicants must take a written examination. Rule 5A(4).

Applicants who must take a written examination are required to meet the following educational qualifications:

> All applicants must have received at the time of the examination their first professional degree from a law school approved by the American Bar Association. . . . An

> applicant without a first degree from an approved law school shall be permitted to take the examination if such applicant will receive a first degree from an approved law school within 60 days after the date of the examination taken. In cases of hardship, the Supreme Court may, upon written application stating the nature and reason for the hardship to the applicant, permit the examination to be taken by an applicant before all other requirements have been fulfilled.

Rule 5C.

Rule 5C clearly states that an applicant for admission upon examination must have obtained his or her first professional degree from a law school approved by the ABA. Further, the rules for admission of attorneys do not provide for proof of education equivalent to the standard set out in rule 5C. Accordingly, rule 5 cannot be interpreted in a way that would allow Collins, a graduate of a law school not approved by the ABA, to be admitted to the bar upon examination. Rather, if this court were to allow Collins to be admitted upon examination, we would have to waive the application of the educational qualifications in rule 5C as they apply to Collins.

WAIVER

Collins' next contention is that if rule 5 cannot be interpreted in a manner that would allow her to be admitted to the Nebraska bar upon examination, the rule should be waived in her case. Although in *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996), this court examined the application of rule 5 to graduates of U.S. law schools not approved by the ABA applying to be admitted without taking an examination, we have never specifically addressed the issue of whether a waiver of rule 5C will be allowed for a graduate of a non-ABA-approved foreign law school seeking to take the Nebraska bar examination.

This court has the power to waive the application of its own rules regarding the admission of attorneys to the Nebraska bar. As previously stated, this court is vested with the sole power to admit persons to the practice of law in this state and to fix the qualifications for admission to the Nebraska bar. *In re Application of Collins*, 252 Neb. 222, 561 N.W.2d 209 (1997);

In re Appeal of Dundee, supra. See Neb. Const. art. II, § 1, and art. V, §§ 1 and 25. See, also, *In the Matter of Tocci*, 413 Mass. 542, 546, 600 N.E.2d 577, 580 (1992) (stating that "[the] court has the equitable power to waive the ABA accreditation requirement"). Jurisdictions with rules similar to those promulgated by this court are split on whether it is appropriate to waive the requirement that an applicant's law degree be from an ABA-approved law school. As one court described the issue, "[t]he decision whether to consider waivers presents a classic rules versus standards debate—whether the certainty and evenhandedness of a clear, bright-line rule justifies the possibility that the rule may work imperfectly in some cases." *Teare v. Committee on Admissions*, 566 A.2d 23, 30 (D.C. App. 1989).

Jurisdictions that do not allow waivers of their admission rules for attorneys from foreign countries do so based on varying policy considerations. One concern is that the granting of waivers will require the courts to engage in expensive and time-consuming investigations of foreign law schools in order to determine whether the education the applicant received at the foreign school is equivalent to the education he or she would have received at an ABA-approved school. See, *Teare v. Committee on Admissions, supra*; *Matter of Adams*, 102 N.M. 731, 700 P.2d 194 (1985); *Florida Bd. of Bar Examiners In re Hale*, 433 So. 2d 969 (Fla. 1983). A second concern regarding waivers is that the ad hoc approach taken in granting waivers can lead to the appearance of discrimination. See *Florida Bd. of Bar Examiners In re Hale, supra.* See, also, *Teare v. Committee on Admissions*, 566 A.2d at 31 (stating that "any case by case consideration of waivers invites the risk of disparate treatment of similar cases, and thus carries its own potential unfairness").

While this court has never specifically addressed whether a waiver might be appropriate in certain circumstances, we have indicated that rule 5 should not be applied on a case-by-case basis. In *In re Appeal of Dundee, supra*, we determined that an individual who received his juris doctor degree from a U.S. law school that was not approved by the ABA and a master of laws (LL.M.) degree from an ABA-approved law school was not eligible to be admitted to the Nebraska bar. In reaching this conclusion, we stated that the required coursework for an LL.M. did

not include coursework in civil procedure, contracts, constitutional law, criminal law, evidence, family law, torts, professional responsibility, property, and trusts and estates. We then stated that although Dundee had practiced in another state for several years and had earned a host of degrees and certificates in other fields, this did not matter, because if rule 5 was not applied uniformly rather than on a case-by-case basis, it would cease to operate as a rule at all. Finally, we stated that LL.M. programs are not subject to any qualitative standards. Thus, we determined that if we were to recognize an LL.M. degree as a sufficient legal education for purposes of rule 5, we would be compelled to undertake our own qualitative review of each LL.M. program.

Of jurisdictions that allow for waivers of their rules of admission, most do so according to the view that in some instances a strict application of the rules would cause injustice. See, *Petition of Dolan*, 445 N.W.2d 553 (Minn. 1989); *Application of Faylona*, 381 So. 2d 1203 (La. 1980). This view is based on the premise that rules of admission were not meant to prevent qualified applicants from taking the bar. Rather, the rules are intended to weed out unqualified applicants. See, *Petition of Dolan, supra*; *Application of Faylona, supra*. Thus, it has been said that while the use of ABA approval as a criterion allows courts to evaluate an applicant's legal education effectively and expeditiously without imposing a burden on the court's resources, a court must also ensure that applicants are treated fairly, because any qualification for admission to the bar " 'must have a rational connection with the applicant's fitness or capacity to practice law.' " *Bennett v. State Bar*, 103 Nev. 519, 522, 746 P.2d 143, 145 (1987). See, also, *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) (stating language quoted in *Bennett v. State Bar, supra*). It has been further said that exceptions should be recognized and waivers granted " 'whenever it can be demonstrated that the rules operate in such a manner as to deny admission to a petitioner arbitrarily and for a reason unrelated to the essential purpose of the rule.' " *Bennett*, 103 Nev. at 522, 746 P.2d at 145.

Jurisdictions have further drawn a distinction between graduates of U.S. law schools that have not been approved by the ABA and graduates of law schools in foreign countries, because

the ABA does not accredit foreign law schools. See, *In Matter of Corliss*, 424 Mass. 1005, 675 N.E.2d 398 (1997); *In the Matter of Tocci*, 413 Mass. 542, 600 N.E.2d 577 (1992); *Application of Schlittner*, 146 Ariz. 198, 704 P.2d 1343 (1985). Thus, it has been determined that in cases involving foreign-educated attorneys, a rigid application of rules requiring graduation from an ABA-approved law school would defeat the rule's purpose of allowing qualified applicants to sit for the examination. See *Application of Faylona, supra*. See, also, *In Matter of Bar Admission of Altshuler*, 171 Wis. 2d 1, 490 N.W.2d 1 (1992) (Abrahamson, J., dissenting) (refusal to grant waiver amounted to categorical refusal to evaluate any applicants trained outside United States). It has also been stated that a rigid application of the rule is not suited to the global economy in which we live. *In Matter of Bar Admission of Altshuler, supra* (Abrahamson, J., dissenting). Thus, some courts will waive rules for applicants from foreign countries but not for those who attended unaccredited law schools in the United States. See *Application of Schlittner, supra*.

Most jurisdictions that allow waivers place the burden on the applicant to prove that a waiver is appropriate in his or her particular case. See, *Bennett v. State Bar, supra*; *Application of Schlittner, supra*. Thus, it becomes the responsibility of the applicant to show that the education received at any particular school was functionally equivalent to the education provided at ABA-approved schools. *Bennett v. State Bar, supra*. By placing the burden on the applicant, the concern that the granting of waivers will require courts to undergo an expensive and burdensome investigation of foreign schools is avoided.

We are persuaded that a strict application of rule 5 may be unfair in some circumstances involving attorneys educated at foreign law schools. Unlike in *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996), foreign law schools do not have the opportunity to seek ABA accreditation. Thus, while a strict application of rule 5 is appropriate for those who have graduated from unaccredited U.S. law schools, such a strict application is not always appropriate for those who attended law school outside the United States. Accordingly, this court will consider waiving rule 5 for graduates of foreign law schools in

limited circumstances to allow such graduates to take the bar examination.

To summarize, following the denial of an application and a hearing before the Commission, we will consider a waiver of rule 5C to allow a graduate of a foreign law school based on the English common law to take the Nebraska bar examination upon proof that the education he or she received was equivalent to that for a juris doctorate available at an ABA-approved law school. In addition, when a foreign-educated attorney seeks a waiver in order to sit for the Nebraska bar examination, the burden at all times will be on the applicant to affirmatively show that the education he or she received was equivalent to that of an ABA-approved law school, and the applicant will be responsible for the costs of providing such information.

Waiver to Take Bar Exam as It Applies to Collins

Having determined that a waiver may be appropriate in some instances, we now turn to the instant case. The record presented by Collins provides the necessary basis for the grant of a waiver so that she may sit for the bar examination. Collins was educated at an English-speaking school whose teaching was based on the English common law, took courses similar to those taught in U.S. law schools, and has 15 years of professional experience. Collins took a course in every subject this court listed in *In re Appeal of Dundee*, 249 Neb. 807, 811, 545 N.W.2d 756, 759 (1996), as the " 'core of courses we deem as minimally necessary to be a properly-trained attorney.' " Further, Collins has taken affirmative steps to educate herself regarding the law of the United States and of Nebraska and has presented this court with a thorough record demonstrating her abilities as an attorney. Most importantly, there is affirmative evidence in the record that Collins received a legal education functionally equivalent to that available at an ABA-approved law school.

Collins has met her burden of proving that she received an education equivalent to the education available at an ABA-approved school. When this is combined with Collins' extensive work experience and her efforts to become acquainted with U.S. and Nebraska law, a waiver is appropriate. Accordingly, we

waive rule 5C as it applies to Collins and allow her to sit for the bar examination upon completion of the regular application process. Having determined that a waiver is appropriate, we need not address Collins' remaining assignments of error.

APPLICATION GRANTED.

CAPORALE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DAVID KOPERSKI, APPELLANT.
578 N.W.2d 837

Filed May 15, 1998. No. S-95-813.

1. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a trial court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
3. **Jury Instructions: Pleadings: Evidence.** Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. Because of this duty, the trial court, on its own motion, must correctly instruct on the law.
4. **Jury Instructions.** The trial court is required to give an instruction where there is any evidence, which could be believed by the trier of fact, in support of a legally cognizable theory of defense.
5. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
6. **Criminal Law: Sexual Assault: Jury Instructions.** For criminal prosecutions brought under Neb. Rev. Stat. § 28-319(1)(a) (Cum. Supp. 1994), the trial court must instruct the jury on the defense of consent when evidence is produced which, under all of the circumstances, could reasonably be viewed by the jury as an indication of affirmative and freely given consent to sexual penetration by the alleged victim.
7. **Criminal Law: Sexual Assault: Intent.** First degree sexual assault under Neb. Rev. Stat. § 28-319(1)(a) (Cum. Supp. 1994) is a general intent crime.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Lancaster County, BERNARD J. MCGINN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BOSLAUGH and GRANT, JJ., Retired.

GERRARD, J.

David Koperski was convicted by a jury of first degree sexual assault and sentenced by the district court to 4 years' probation and 60 days in jail. The Nebraska Court of Appeals affirmed the district court's judgment. Koperski successfully petitioned this court for further review. Finding error below, we reverse the judgment of the Court of Appeals and remand this matter with directions that it vacate the district court's judgment and remand this cause to the district court for a new trial.

FACTS

The alleged victim in this case, K.O., and her friend and coworker Marti G., both residents of Omaha, made plans to meet in Lincoln on the afternoon of Friday, April 8, 1994. K.O. and Marti intended to spend that evening drinking and dancing at a popular Lincoln nightclub with Marti's friend, Tanja D. Marti was a close friend of the defendant, Koperski. Marti knew that Friday was Koperski's birthday and that he was having a party at the house he shared with three other young men. At around 8:30 p.m., before going to the nightclub, the three young women briefly stopped by Koperski's party, where Marti first introduced K.O. to Koperski. The women stayed at the party for about 30 minutes. Nothing remarkable occurred at this time.

Marti and K.O. had intended to spend the night at Tanja's apartment. However, during the course of the evening, the women separated when Tanja left with her boyfriend. When Marti and K.O. arrived at Tanja's apartment around 2 a.m., Tanja was not home. Marti called Koperski and asked if they could spend the night at his house. He agreed. There was an "after-hours" party going on at Koperski's when the women arrived. Both young women joined the party.

After awhile, K.O. felt ill and lay down on the couch in the living room, covered herself with a comforter, and fell asleep. Koperski noticed that K.O. was not well and checked on her at least twice during the party. It is uncontroverted that at this point, both K.O. and Koperski were under the influence of alcohol, but not so intoxicated that either was obviously impaired. It is also uncontroverted that during the course of the evening, Koperski had not made any sort of sexually suggestive remark directed at K.O. and that K.O. had not shown any sort of romantic interest in Koperski.

After the last guest left the party, Koperski checked on K.O. one last time. K.O. testified that Koperski woke her up, leaned over the back of the couch, and kissed her. K.O. stated that she kissed him back and that these kisses were French kisses. K.O. testified that as they kissed, Koperski jumped over the back of the couch and landed on top of her. Once on top, he began aggressively grinding his hips against her hips, simulating sexual intercourse. K.O. said that at this point, she stopped kissing Koperski, repeatedly told him no, and attempted to push him away.

K.O. testified that instead of stopping, Koperski got up onto his knees and, in one motion, pulled down her pants and underwear causing her pants to rip and two buttons to pop off. K.O. further testified that she tried to pull her pants back up but that Koperski pulled them back down again. K.O. said that she was unable to get up off the couch at this time because Koperski was kneeling on her pants which were around her calves.

K.O. testified that Koperski, with his penis now exposed and erect, lay back down on top of her. With Koperski back on top of her, K.O. said that she again told Koperski to stop. K.O. testified that for the next 20 minutes or so, Koperski lay on top of her begging for sex and that she never consented to sexual penetration. K.O. testified that Koperski penetrated her anyway and that she began crying. At this point, Koperski stopped, got up, and, according to K.O., said, "I'm sorry, I don't know what came over me."

On cross-examination, K.O. admitted that most of the time her arms were free, that she never cried out in a loud voice, and that Koperski never threatened her in any manner or used his

arms to hold her down. K.O. also said that when Koperski lay back down on top of her after pulling down her pants, she thought that she could push him away at any time and that he would listen to her. K.O. testified that Koperski's body weight was the only force used to overcome her. Koperski is 6 feet tall and weighs 185 pounds. K.O. is 5 feet 1 inch tall and weighs 130 pounds.

Koperski's account of the alleged attack is somewhat different. Koperski said that when he went to check on K.O. after his last guest left, he approached the couch from behind and placed his hand either on the couch or on K.O.'s shoulder and asked her if she was all right. Koperski said that K.O. sat up, took hold of his shirt, and pulled him forward, at which time they began to kiss very passionately. Koperski said that he climbed over the back of the couch and lay on top of K.O.

According to Koperski, they kissed passionately and moved their hips in unison. Koperski testified that during this time, they both removed the comforter that was between them and that he thought K.O. was attempting to pull down his pants. Koperski then got to his knees, pulled down K.O.'s pants, and then stood up and removed his pants and shoes. Koperski said that when he stood up, K.O. made no attempt to get up or leave. Koperski lay back down on K.O. When he attempted to penetrate her, Koperski testified that K.O. muttered "no" one or two times. Koperski asked K.O. if she was just teasing him. K.O. did not immediately answer.

Koperski then attempted to penetrate her again. K.O. uttered "no" four or five times in a somewhat louder, crescendo-like fashion. Koperski stopped, told K.O. he was sorry, and retrieved a glass of water for her. Koperski specifically denied begging for sex for 20 minutes or saying anything like "I don't know what came over me." Koperski testified that the entire episode, from the time they began kissing until he stopped after K.O. repeatedly told him "no," lasted 5 to 7 minutes. Koperski also testified that at the time, he did not believe he had sexually penetrated K.O., but that it was possible that he had. Koperski said he knew that K.O. was upset and attempted to talk to her, but K.O. was not responsive. Koperski retired to his bedroom.

K.O. slept the rest of the night on the couch. Koperski's roommates were all sleeping in their bedrooms, and K.O.'s friend Marti was sleeping in the basement during this incident. K.O. did not seek help or assistance from any of them. In the morning, K.O. told Marti what had happened. K.O. said Marti was unsympathetic. K.O. and Marti left Koperski's house and spent much of the rest of the day in Lincoln with Tanja. Tanja testified that K.O. was in good spirits, laughing and joking much of the time.

After returning to Omaha and talking to her estranged husband, her roommate, and her best friend, K.O. presented herself to St. Joseph Hospital and reported that she had been raped. On Sunday, the Lincoln Police Department contacted Koperski concerning K.O.'s allegation. Koperski cooperated with the police, providing a taped statement shortly after being informed of K.O.'s charge and allowing the police access to search his house while he went to work. Koperski then arranged to take the rest of the day off work so that he could cooperate further in the investigation.

At the close of the evidence, Koperski's counsel asked the trial court to instruct the jury with respect to the issue of consent. The trial court refused because, in its view, the lack of consent was not an element to be proved by the State. The court thought that allowing each side an opportunity to argue the issue of consent would be adequate. During the course of deliberations, the jury asked the court to further clarify the meaning of the word "force" and whether they could consider the issue of consent.

The case was submitted to the jury on a Friday morning. By 8:30 p.m., no verdict had been reached. Koperski had refused to waive sequestration of the jurors, so the court prepared to have the jury transported to a hotel for the night. When the bailiff contacted one juror's wife, the bailiff was informed that the juror's wife's grandmother had passed away and that they needed to fly to Florida on Saturday for her funeral. The trial judge delivered this message to the juror, who happened to be the foreman. When asked what would happen if the jury did not reach a verdict before Saturday, the trial judge responded that he would have to declare a mistrial. This exchange was over-

heard by other jurors. The jurors then asked if they could continue their deliberations.

The trial judge returned to his chambers and immediately held a telephone conference with the attorneys, informing them of his contact with the jury. Koperski's counsel agreed to contact Koperski and come immediately to the courtroom to discuss the possibility of waiving sequestration. Before Koperski and his counsel could arrive, the jury returned its verdict. Koperski did not move for a mistrial before the verdict was received, but, instead, filed a motion for a new trial after learning of the adverse result.

Koperski appealed the judgment of conviction to the Court of Appeals, assigning as error the failure of the trial court to give his proffered jury instructions concerning the issue of consent and the ex parte contact between the judge and the jury. The Court of Appeals, in a memorandum opinion filed May 30, 1996, affirmed the district court's judgment, holding that Koperski's proffered jury instruction regarding the issue of consent was not a correct statement of Nebraska law because, in reliance on *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994), wherein this court stated that intent is not an element of Neb. Rev. Stat. § 28-319 (Cum. Supp. 1994), the proffered instructions incorrectly required criminal intent on the part of Koperski. In addition, the proffered instructions defined consent in terms of K.O.'s state of mind, improperly directing the jury's attention away from Koperski's conduct of overcoming K.O.

As to Koperski's other assigned error, the Court of Appeals held that although Koperski had adequately preserved his claimed error concerning improper contact between the judge and the jury, the contact in this case was not prejudicial.

ASSIGNMENT OF ERROR

Summarized, Koperski assigns but one error in his petition before this court—that being, the trial court's failure to instruct the jury on the issue of consent. In its brief in response, the State asserts that Koperski has thus waived the error assigned below regarding improper contact between the judge and jury. In a supplemental brief, Koperski asks us to consider all errors assigned to the Court of Appeals under our plain error doctrine.

STANDARD OF REVIEW

On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *State v. Howell, ante* p. 247, 575 N.W.2d 861 (1998).

ANALYSIS

In regard to the issue of consent under § 28-319, this case presents an issue of last, or at least limited, impression. Koperski was charged under § 28-319(1)(a), which provides: "(1) Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in the first degree." Noticeably absent from the statutory text is the word "consent." We note that in 1995, the Legislature amended § 28-319 to provide: "(1) Any person who subjects another person to sexual penetration (a) without *consent* of the victim . . . is guilty of sexual assault in the first degree." (Emphasis supplied.) § 28-319 (Reissue 1995). Further, Neb. Rev. Stat. § 28-318 (Reissue 1995), as amended, provides:

> (8) Without consent means:
>
> (a)(i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor;
>
> (b) The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; and
>
> (c) A victim need not resist verbally or physically where it would be useless or futile to do so; and
>
> (9) Force or threat of force means (a) the use of physical force which overcomes the victim's resistance or (b) the threat of physical force, express or implied, against the victim or a third person that places the victim in fear of death

or in fear of serious personal injury to the victim or a third person where the victim reasonably believes that the actor has the present or future ability to execute the threat.

In the instant case, the trial court instructed the jury essentially in the language of the statute as follows:

INSTRUCTION NUMBER 4

The material elements which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged are:

1. That the defendant, David Koperski, did intentionally subject [K.O.] to sexual penetration.

2. That the defendant did so by overcoming [K.O.] by force, threat of force, express or implied, coercion or deception.

3. That the defendant did so on or about April 9, 1994, in Lancaster County, Nebraska.

In instruction No. 7, the trial court defined the terms "intentionally," "actor," "sexual penetration," "victim," and "coercion."

Koperski's theory at trial was that he reasonably believed that K.O. had consented to sexual penetration and that he did not use force to overcome K.O. beyond that force normally employed when two consenting adults engage in sexual intercourse. To this end, Koperski tendered the following instructions:

PROPOSED INSTRUCTION NO. 1;

In the crime of first degree sexual assault, criminal intent must exist at the time of the first degree sexual assault. There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in sexual intercourse. Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such charge.

If after consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at the time of sexual intercourse, you must find him not guilty of such crime.

. . . .

PROPOSED INSTRUCTION NO. 2:

In prosecutions for first degree sexual assault, the word "consent" means positive cooperation in an act or attitude

> as an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

To establish reversible error from a trial court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998); *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998).

However, whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. Because of this duty, the trial court, on its own motion, must correctly instruct on the law. *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997). The trial court is required to give an instruction where there is any evidence, which could be believed by the trier of fact, in support of a legally cognizable theory of defense. See *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). Notwithstanding, all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997); *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996).

Thus, the district court was incorrect to conclude that the jury need only receive instruction over the elements of the offense and not Koperski's theory or theories of defense. Further, the Court of Appeals did not address the issue of whether an instruction concerning Koperski's theory of defense was merited when it denied Koperski relief relying solely on its conclusion that Koperski's proffered instructions were not a correct statement of Nebraska law.

Accordingly, the issues before this court are whether consent is a defense to a charge of first degree sexual assault pursuant to § 28-319(1), and if so, whether any evidence was adduced in support of a legally cognizable theory of defense regarding consent. If such evidence was adduced, then the jury instructions given

must be analyzed to determine whether, when read as a whole, they are a correct statement of the law that adequately cover Koperski's theory or theories of defense and are not misleading.

Although lack of consent is not an element of § 28-319(1), it can hardly be said that consent is not an issue in regard to a charge of first degree sexual assault. Generally, the law may only proscribe nonconsensual sexual conduct, in other words, sexual conduct which is forced upon a person by another without the consent of such person, or where one person is incapable of consenting, or where, although there is consent, such consent is invalid due to, for example, the victim's minority or diminished mental capacity. However, it is evident that consent may well be an issue in a prosecution for first degree sexual assault even though lack of consent is not an express, substantive element of the crime. See *State v. Camara*, 113 Wash. 2d 631, 781 P.2d 483 (1989) (nonconsent traditionally has been essence of crime of rape).

Our cases certainly reveal that this court has, subsequent to the 1975 and 1977 revisions to our sexual assault statutes, considered consent to be an issue in regard to a charge of sexual assault. In *State v. Willis*, 223 Neb. 844, 848, 394 N.W.2d 648, 651 (1986), we noted that only "nonconsensual sexual intercourse" is proscribed by our revised first degree sexual assault statute. In *State v. Dondlinger*, 222 Neb. 741, 386 N.W.2d 866 (1986), we held that a genuine issue of fact regarding a victim's lack of consent presented a fact question for the jury to resolve. In *State v. Hopkins*, 221 Neb. 367, 377 N.W.2d 110 (1985), we recognized that the 1975 revisions to our criminal code limited the introduction of evidence of the victim's past sexual relations, except that evidence which was allowed to demonstrate a pattern of conduct probative as to the issue of the victim's consent.

It is true that consent is not a statutorily defined affirmative defense similar to the affirmative defenses of justification for the use of force pursuant to Neb. Rev. Stat. § 28-1406 et seq. (Reissue 1995). Neither is consent a statutorily defined affirmative defense specifically made part of our sexual assault statute similar to the affirmative defense made specifically applicable to the offense of unauthorized use of a propelled vehicle. See Neb. Rev. Stat. § 28-516(3) (Reissue 1995).

Nonetheless, consent can operate as a defense to a charge of first degree sexual assault pursuant to § 28-319(1)(a) for two reasons. First, consent may operate as a failure of proof in regard to the essential element of the use of force, or in regard to the essential element that the victim must be overcome. See *State v. Smith*, 210 Conn. 132, 140, 554 A.2d 713, 717 (1989) ("[a] finding that a complainant had consented would implicitly negate a claim that the actor had compelled the complainant by force or threat to engage in sexual intercourse"). See, also, Model Penal Code § 2.11 (1985); 1 Paul H. Robinson, Criminal Law Defenses §§ 66 and 108 (1984).

Second, consent becomes a defense to a charged crime when consent precludes the infliction of the harm or evil sought to be prevented by the law defining the offense. See, Model Penal Code § 2.11(1) (1985); Robinson, *supra*, § 66(a)(3). In this regard, consent, although a defense to sexual contact effected through the use of force between adults, can never be a defense to a charge of first degree sexual assault pursuant to § 28-319(1)(c), which makes criminal the sexual penetration of a child under the age of 16 when the assailant is 19 years of age or older. This is so because the harm sought to be prevented by § 28-319(1)(c) is the sexual exploitation of a child of tender years by an adult.

Accordingly, we conclude that consent may be a defense to a charge of first degree sexual assault pursuant to § 28-319(1)(a). The next step in our inquiry is to determine whether any evidence was adduced in the instant case which could be believed by the trier of fact, in support of a legally cognizable consent theory of defense.

Koperski asserts that his testimony, if believed by the trier of fact, demonstrates that he subjectively believed that by her conduct, K.O. had affirmatively consented to sexual penetration, or, at least, if she had not affirmatively consented to sexual penetration, no force other than that inherent in the act of consensual sexual intercourse was used to overcome her and effect sexual penetration. Koperski also asserts that his subjective belief that either K.O. was consenting or force was not used to overcome her was objectively reasonable.

The State argues Nebraska law does not countenance the notion that a defendant's subjective belief that an alleged victim

consented to sexual penetration is a defense to the crime of first degree sexual assault. This is so, the State contends, for two reasons. First, the harm sought to be prevented by the offense describing first degree sexual assault is any nonconsensual sexual penetration wherein force is used to overcome the victim. Because the defendant's subjective mistake of fact as to consent is a manifestation of this type of harm, it logically follows that a subjective belief of consent cannot be a defense to first degree sexual assault. Second, the 1975 revisions to Nebraska's sexual assault statutes purposefully intended to focus the inquiry on objective quantities, such as the victim's demonstrative and verbal conduct evincing consent, and not on the assailant's subjective beliefs.

One accused of first degree sexual assault does not produce a legally cognizable consent defense if the evidence adduced merely indicates that the defendant subjectively believed that the victim had consented to sexual penetration. A mistake of fact as to the victim's consent is likewise not a defense to first degree sexual assault.

The purpose of the 1975 revision of Nebraska's former rape statute effected with the passage of 1975 Neb. Laws, L.B. 23, was to make our law, with respect to sexual assault, gender neutral and treat the offense as one involving assaultive conduct, not sexual activity. Thus, L.B. 23 sought to shift the focus of the inquiry away from an examination of what the victim did or should have done and instead concentrate on the conduct of the assailant.

In that regard, this court, as well as the courts of other jurisdictions construing similar legislative enactments, have removed or limited the many evidentiary impediments made applicable to the former crime of rape which distinguished it from other assaultive offenses. For example, courts and legislatures have either abandoned or severely limited the requirement of corroboration of a victim's testimony, the requirement that the victim must offer palpable resistance, the requirement of prompt reporting, the spousal exemption, and evidence of a victim's prior sexual conduct. See, *State v. Willis*, 223 Neb. 844, 394 N.W.2d 648 (1986); *State in Interest of M.T.S.*, 129 N.J. 422, 609 A.2d 1266 (1992).

The common thread running through each of these abrogated impediments to proof is that, formerly, each was thought to be an essential evidentiary precaution so as to test whether the victim had consented to sexual penetration. Moreover, each, in effect, served to protect an accused's subjective belief that the victim had consented to sexual penetration, even when such belief was predicated on a mistake of fact whether reasonable or not. Abrogation of these impediments to proof necessarily means that an accused's subjective or mistaken belief as to a victim's consent is a harm which the 1975 legislative enactment sought to preclude.

Koperski argues that an accused's subjective belief that consent has been given to sexual penetration should act as a complete defense to the offense of first degree sexual assault if, and only if, this subjective belief is also objectively reasonable. However, no statutory authority exists for the proposition that an accused's subjective belief regarding consent should act as a defense to the crime of first degree sexual assault. If the element of the accused's subjective belief as to the alleged victim's state of mind is to be established as a defense to the crime of first degree sexual assault, then it should be done by our Legislature which has the power to define crimes and offenses.

Nonetheless, because consensual sexual intercourse is not a harm proscribed by legislative enactment, if, by examining the facts and circumstances of the accused's conduct, it is objectively reasonable to conclude that the alleged victim consented to sexual penetration, then the accused should be free from criminal culpability. The Supreme Court of Connecticut reached a similar conclusion in *State v. Smith*, 210 Conn. 132, 554 A.2d 713 (1989). Like § 28-319(1)(a), the Connecticut statute at issue in *State v. Smith* did not expressly make lack of consent an element of the crime of first degree sexual assault. Nevertheless, the court held that consent was a defense because it negated the statutory element of force. The court went on to explain how the defense of consent operates:

> While the word "consent" is commonly regarded as referring to the state of mind of the complainant in a sexual assault case, it cannot be viewed as a wholly subjective concept. Although the actual state of mind of the actor in

> a criminal case may in many instances be the issue upon which culpability depends, a defendant is not chargeable with knowledge of the internal workings of the minds of others except to the extent that he should reasonably have gained such knowledge from his observations of their conduct. . . . [W]hether a complainant has consented to intercourse depends upon her manifestations of such consent as reasonably construed. If the conduct of the complainant under all the circumstances should reasonably be viewed as indicating consent to the act of intercourse, a defendant should not be found guilty because of some undisclosed mental reservation on the part of the complainant. Reasonable conduct ought not to be deemed criminal.

Id. at 140-41, 554 A.2d at 717. Likewise, in *State v. Ayer*, 136 N.H. 191, 195-96, 612 A.2d 923, 926 (1992), the New Hampshire Supreme Court stated:

> The defendant argues that the purported lack of consent must be communicated to a defendant in some way in order for him to be guilty. To the extent he means by this that the victim must manifest her unwillingness objectively, the defendant is correct. If, however, the victim objectively communicates lack of consent and the defendant subjectively fails to receive the message, he is guilty. The appropriate inquiry is whether a reasonable person in the circumstances would have understood that the victim did not consent.

In this regard, we agree with the reasoning of the Connecticut and New Hampshire courts. Accordingly, for criminal prosecutions brought under § 28-319(1)(a), we hold that the trial court must instruct the jury on the defense of consent when evidence is produced which, under all of the circumstances, could reasonably be viewed by the jury as an indication of affirmative and freely given consent to sexual penetration by the alleged victim. The focus remains on the accused's conduct in determining whether or not the accused has overcome the alleged victim, resulting in sexual penetration against his or her will.

In the instant case, Koperski's testimony, if believed by the trier of fact, could allow it to conclude that Koperski believed that K.O. had affirmatively and freely consented to sexual inter-

course through her conduct, that Koperski's belief was objectively reasonable at the time of the sexual act, and that Koperski stopped when K.O. verbally indicated that she no longer consented. Whether the totality of the circumstances reasonably indicated that K.O. freely and affirmatively consented to sexual penetration by Koperski is a question of fact for the jury. Because enough evidence had been produced in support of a legally cognizable theory of defense, we determine that the issue of consent should have been submitted to the jury.

We now turn our attention to examining whether the jury instructions, when read as a whole, correctly state the law, are not misleading, and adequately cover the issues supported by the evidence, notwithstanding the trial court's refusal to instruct the jury on the issue of consent.

The State argues that Koperski was not prejudiced by the instructions given because the issue of consent is the analytical opposite of the essential element that the victim must be overcome by force or one of the other prohibited means. In other words, the issue of consent is subsumed in the instruction regarding the substantive elements of the offense.

Similarly, in refusing Koperski's proffered jury instructions regarding consent, the trial court expressed the view that making consent a separate element or aspect of the case was confusing. Instead of an instruction regarding Koperski's theory of defense, the trial court thought it sufficient to simply not prohibit Koperski from arguing the issue of consent in his closing statement to the jury.

Contrary to the trial court's intuition, failing to instruct the jury regarding Koperski's consent theory of defense was in fact a source of confusion as evidenced by the jury's question to the court during deliberations asking whether it could even consider the issue of consent. Moreover, the trial court added to the jurors' confusion by not defining the term "force," but, instead, defining the term "coercion" in the instant case. The State's theory of criminal culpability was that Koperski used force to overcome K.O. and effect sexual penetration. Even though K.O. testified that Koperski begged her for sex, she did not indicate that sexual penetration was effected due to coercion.

In this regard, instructing the jury as to the meaning of "coercion" was not only confusing but was clearly prejudicial, as the jury is thus instructed over an issue not supported by the evidence adduced. See *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997). The jury was further instructed that criminal culpability could be predicated on a finding that Koperski overcame K.O. by threat of force, express or implied; coercion; or deception, even though no evidence was adduced supporting any of these theories.

We cannot agree with the State that an instruction regarding the substantive elements of the offense subsumes an instruction regarding Koperski's consent theory of defense. An instruction regarding the substantive elements of the offense alone fails to apprise the jury that an alleged victim's consent must be affirmatively and freely given, that such consent may be manifested by words or conduct, and that from the facts and circumstances in regard to the accused's conduct, it must be objectively reasonable to conclude that consent was given by the alleged victim. Thus, we determine that the trial court erred in not submitting the issue of consent to the jury and that such error was prejudicial to Koperski.

Finally, pursuant to *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994), the Court of Appeals found that the trial court did not err in refusing Koperski's proffered instruction because intent was not an element of first degree sexual assault and that the focus of the proffered instruction impermissibly shifted the inquiry from the wrongful conduct of Koperski to the state of mind of K.O. Further, the Court of Appeals stated that the trial court erred in its instructions in favor of Koperski when it required the State to prove that Koperski *intentionally* subjected K.O. to sexual penetration. We address the issue of intent because this cause is being remanded for a new trial.

In *State v. Trackwell, supra*, the defendant was convicted by a jury of first degree sexual assault. We vacated the conviction on the grounds of improper comment by the prosecutor during closing arguments. We then addressed Trackwell's assigned error regarding the trial court's failure to instruct the jury on intent as an element of first degree sexual assault. We concluded that intent was not an element of first degree sexual assault as

defined by the statute and therefore found no error in the court's instruction.

The absence of words in a statute requiring a certain mental state does not warrant the assumption that the Legislature intended to impose strict liability. To the contrary, at least for an offense as serious as sexual assault, it should be presumed that the Legislature intended to follow the usual mens rea requirement unless excluded expressly or by necessary implication. See 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.1(b) (1986).

While it is correct that § 28-319(1)(a) does not expressly state any requisite level of criminal intent with regard to any of the elements of the crime and first degree sexual assault is clearly not a specific intent crime, we conclude that first degree sexual assault under § 28-319(1)(a) is, nevertheless, a general intent crime. See, *State v. Smith*, 210 Conn. 132, 136, 554 A.2d 713, 715 (1989) (" '[i]t is well settled that first degree sexual assault is a general intent crime' "); *Peck v. Dunn*, 574 P.2d 367 (Utah 1978) (murder, rape, and kidnapping are examples of general intent crimes); *Sanchez v. State*, 567 P.2d 270 (Wyo. 1977) (rape is commonly classified as general intent crime). As a general intent crime, criminal intent is inferred from the commission of the acts constituting the elements of the crime of first degree sexual assault. *State v. Smith, supra*; *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982); *State v. Keyonnie*, 91 N.M. 146, 571 P.2d 413 (1977); *Sanchez v. State, supra*. Therefore, the only burden on the prosecution in order to prove general criminal intent under § 28-319(1)(a) is to prove beyond a reasonable doubt that the accused subjected another person to sexual penetration and overcame the victim by force, threat of force, coercion, or deception. To the extent that our decision in *State v. Trackwell, supra*, conflicts with this opinion, it is expressly disapproved. Thus, the foregoing reasoning leads us to conclude that the Court of Appeals was correct regarding the issue of requisite intent when it stated that the district court erred by instructing the jury that Koperski must have *intentionally* sexually penetrated K.O. but that such error was not prejudicial to Koperski.

CONCLUSION

Accordingly, we conclude that the district court committed prejudicial error by failing to instruct the jury in regard to Koperski's consent theory of defense. Having so held, it is unnecessary for us to address Koperski's assigned error regarding the ex parte contact between the trial judge and jury. Therefore, we reverse the judgment of the Court of Appeals and remand this matter with directions that it vacate the district court's judgment and remand this cause to the district court for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

MICHAEL J. McINTOSH, A MINOR, BY AND THROUGH MICHAEL T. McINTOSH, FATHER OF SAID MINOR CHILD, AND MICHAEL T. McINTOSH, APPELLANTS, V. THE OMAHA PUBLIC SCHOOLS, APPELLEE.

578 N.W.2d 431

Filed May 15, 1998. No. S-97-002.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence: Liability: Invitor-Invitee: Proximate Cause.** A possessor of land is subject to liability for injury caused to a business invitee by a condition of the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.
3. **Negligence: Proof.** In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Terry M. Anderson and Gordon R. Hauptman, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellants.

Brien M. Welch, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Michael J. McIntosh (McIntosh) and his father, Michael T. McIntosh, sued the Omaha Public Schools (OPS) for an injury McIntosh suffered on Collin Field, which was owned and managed by OPS. The McIntoshes appeal from a judgment in favor of OPS.

SCOPE OF REVIEW

In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Scholl v. County of Boone*, 250 Neb. 283, 549 N.W.2d 144 (1996); *Nelson v. Metropolitan Utilities Dist.*, 249 Neb. 956, 547 N.W.2d 133 (1996); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996) (*McIntosh I*).

FACTS

McIntosh was a student at Omaha South High School during the 1988-89 academic year. In the fall of 1988, McIntosh played freshman football. During the season, he practiced on Collin Field.

In the spring of 1989, McIntosh attended a football clinic which was supervised by the head football coach of Omaha

South High School. According to McIntosh, the 2-week clinic served to familiarize future high school football players with the offensive and defensive schemes of the team. The clinic consisted of indoor drills in a gymnasium and outdoor no-contact drills on Collin Field.

On June 1, 1989, McIntosh seriously fractured his left leg while participating in outdoor drills on Collin Field. At the time of the injury, McIntosh was jumping to deflect a pass. McIntosh testified that upon landing, his left foot was stuck or caught and that it stayed in the same position from the time he planted it flat on the ground until the time he heard his leg break.

Since McIntosh did not look down when his foot came down, he was unable to point out the exact spot on the field where the accident occurred. He said that the general area had little grass and was "very hard and uneven" and that the condition of the field on June 1, 1989, was poor. He also testified that the bare spots in the field were "pretty much baked clay" and that they contained mounds and ruts which made the ground uneven.

The McIntoshes' case was originally dismissed by the district court, which found that McIntosh was a licensee and that, therefore, OPS had a duty to avoid only willful and wanton negligence. We reversed, stating that McIntosh was not a licensee, but, instead, an invitee and that, therefore, the district court was clearly wrong in placing the burden upon the McIntoshes to prove willful and wanton negligence on the part of OPS. We remanded the cause for a new trial with directions to apply the proper standard of care. Because the district court's factual findings in the first trial were applied under the wrong legal standard, we did not review the McIntoshes' assigned errors regarding the factual findings of the district court. See *McIntosh I.*

On remand, the parties submitted the bill of exceptions from the first trial, including the exhibits, and made oral arguments. The McIntoshes chose to stand on their original petition, which alleged that OPS was negligent because Collin Field was uneven and contained ruts which could injure a student.

The district court relied upon the factual findings which it had made in the first trial, as set out in the court's March 1, 1994, order and as recited in *McIntosh I.* The district court then applied these findings to the standard of care of an invitee as set

forth in *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996). The district court noted that OPS conducted yearly maintenance of Collin Field. The maintenance consisted of spreading dirt on the field, aerating the soil, planting grass seed, and erecting a snow fence around the field to keep people out when the field was not in use. The district court found relevant the fact that with this maintenance program there had only been reports of students scraping and bruising themselves. Thus, the district court concluded that there was no evidence to support the McIntoshes' theory that OPS failed to use reasonable care to protect against broken legs or that the condition of the field was a proximate cause of McIntosh's injury.

The district court stated:

> [T]he Court finds no evidence supporting the Plaintiffs' theory that the Defendant failed to use reasonable care to protect the Plaintiff invitee against the danger of a broken leg or that the condition of the field was a proximate cause of young Plaintiff McIntosh's injury.
>
> . . . [T]here was no record of complaint(s) in prior years of ruts, only of a hard and uneven surface. Had ruts been a problem before, or if there were any evidence that Defendant was aware of ruts on the field in the Spring of 1989, then it is possible that the Defendant failed in its duty to maintain the field in a safe condition. Again, if there had been record of those complaints, then the Defendant School District could reasonably foresee that a student could get his or her foot caught in a rut and suffer a serious injury. But, as stated earlier, the only testimony of ruts was from the two students who witnessed young Plaintiff McIntosh break his leg.
>
> The Court finds that there is no evidence that Defendant School District knew before June 1, 1993 of ruts, pot-holes [sic], or something in which a student's foot could get caught.

The district court entered judgment for OPS and dismissed the action.

ASSIGNMENTS OF ERROR

The McIntoshes assign the following errors: The district court erred in (1) finding that OPS was not negligent in its

maintenance of Collin Field, (2) finding that OPS' maintenance of Collin Field was not the proximate cause of McIntosh's injury, (3) finding that OPS could not foresee that its maintenance of Collin Field created a risk of injury to McIntosh, and (4) finding that OPS was not negligent because it could not foresee McIntosh's actual injury.

ANALYSIS

In *McIntosh I*, we concluded that McIntosh was a business invitee. A possessor of land is subject to liability for injury caused to a business invitee by a condition of the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff. *McIntosh I*; *Cloonan v. Food-4-Less*, 247 Neb. 677, 529 N.W.2d 759 (1995).

Since the district court found that the condition of the field was not a proximate cause of McIntosh's injury, we focus on the issue of proximate cause. In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *Hand v. Starr*, 250 Neb. 377, 550 N.W.2d 646 (1996).

McIntosh had the burden to prove by the greater weight of the evidence that OPS' alleged negligence was the proximate cause of his injury. However, McIntosh did not know what caused his foot to catch on the ground. He could testify only that he believed that his foot was "caught." Another witness present at the time of McIntosh's injury stated that McIntosh's foot came down in an area that was barren, hard, rutted, and had little grass, but could offer no testimony regarding whether the condition of the ground caused McIntosh's injury. Dr. Richard

Murphy, the doctor who treated McIntosh, testified that his injury was consistent with the body rotating on a leg with the foot being caught on the ground, but Murphy did not opine that the injury was caused by ruts or any other condition on the field. Based upon these facts, the district court found that McIntosh did not prove that the condition of the field was a proximate cause of his injury.

In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Scholl v. County of Boone*, 250 Neb. 283, 549 N.W.2d 144 (1996); *Nelson v. Metropolitan Utilities Dist.*, 249 Neb. 956, 547 N.W.2d 133 (1996); *McIntosh I.*

Considering all the evidence in a light most favorable to OPS and giving every inference which can reasonably be deduced from such evidence to OPS, we cannot say that the district court was clearly wrong when it found that McIntosh had not proved proximate causation. The judgment of the district court is affirmed.

AFFIRMED.

JOHN A. LOGAN, APPELLANT, V. DEPARTMENT OF CORRECTIONAL SERVICES OF THE STATE OF NEBRASKA ET AL., APPELLEES.
578 N.W.2d 44

Filed May 22, 1998. No. S-96-902.

1. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusion independent from a trial court.
2. **Demurrer: Declaratory Judgments.** The use and determination of a demurrer in actions for declaratory judgment are controlled by the same principles as apply in other cases.
3. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled,

together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.

4. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the trial court.
5. **Demurrer: Jurisdiction.** Lack of jurisdiction is a proper ground for demurrer to a petition.
6. **Immunity: Waiver.** A waiver of sovereign immunity is found only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.
7. **Declaratory Judgments: Immunity.** The state's immunity from suit is unaffected by declaratory judgment statutes. Nebraska's Uniform Declaratory Judgments Act does not waive the state's sovereign immunity, and a plaintiff who seeks declaratory relief against the state must find authorization for such remedy outside the confines of the Uniform Declaratory Judgments Act.
8. **Administrative Law: Legislature: Immunity: Waiver: Intent.** The express language of Neb. Rev. Stat. § 84-911 (Reissue 1994) demonstrates the Legislature's intent to waive the state's sovereign immunity regarding questions construing the validity of administrative rules and regulations.
9. **Actions: Public Officers and Employees: Statutes: Immunity.** A declaratory or other equitable action against a state officer or agent attacking the constitutionality of a statute or seeking relief from an invalid act or an abuse of authority by an officer or agent is not a suit against the state and is therefore not prohibited by principles governing sovereign immunity.
10. **Declaratory Judgments: Public Officers and Employees: Immunity.** A declaratory judgment action seeking to compel affirmative action on the part of a state official is barred by the doctrine of sovereign immunity; if such a suit simply seeks to restrain the state official from performing affirmative acts, it is not within the rule of immunity.
11. **Demurrer: Pleadings.** A demurrer reaches an instrument filed with a petition and made a part thereof but does not admit any construction placed on any instrument pled and set forth in the petition.
12. ____: ____. In determining whether a demurrer should be sustained, the trial court may construe an instrument made part of the petition.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT and JEFFRE CHEUVRONT, Judges. Reversed and remanded with directions.

John Jedlicka for appellant.

Don Stenberg, Attorney General, and Melanie J. Whittamore-Mantzios for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

John A. Logan brought this action for declaratory judgment in Lancaster County District Court against the Department of Correctional Services of the State of Nebraska (Department); Harold W. Clarke, director of the Department; and Frank Hopkins, warden (all three collectively referred to as "the defendants"). Logan requested a determination concerning how three sentences imposed on him by other Nebraska courts should be interpreted. The district court determined that there had been no waiver of the state's sovereign immunity and that the court had no jurisdiction to hear the action. Accordingly, the district court sustained a demurrer filed by the defendants. Logan elected to stand on his petition, which was dismissed, and he appeals.

SCOPE OF REVIEW

The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusion independent from a trial court. *In re Estate of Andersen*, 253 Neb. 748, 572 N.W.2d 93 (1998).

The use and determination of a demurrer in actions for declaratory judgment are controlled by the same principles as apply in other cases. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994).

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Lawry v. County of Sarpy, ante* p. 193, 575 N.W.2d 605 (1998); *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997).

In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the trial court. *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995).

FACTS

Logan received the following sentences of imprisonment: (1) 5 to 10 years, Rock County, sentenced on March 13, 1995; (2)

5 to 10 years, Knox County, sentenced on May 1, 1995, to be served concurrently with the Rock County sentence; (3) 5 years, Madison County, sentenced on May 1, 1995, to be served concurrently with the Rock County sentence; and (4) 3 to 5 years, Lancaster County, sentenced on May 23, 1995, to be served consecutively to any other sentence. The Madison County and Knox County sentences, which were both imposed by Judge Richard P. Garden, were silent as to how they related to each other.

By letter dated August 28, 1995, which is attached to Logan's petition, the Department advised Logan's attorney that "[s]ince the court did not specifically state the manner in which the [Knox County] and [Madison County] sentences were to run in relation to each other, we have no choice but to run these sentences consecutively to each other." The Department relied upon our decision in *Nelson v. Wolff*, 190 Neb. 141, 142-43, 206 N.W.2d 563, 564 (1973), which states: " 'When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise.' " The Department determined that the combined total term of the Knox County, Madison County, and Lancaster County sentences was 8 to 15 years.

Logan's petition for declaratory relief alleged that while he was serving the Rock County sentence, charges were also pending in Knox and Madison Counties. In both Knox and Madison Counties, plea agreements were reached wherein the State would recommend in each county that the sentence run concurrently with the Rock County sentence. At the time of the plea agreements, it was unclear whether Knox County or Madison County would sentence Logan first. The petition alleged that Logan was sentenced in Madison County immediately before Knox County. Neither the Knox County sentence nor the Madison County sentence mentioned how it was to be served in relation to the other, but both were to run concurrently with Logan's sentence in Rock County.

Logan alleged that the Department's interpretation was contrary to the duties imposed upon the defendants under Neb. Rev.

Stat. §§ 29-2401 (Reissue 1995) and 83-1,118(4) (Reissue 1994) and that such interpretation violated his right to due process. He claimed that by misapplying state and federal law, the defendants gave Logan a greater term than actually imposed by Judge Garden and that the defendants violated the Due Process Clauses of the state and federal Constitutions. Logan requested an evidentiary hearing and a declaration of the rights and duties of the respective parties under the applicable statutes and constitutional provisions.

The defendants demurred on the grounds that the district court lacked jurisdiction over the defendants as a result of the state's sovereign immunity. The defendants also claimed that the district court lacked subject matter jurisdiction over the interpretation and application of criminal sentences ordered by the district courts for Knox County and Madison County.

ASSIGNMENT OF ERROR

Logan asserts that the district court erred in sustaining the defendants' demurrer.

ANALYSIS

The defendants' demurrer alleged that Logan's declaratory judgment action was barred by the state's sovereign immunity. Lack of jurisdiction is a proper ground for demurrer to a petition. See, Neb. Rev. Stat. § 25-806 (Reissue 1995); *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993).

Neb. Const. art. V, § 22, provides: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." This provision of the constitution is not self-executing, and legislative action is necessary to waive the state's sovereign immunity. *Concerned Citizens v. Department of Environ. Contr., supra.* A waiver of sovereign immunity is found only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *Concerned Citizens v. Department of Environ. Contr., supra.* "Just as an appellate court must determine the scope of review in an action for declaratory judgment

from the nature of the dispute, so does such a court determine whether sovereign immunity lies." *County of Lancaster v. State*, 247 Neb. 723, 726, 529 N.W.2d 791, 793 (1995).

In *County of Lancaster*, we stated that the state's immunity from suit is unaffected by declaratory judgment statutes. Nebraska's Uniform Declaratory Judgments Act does not waive the state's sovereign immunity, and a plaintiff who seeks declaratory relief against the state must find authorization for such remedy outside the confines of the Uniform Declaratory Judgments Act.

Logan asserts that his action for declaratory judgment is permitted by Neb. Rev. Stat. § 84-911 (Reissue 1994). The express language of § 84-911 demonstrates the Legislature's intent to waive the state's sovereign immunity regarding questions construing the validity of administrative rules and regulations. *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993). Section 84-911 provides in part:

> The validity of any rule or regulation may be determined upon a petition for a declaratory judgment thereon addressed to the district court of Lancaster County if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner.

We thus consider whether Logan's petition relates to a rule or regulation of the Department or the Department's threatened application of such rule or regulation which would interfere with, impair, or threaten Logan's legal rights or privileges. Neb. Rev. Stat. § 84-901(2) (Reissue 1994) states in part: "Rule or regulation shall mean any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure."

In arguing that his petition relates to a rule or regulation of the Department, Logan relies upon a decision by the Nebraska Court of Appeals in *Richardson v. Clarke*, 2 Neb. App. 575, 512 N.W.2d 653 (1994). In *Richardson*, inmates brought a declaratory judgment action against the Department and its director, seeking recalculation of their sentences pursuant to newly

imposed "good time laws." The Department had determined the inmates' parole eligibility and tentative release dates pursuant to Neb. Rev. Stat. § 83-1,107 (Reissue 1987), the statute in effect at the time of sentencing, rather than applying the later version of the statute. The Court of Appeals concluded that the action was not barred by sovereign immunity because the case fell under the limited waiver granted by § 84-911. The Court of Appeals stated: "When Clarke and the Department decided to determine the length of these sentences pursuant to § 83-1,107 (Reissue 1987) rather than the new law, the decision was a 'standard issued by an agency . . . designed to implement, interpret, or make specific the law' administered by it." *Richardson*, 2 Neb. App. at 577-78, 512 N.W.2d at 655, quoting § 84-901(2) (Reissue 1987).

In *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997), an inmate filed a petition for declaratory judgment, requesting that the district court determine whether the Department could revoke his good time credits based on a letter by Nebraska's Attorney General interpreting Neb. Rev. Stat. § 28-416 (Supp. 1993) to the effect that inmates serving mandatory minimum terms could not be paroled unless they had served the entire mandatory minimum term without good time. In response to the Attorney General's letter, the director of the Department informed the records administrator for the Department that effective immediately the application of good time toward mandatory minimum sentences imposed for certain drug offenses was to be discontinued. We determined that the state had not waived its sovereign immunity, holding that the director's memorandum did not constitute a rule, regulation, or standard under § 84-911. We distinguished *Richardson* "because it involved the judicial interpretation of a standard, not a statute." *Perryman*, 253 Neb. at 70, 568 N.W.2d at 245.

Logan's petition alleged that the Department had misapplied state and federal law. The Department's interpretation of Logan's sentences was based upon its understanding of the law set forth in *Nelson v. Wolff*, 190 Neb. 141, 206 N.W.2d 563 (1973). Logan does not allege that the Department's decision related to any rule or regulation issued by the Department. He

does not even allege a general standard followed by the Department. Clearly, this is not a matter which deals with the validity of any rule or regulation for purposes of the Administrative Procedure Act, and § 84-911 does not apply so as to waive the state's sovereign immunity and authorize Logan's declaratory judgment action against the Department.

Having determined that Logan's action as against the Department is barred by sovereign immunity, we next address whether the action can still be maintained against the state officers named in the action. In other words, we must determine whether the declaratory judgment action against the individual officers is in reality an action against the state and, therefore, barred by sovereign immunity. See *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995).

A declaratory or other equitable action against a state officer or agent attacking the constitutionality of a statute or seeking relief from an invalid act or an abuse of authority by an officer or agent is not a suit against the state and is therefore not prohibited by principles governing sovereign immunity. *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997); *County of Lancaster v. State, supra*; *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993). This is true because acts of state officers not legally authorized, or which exceed or abuse the authority conferred upon them, are judicially regarded as their own acts and not acts of the state. *Id.* A declaratory judgment action seeking to compel affirmative action on the part of a state official is barred by the doctrine of sovereign immunity; if such a suit simply seeks to restrain the state official from performing affirmative acts, it is not within the rule of immunity. *County of Lancaster v. State, supra.*

Logan argues that he does not seek affirmative relief, but, instead, seeks to prevent the Department from misapplying the law. We note that Logan's petition asserts that the defendants "have failed, refused, and neglected to grant this plaintiff the benefits of the order Judge Garden imposed . . . in violation of Mr. Logan's right to Due Process of Law and his rights under Neb. Rev. Stat. Section 29-2,401 and Section 83-1,118(4)." His petition further alleges that by misapplying state and federal law, the Department gave Logan a sentence greater than that

actually imposed by Judge Garden. In his petition, Logan does not attack the constitutionality of a statute, nor does he allege that the defendants have exceeded or acted outside their statutory authority.

Relying on our decision in *County of Lancaster*, the district court concluded that Logan's petition was a request for affirmative relief. The district court stated:

> *Lancaster County* held that actions of this nature, which allege that state officials neglected or refused their statutorily imposed duties, are construed as a suit against the state. As a result, because the action in this case alleges the same type of refusal and neglect as in *Lancaster County*, it must also be construed as a suit against the state requiring a waiver of immunity.

In *County of Lancaster*, the county sought a declaratory judgment that the Nebraska Department of Public Institutions had to accept people committed to the department by the Lancaster County Mental Health Board. We held that the suit against the individuals which sought to compel affirmative action was within the rule of immunity and that the district court did not have jurisdiction to determine the issue. However, we recognized that suits which simply seek to restrain state officials from performing affirmative acts are not within the rule of immunity.

In determining whether the defendants' demurrer should have been sustained, we look at whether Logan seeks to compel affirmative action on the part of state officials which is within the rule of immunity or, instead, seeks to restrain state officials from performing affirmative acts which are not within the rule of immunity. A demurrer reaches an instrument filed with a petition and made a part thereof but does not admit any construction placed on any instrument pled and set forth in the petition. In determining whether a demurrer should be sustained, the trial court may construe an instrument made part of the petition. *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997); *Clyde v. Buchfinck*, 198 Neb. 586, 254 N.W.2d 393 (1977). When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law

and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Lawry v. County of Sarpy, ante* p. 193, 575 N.W.2d 605 (1998); *Pratt v. Nebraska Bd. of Parole, supra.*

In summary, Logan's petition sets forth the sentences he received and how the Department intends to interpret his terms of imprisonment. Attached to the petition is the letter from the Department dated August 28, 1995, which sets forth the Department's interpretation of the sentences. It is clear from the letter that no action has yet been taken concerning whether the Knox County sentence will be served consecutively to the Madison County sentence. The petition ultimately requests that the officers of the Department be prevented from requiring that the sentences from Knox County and Madison County be served consecutively to each other. Thus, Logan's action seeks to restrain state officials from performing affirmative acts which he alleges would be invalid and an abuse of authority. Therefore, the action as against Clarke and Hopkins is not barred by sovereign immunity.

One issue regarding jurisdiction remains. The demurrer alleged that the district court lacked subject matter jurisdiction over the interpretation and application of criminal sentences imposed in Knox County and Madison County. We have previously held that the sentencing court is, in limited circumstances, the court of proper jurisdiction to determine the constitutional validity of a prior plea-based conviction and to hear a motion to revoke probation. See, *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993); *State v. Daniels*, 224 Neb. 264, 397 N.W.2d 631 (1986). However, the case at hand does not involve such issues. Rather, at issue is the state officials' intended implementation of the sentences imposed on Logan. Logan seeks to restrain such officials from having him serve the Knox County and Madison County sentences consecutively to each other when the district court required that the Knox County and Madison County sentences be served concurrently with the Rock County sentence. We conclude that the district court has subject matter jurisdiction over Logan's declaratory judgment action against the named state officials.

Logan was sentenced to 5 to 10 years' imprisonment in Rock County. The sentences in Knox County and Madison County are to be served concurrently with the Rock County sentence. The question remains, How can the sentences in Knox County and Madison County be served concurrently with the sentence in Rock County and yet be served consecutively to each other? Since this case reaches us on a demurrer, we must remand the cause to the district court to answer this rhetorical question.

CONCLUSION

We conclude that the district court has jurisdiction with respect to defendants Clarke and Hopkins. Therefore, we reverse the judgment and remand the cause to the district court with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD K. DAVIDSON, APPELLANT AND CROSS-APPELLEE, V. MARSHA C. DAVIDSON, APPELLEE AND CROSS-APPELLANT.

578 N.W.2d 848

Filed May 22, 1998. No. S-96-951.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Divorce: Appeal and Error.** Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record.
3. **Divorce: Property Division.** The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties.
4. **Divorce: Property Division: Stock.** Employee stock options and stock retention shares are a form of deferred compensation, and in Nebraska, deferred compensation is property for purposes of determining the contents of the marital estate.
5. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. Such exceptions include property accumulated and acquired through gift or inheritance or property held in trust by a third person, but do not include property obtained through one or both spouses' employment.

6. **Divorce: Property Division: Stock: Time.** In applying the time rule, it is incumbent upon the trial court to calculate whether and to what extent the options or retention shares were granted as compensation for past, present, or future services. Then the trial court should determine what percentage of each portion thereof was accumulated and acquired during the marriage.
7. **Employer and Employee: Stock.** To determine which percentage represents compensation for past, present, and future services, neither the language of the employee stock option or stock retention share agreement itself nor the testimony of the employer is dispositive. Relevant, nonexhaustive considerations include whether the employee stock options or stock retention shares were intended to (1) secure optimal tax treatment, (2) induce the employee to accept employment, (3) induce the employee to remain with the employer, (4) induce the employee to leave his or her employment, (5) reward the employee for completing a specific project or attaining a particular goal, and (6) be granted on a regular or irregular basis.
8. **Divorce: Property Division.** In a dissolution action, the date upon which the marital estate is valued should be rationally related to the property composing the marital estate.
9. **Divorce: Property Division: Alimony.** In dividing property upon a dissolution of marriage and in determining alimony, a court should consider four factors: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
10. **Divorce: Property Division: Alimony: Appeal and Error.** Alimony payments paid during the pendency of an appeal must be credited toward the payor's other alimony and property division payments.
11. **Divorce: Attorney Fees.** The award of attorney fees in a dissolution action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Affirmed as modified.

Edward D. Hotz, of Hotz & Weaver, for appellant.

John S. Slowiaczek, Sandra L. Dougherty, and Virginia A. Albers, of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

The central issue on appeal in this marital dissolution is whether and to what extent an interest in stock option and retention stock benefit plans provided by a spouse's employer constitutes marital property. We conclude that such plans, in the instant case, constitute marital property and that a time rule should be applied to determine to what extent the stock options and retention shares were earned during the marriage. Because the trial court erroneously excluded certain unvested stock options and retention stock, we affirm as modified.

I. BACKGROUND

Richard K. Davidson and Marsha C. Davidson were married on June 5, 1993.

Prior to the marriage, Marsha was employed by Security Benefit Group in Topeka, Kansas, where she earned approximately $45,000 per year, plus benefits. At the time of the marriage, Marsha had a bachelor's degree in English education and a master's degree in curriculum and education, and had finished the bulk of the classwork for an additional master's degree and her coursework on a Ph.D. She completed her Ph.D. in adult education during the marriage.

Marsha left her career in Topeka so that she could live in Omaha, Nebraska, with Richard. This was Marsha's third marriage. She had a 17-year-old child from one of her prior marriages who accompanied her to Omaha to live with Richard.

Marsha did not work outside the home during the marriage. She did, however, expend time and energy in community service. Although Richard testified that Union Pacific did not require his wife to devote time and effort to community activities, he did testify that he felt a personal obligation to give something to the Omaha community and that Marsha had helped him to fulfill that perceived obligation.

Richard's previous marriage, which lasted 19 years, ended in November 1992. Two children were born to that marriage, both living with their natural mother during this marriage. At trial, one child was in college, and the other was a senior in high school.

Richard was employed by the Union Pacific throughout his marriage to Marsha. Richard's career in the railroad industry began in 1960 with the Missouri Pacific Railroad, where he was

employed as a brakeman. By 1982, when the Missouri Pacific Railroad was purchased by the Union Pacific, Richard was acting as the Union Pacific's vice president of operations. Two years later, Richard was promoted to executive vice president of operations of the Union Pacific Railroad (Railroad), and in 1991, he became the Railroad's president. Within a matter of weeks, Richard became the Railroad's chairman, while retaining his position as president.

Richard's achievements continued during his marriage to Marsha. In 1994, approximately 1 year into the marriage, Richard was named president of the Union Pacific Corporation (Corporation). The Corporation is the parent company of the Railroad. Where the record is unclear as to this distinction, the term "Union Pacific" will be used. Finally, in 1995, Richard was promoted to chief operating officer of the Corporation. Richard held that position at the time of trial and testified that he expected to become chairman of the Corporation by the end of the year.

Problems arose during the marriage, and by June 1, 1995, the parties had separated. Richard filed a petition for dissolution on June 29, and a trial was held on May 7, 8, and 24, 1996. The primary point of contention at trial was the marital estate; specifically, the value of the marital estate and each party's contribution thereto. Richard's accountants prepared two financial statements concerning Richard's assets. The first financial statement was calculated as of May 31, 1993, immediately prior to the marriage. The second statement was calculated as of December 31, 1995, after the parties' separation but approximately 4 months prior to the trial. Rather than identify and value each asset, the trial court relied on Richard's financial statements to calculate the value of the marital estate. The trial court determined that the increase in Richard's net worth between May 31, 1993, and December 31, 1995, was the value of the marital estate.

During the relevant period, Richard's taxable income was $4,051,854 in 1993; $1,578,435 in 1994; and no taxable income in 1995 because of a loss carryover from a farming operation. A large portion of Richard's compensation during those years was composed of employee stock options and stock retention shares.

Stock retention shares are stock shares that are unvested when granted but will vest at some predetermined point in time. In the instant case, Richard's unvested retention shares would vest only if Richard remained employed with Union Pacific until a certain point in time.

An employee stock option is an employee's contractual right to purchase an employer's stock during a specified period at a predetermined price. An employee stock option may be vested and matured, vested and unmatured, or unvested. If the employee has an absolute right to exercise the option immediately, the option is vested and matured. If the employee cannot exercise the option until some future date, but the employee has an absolute right to exercise the option on that date, the option is vested and unmatured. If the option cannot be exercised until some future date and the option is subject to divestment, the option is unvested.

Richard had received stock options and stock retention shares from the Corporation since 1983. At the time of trial, Richard had both vested and matured and unvested stock options, and unvested stock retention shares. Robert Knight, a director of compensation and human resource information systems for the Corporation, testified that Union Pacific's employee stock options program was designed to recognize and reward past performance and to create an incentive for future contribution to the organization. According to the Corporation's proxy statement, stock retention shares were granted to retain executives, provide incentive for long-term performance, and create shareholder value. Knight testified that Richard's stock retention shares were indeed designed to retain Richard through a predetermined point in time. The estimated effective income tax rate of the employee stock options was 43 percent, and the rate of the retention shares was 32 percent, assuming they were sold as of December 31, 1995.

The trial court determined that Richard's unvested stock options and retention shares should not be included in the marital estate because they were too difficult to value. This finding necessitated an adjustment to Richard's May 31, 1993, financial statement because that statement included some unvested options in its calculations. The trial court adopted a procedure

called the Black/Sholes valuation method to value the remaining options because that method was used by Richard's accountants, by Union Pacific, and by Marsha's expert witness.

After valuing the marital estate at $5,280,010, the court divided that amount, giving two-thirds to Richard and one-third to Marsha. The trial court made this division, stating that Marsha had interrupted her career and provided domestic support during the marriage. This division resulted in a cash award to Marsha of $1,718,643, which was to be paid within 180 days, less certain credits. The trial court also awarded Marsha $5,000 per month in alimony for a period of 6 months, $52,079 in attorney fees, and $9,586 in expert witness fees. In addition, the trial court awarded Marsha $7,500 a month in temporary maintenance during the appeal.

II. ASSIGNMENTS OF ERROR

Restated, Richard's assignments of error assert that the trial court erred in (1) determining that the marital estate's value was approximately $5.3 million, (2) awarding Marsha one-third of the marital estate, (3) not providing Richard with certain credits, and (4) awarding Marsha attorney fees and costs.

On cross-appeal, Marsha asserts that the trial court erred in (1) failing to include certain unvested stock options and retention stock in the marital estate, (2) giving Richard a certain credit, and (3) valuing the assets of the marital estate as of December 31, 1995.

III. SCOPE OF REVIEW

In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996).

IV. ANALYSIS

The parties dispute the trial court's determination as to the extent, value, and division of the marital estate, as well as certain credits and attorney fees. Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate

court is empowered to enter the order which should have been made as reflected by the record. *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997). In the instant case, the record is sufficient to support our entry of the appropriate order.

1. Extent of Marital Estate

We have long held that the marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties. See, e.g., *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). Thus, to determine whether the unvested employee stock options and stock retention shares are part of the marital estate, we must determine whether they are property, whether they were accumulated and acquired during the marriage, and whether they are the result of the joint efforts of the parties.

This court has not addressed whether unvested employee stock options and stock retention shares accumulated and acquired during the marriage through the joint efforts of the parties constitute marital property. Other jurisdictions have held that employee stock options and stock retention shares are a form of deferred compensation. See, e.g., *Klingenberg v. Klingenberg*, 342 Md. 315, 675 A.2d 551 (1996); *Hann v. Hann*, 655 N.E.2d 566 (Ind. App. 1995); *Green v. Green*, 64 Md. App. 122, 494 A.2d 721 (1985). In Nebraska, deferred compensation is property for purposes of determining the marital estate. Neb. Rev. Stat. § 42-366(8) (Reissue 1993). See, also, *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981). We conclude that unvested employee stock options and stock retention shares constitute marital property when accumulated and acquired during the marriage through the joint efforts of the parties.

2. Joint Efforts of Parties

Richard asserts that the employee stock options and retention shares at issue were obtained as a result of his sole effort and, thus, were not accumulated and acquired through the joint efforts of the parties.

As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. See, *Maricle v. Maricle*, 221 Neb. 552, 378 N.W.2d 855 (1985);

Cady v. Cady, 224 Kan. 339, 581 P.2d 358 (1978). Such exceptions include property accumulated and acquired through gift or inheritance, *Reichert v. Reichert, supra*, or property held in trust by a third person, *Essex v. Essex*, 195 Neb. 385, 238 N.W.2d 235 (1976). Property obtained through one or both spouses' employment, however, is not such an exception. See, *Chrisp v. Chrisp*, 207 Neb. 348, 299 N.W.2d 162 (1980); *Shomaker v. Shomaker*, 166 Neb. 164, 88 N.W.2d 221 (1958) (including stock options in marital estate without discussing whether they were vested or unvested). We conclude that to the extent Richard's unvested employee stock options and stock retention shares were accumulated and acquired during the marriage, they were accumulated and acquired through the joint efforts of the parties. See, *Pascale v. Pascale*, 140 N.J. 583, 660 A.2d 485 (1995); *Smith v. Smith*, 682 S.W.2d 834 (Mo. App. 1984) (holding that employee stock options were " 'created by the joint effort of the spouses' ").

3. When Accumulated and Acquired

This court has never determined the issue of whether and to what extent stock options and retention shares are accumulated and acquired during the marriage. Other jurisdictions' approaches are instructive.

In *Smith v. Smith, supra*, the court held that unvested employee stock options granted during the marriage should be included within the marital estate. See, also, *Green v. Green, supra*. The court distinguished employee stock options from pensions, stating that "[an employee stock option] has already been earned, while a pension is earned over the whole period of the worker's employment." *Smith v. Smith*, 682 S.W.2d at 837. Implicit in this holding is the court's assumption that employee stock options are earned in their entirety when granted.

However, most courts recognize that employee stock options may be granted for past, present, or future services, or some combination thereof, depending on the circumstances surrounding the options' grant. E.g., *In re Marriage of Hug*, 154 Cal. App. 3d 780, 201 Cal. Rptr. 676 (1984). In *Hall v. Hall*, 88 N.C. App. 297, 307, 363 S.E.2d 189, 196 (1987), the court held that unvested employee stock options are not part of the marital estate, stating that

> this rule more closely recognizes the purpose of stock options granted an employee which are designed so that they vest and become exercisable over a period of time; such options represent both compensation for the employee's past services and incentives for the employee to continue in his employment in the future.

Were *Hall* to have included the unvested employee stock options in the marital estate in their entirety, such as in *Smith*, that portion of the options which represented compensation for services performed prior to the marriage or subsequent to the dissolution would have been erroneously included within the marital estate. However, by excluding the unvested employee stock options in their entirety, that portion of the options which represented compensation earned for past or future services performed during the marriage was erroneously excluded from the marital estate. See *In re Marriage of Hug, supra.*

Most courts faced with the issue of when stock options and retention stock are accumulated and acquired look to whether and to what extent the unvested employee stock options at issue were granted for past, present, or future services and then determine what percentage thereof was earned during the marriage and what percentage was earned prior to the marriage and/or subsequent to its dissolution. See, *DeJesus v. DeJesus*, 90 N.Y.2d 643, 687 N.E.2d 1319 (1997); *Powell and Powell*, 147 Or. App. 17, 934 P.2d 612 (1997); *In re Marriage of Miller*, 915 P.2d 1314 (Colo. 1996); *Garcia v. Mayer*, 122 N.M. 57, 920 P.2d 522 (1996); *In re Marriage of Short*, 125 Wash. 2d 865, 890 P.2d 12 (1995); *In re Marriage of Walker*, 216 Cal. App. 3d 644, 265 Cal. Rptr. 32 (1989). This approach is commonly referred to as the time rule.

We are persuaded that those jurisdictions applying the time rule are the most consistent with Nebraska law concerning when property is accumulated and acquired for purposes of determining the marital estate. See *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997). We conclude that the time rule generally applies to stock options and retention stock. While it is true that other jurisdictions have held that stock retention shares are accumulated and acquired in their entirety when granted, see *In re Marriage of Miller, supra*, we see no

reason to distinguish between employee stock options and retention shares. See *DeJesus v. DeJesus, supra* (treating stock options and retention shares alike).

In the instant case, the trial court did not attempt to determine whether and to what extent Richard's unvested employee stock options or retention shares were granted for past, present, or future services. Therefore, we conclude that the trial court abused its discretion in excluding the unvested employee stock options in their entirety.

As we have determined that the time rule applies to employee stock options and retention shares in dissolution actions, the question is, In applying the time rule, what stock options and retention shares are included within the marital estate? In applying the time rule, it is incumbent upon the trial court to calculate whether and to what extent the options were granted as compensation for past, present, or future services. Then the trial court should determine what percentage of each portion thereof was accumulated and acquired during the marriage.

To determine which percentage represents compensation for past, present, and future services, "[n]either the language of the [employee stock option or stock retention share] agreement itself nor the testimony of the employer is dispositive." Thomas P. Malone, *Employee Stock Options and Restricted Shares: Determining And Dividing the Marital Pot*, 25 Colo. Law. 87 at 90 (1996). Relevant, nonexhaustive considerations include whether the employee stock options or stock retention shares were intended to (1) secure optimal tax treatment, (2) induce the employee to accept employment, (3) induce the employee to remain with the employer, (4) induce the employee to leave his or her employment, (5) reward the employee for completing a specific project or attaining a particular goal, and (6) be granted on a regular or irregular basis. These, as well as any other relevant considerations, should be applied by the trial court according to the unique circumstances presented.

Based on Union Pacific's proxy statement and the testimony of Knight, we conclude in the instant case that Richard's stock options were granted to compensate Richard equally for both past and future services and that his retention shares were granted entirely for future services.

4. Determining Percentage Earned During Marriage

Once the trial court has determined whether and to what extent the unvested employee stock options or stock retention shares were granted for past, present, or future services, the trial court should determine what percentage of each portion was accumulated and acquired during the marriage. The following formulas or variations thereof should be used by the trial court to make that determination.

If an option or retention share is granted prior to the marriage, that portion of the option or retention share which represents compensation for past services was accumulated and acquired entirely outside the marriage. If, however, an option or retention share is granted during the marriage, the trial court must determine the percentage of compensation for past services accumulated and acquired during the marriage, if any, by creating a fraction. The numerator is the period of time from the beginning of the marriage until the date of the grant, and the denominator is the period of time from the beginning of the employee-spouse's employment until the date of the grant. See *DeJesus v. DeJesus*, 90 N.Y.2d 643, 687 N.E.2d 1319 (1997). Diagrammed, the fraction would look like this:

$$\frac{\text{Married [Date] to Grant [Date/\# Days]}}{\text{Employed [Date] to Grant [Date/\# Days]}} = \% \text{ Past Service}$$

It should be noted that if the employee-spouse's employment began after the parties were married, that portion of the option or retention share which represents compensation for past services was accumulated and acquired entirely within the marriage.

To determine the percentage of compensation for future services, if any, when the option or retention share is granted prior to the marriage but vests during the marriage, the trial court should create a fraction. The numerator is the period of time from the beginning of the marriage until the stock option or retention share vests, and the denominator is the period of time from the date of the grant until the employee stock option or retention share vests. Diagrammed, the fraction looks like this:

$$\frac{\text{Married [Date] to Vested [Date/\# Days]}}{\text{Granted [Date] to Vested [Date/\# Days]}} = \% \text{ Future Services}$$

If the option or retention share is granted during the marriage and vests during the marriage, that portion of the option or retention share which represents compensation for future services, if any, was accumulated and acquired entirely during the marriage. If, however, the option or retention share is granted during the marriage and will vest sometime after dissolution, the percentage of future services, if any, is determined by a fraction. The numerator is the period of time from the date of the grant until dissolution, and the denominator is the period of time from the date of the grant until the employee stock option vests. *DeJesus v. DeJesus, supra.* Diagrammed, the fraction looks like this:

$$\frac{\text{Granted [Date] to Dissolved [Date/\# Days]}}{\text{Granted [Date] to Vested [Date/\# Days]}} = \% \text{ Future Services}$$

Finally, any option/retention share or portion thereof which is granted during the marriage and determined to be compensation for present services is accumulated and acquired in its entirety when granted. *In re Marriage of Short*, 125 Wash. 2d 865, 890 P.2d 12 (1995).

Pursuant to our de novo review, we now apply the above fractions to the stock options and retention shares. We emphasize that although the trial courts should apply some fraction to determine to what extent the employee stock options or stock retention shares were earned during the marriage, the trial courts are not limited to any specific application of the time rule. *In re Marriage of Hug*, 154 Cal. App. 3d 780, 201 Cal. Rptr. 676 (1984). Rather, the trial courts should tailor such a determination to the unique facts of each case. *Powell and Powell*, 147 Or. App. 17, 934 P.2d 612 (1997).

In the instant case, we conclude that there is no need to adjust the typical fractions applicable to future compensation; however, adjustments should be made to the fractions concerning past compensation. The period during which Richard's past services were performed must be limited to the time elapsed from the last date upon which an option was granted to Richard until the date upon which the option at issue was granted. Had the Corporation intended to compensate Richard for services rendered prior to the date upon which the previous option was granted, Union Pacific would have simply awarded more

employee stock options to Richard at that time. In our adjusted past services fraction, the numerator is the period of time from the date the last employee stock options were granted or the beginning of the marriage, whichever is later, until the date of the grant. The denominator is the period of time from the date the last employee stock options were granted, until the date of the grant. Diagrammed, the fraction looks like this:

Last Granted/ Married	[Date]	to	Granted	[Date/# Days]	= % Past
Last Granted/ Employed	[Date]	to	Granted	[Date/# Days]	Service

The percentage of each block of stock options and stock retention shares granted for past services and the percentage granted for future services are set forth in the appendix to this opinion.

5. Value of Marital Estate

Marsha argues that the trial court erred in valuing the marital estate as of December 31, 1995, rather than as of the time of trial. In *Else v. Else*, 5 Neb. App. 319, 558 N.W.2d 594 (1997), the Nebraska Court of Appeals held that valuations of certain marital property that were calculated 1 week before trial bore a rational relationship to the property to be divided upon dissolution. Considering the complexity of the financial information involved in this case, the valuation of Richard's December 31, 1995, financial statement is certainly rationally related to the property composing the marital estate. Therefore, we conclude that the trial court did not abuse its discretion in valuing the marital estate as of December 31, 1995. See, also, *Everett v Everett*, 195 Mich. App. 50, 489 N.W.2d 111 (1992) (stating that actual date on which to determine market price of stock options for valuation purposes is within discretion of trial court).

(a) Valuing Unvested Stock Options and Retention Shares Earned During Marriage

We recognize that other jurisdictions have employed a variety of methods to value employee stock options and retention shares. In *Green v. Green*, 64 Md. App. 122, 137, 494 A.2d 721, 729 (1985), the court adopted an " 'if, as and when' " method of

valuing unexercised options. Under the if, as, and when method, the nonemployee spouse does not receive his or her share of the marital estate composed of the unvested or vested but unexercised stock options until those options are actually exercised. *Id.* See, also, *In re Marriage of Frederick*, 218 Ill. App. 3d 533, 578 N.E.2d 612 (1991); *Smith v. Smith*, 682 S.W.2d 834 (Mo. App. 1984). At least one court has used a variation of the if, as, and when method by imposing a constructive trust on the employee stock options, with the employee-spouse acting as trustee for the benefit of the nonemployee spouse. *Callahan v. Callahan*, 142 N.J. Super. 325, 361 A.2d 561 (1976). Finally, some courts use the intrinsic value method, which is the market value of the stock, less the exercise cost of the option and any applicable financing costs. Under this method, the options are valued at the time of dissolution and the nonemployee spouse receives his or her share either immediately or in installments. *Wendt v. Wendt*, No. FA 960149562S, 1997 WL 752374 (Conn. Super. Dec. 3, 1997); *In re Marriage of Hug*, 154 Cal. App. 3d 780, 201 Cal. Rptr. 676 (1984).

In the instant case, the trial court valued the employee stock options using the Black/Sholes method, which is a mathematical formula used to value stock options. This method takes into account the option price, the term of the option, the market value of the underlying security, a risk-free rate of return, and the underlying volatility of the stock option, in order to come up with a present value for the options at issue. Richard asserts that the trial court erred by applying the Black/Sholes option pricing method rather than the intrinsic value method. We note, however, that Richard's own accountants used the Black/Sholes option pricing method to value Richard's employee stock options on his financial statements. Likewise, the Corporation used the Black/Sholes option pricing method to value Richard's shares in its 1996 proxy statement. Therefore, we conclude that the trial court did not abuse its discretion in this instance by using the Black/Sholes option pricing method to value Richard's employee stock options.

(b) Black/Sholes Valuation Method

The next step in our de novo review is to determine the value of the unvested options and retention shares that constitute mar-

ital property. To do so, we multiply the difference between the options' exercise price and present value by the number of shares at issue, and then multiply the product thereof by the sum of the past percentage and the future percentage divided by 2. The product thereof represents the pretax value of the stock options to the marital estate, which should be adjusted to reflect the posttax value. Diagrammed, the equation looks like this: (Black/Sholes - Option Price × # shares) (Past % + Future % /2) × (100% - Effective Tax Rate %) = Estate Value

We use a similar equation for the stock retention shares, simply omitting the option price and past percentage.

The valuation calculations are set forth in the appendix to this opinion. Those calculations indicate that the total value of Richard's employee stock options and stock retention shares attributable to the marital estate is $5,655,974. According to the method of calculation used by the trial court, and a comparison of the financial statements prepared by Richard's accountants, the remaining portion of the marital estate is $2,230,145. Added together, we conclude that the value of the marital estate is $7,886,119.

6. Division of Marital Estate

In dividing property and determining alimony, a court should consider four factors: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party, *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994), the polestar being fairness and reasonableness as determined by the facts of each case, *Venter v. Venter*, 249 Neb. 712, 545 N.W.2d 431 (1996).

In the instant case, Marsha and Richard separated after 2 years and were married for only 38 months. Richard's 33-year career in the railroad industry had reached its zenith at the time the parties were married. Richard was already president of the Railroad and had received stock option grants every year since 1983. It is true that Richard was promoted to chairman of the

Railroad and then to president of the Corporation during the marriage and that he was awarded significant grants of stock options and retention shares. However, the record reflects that Richard had steadily climbed the corporate ladder and was well positioned to attain these promotions before he married Marsha. Most importantly, the bulk of the marital estate consists of stock options and retention shares that were earned as a result of those promotions.

We are aware that Marsha assisted Richard with his employee-related responsibilities by providing social support and that she tutored Richard's college-age son. Furthermore, although Marsha completed her Ph.D. during the marriage, she interrupted a successful career to marry Richard. These contributions to the marriage are relevant and must be taken into consideration. See *Chrisp v. Chrisp*, 207 Neb. 348, 299 N.W.2d 162 (1980). However, we also note that no children were born to the marriage and that Richard's children did not reside permanently in Richard and Marsha's home during the marriage.

Considering that no children were born to the parties, that the parties separated after 2 years, that the marriage lasted 38 months, that Richard's career was well established, and that Marsha is highly educated and capable of finding employment, we conclude that the trial court's adherence to the general guidelines was an abuse of discretion.

We determine Marsha is entitled to $950,000, less a credit of $145,789, which is the value of the Lexus and Mustang automobiles ($41,013), the jewelry ($49,515), the personal property retained by Marsha ($15,261), the payment to prepare the premarital home for sale ($15,000), and the $25,000 cash payment that was to be made immediately upon entry of the trial court's decree. That amount shall be paid in cash within 45 days of the release of this opinion.

7. Credits

Richard argues that the trial court erred in not ordering the $7,500 monthly payment Richard must make to Marsha during the pendency of this appeal be credited against Marsha's share of the marital estate. Although the trial court did not expressly state that the $7,500 payments be credited against Richard's total liability, we assume that the trial court intended its order to

be in conformity with the law. The law is clear in this state that alimony payments paid during the pendency of an appeal must be credited toward the payor's other alimony and property division payments. See *Isenberger v. Isenberger*, 239 Neb. 706, 477 N.W.2d 927 (1991). Thus, we conclude that the $7,500 payments shall be credited toward Richard's obligations in addition to those credits already awarded.

On cross-appeal, Marsha asserts that the trial court erred in giving Richard a credit for voluntary payments he made to Marsha during the pendency of the proceedings below. The record reflects that a substantial number of these payments were made to maintain the family home, which was ultimately awarded to Richard. Richard should not receive a credit for maintaining his own assets. We conclude that the trial court abused its discretion in giving a credit for Richard's voluntary payments as reflected in exhibit 61.

8. Attorney Fees

The award of attorney fees in a dissolution action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996). The trial court did not abuse its discretion in awarding attorney fees and expert witness fees to Marsha.

V. CONCLUSION

We are aware that the portion of the marital estate awarded to Marsha is less than the one-third to one-half guideline of the general rule. However, under the unique circumstances of the instant case, we are satisfied that Marsha's award is fair and reasonable. Richard shall pay Marsha $950,000, less those credits awarded in this opinion, within 45 days of this opinion's release. In all other respects, the trial court's decree is affirmed.

Affirmed as modified.

APPENDIX

EMPLOYEE STOCK OPTIONS

BLOCK ONE							
# Shares	Granted	Vested	Option Price	Black/ Sholes	Married	Dissolved	Taxed
40,000	09/24/92	09/24/93	$54.13	$74.83	06/05/93	08/29/96	43%
Past	Accumulated and acquired entirely outside the marriage.[1]						
Future	Married 06/05/93 to Vested 09/24/93 / Granted 09/24/92 to Vested 09/24/93 = 30.25%						
Value	($74.83 - $54.13 x 40,000) (0% + 30.25% / 2) x 57% = $71,408						

BLOCK TWO							
# Shares	Granted	Vested	Option Price	Black/ Sholes	Married	Dissolved	Taxed
40,000	11/18/93	11/18/94	$63.75	$81.42	06/05/93	08/29/96	43%
Past	Married 06/05/93 to Granted 11/18/93 / Prior Grant 09/24/92 to Granted 11/18/93 = 39.35%						
Future	Accumulated and acquired entirely within the marriage.[2]						
Value	($81.42 - $63.75 x 40,000) (39.35% + 100% / 2) x 57% = $280,724						

BLOCK THREE							
# Shares	Granted	Vested	Option Price	Black/ Sholes	Married	Dissolved	Taxed
56,250	12/15/94	12/15/95	$47.00	$72.36	06/05/93	08/29/96	43%
Past	Accumulated and acquired entirely within the marriage.[3]						
Future	Accumulated and acquired entirely within the marriage.[2]						
Value	($72.36 - $47.00 x 56,250) (100% + 100% /2) x 57% = $813,105						

BLOCK FOUR							
# Shares	Granted	Vested	Option Price	Black/ Sholes	Married	Dissolved	Taxed
56,250	12/15/94	12/15/96	$47.00	$72.36	06/05/93	08/29/96	43%
Past	Accumulated and acquired entirely within the marriage.[3]						
Future	Granted 12/15/94 to Dissolved 08/29/96 / Granted 12/15/94 to Vested 12/15/96 = 82.25%						
Value	($72.36 - $47.00 x 56,250) (100% + 82.25% / 2) x 57% = $740,983						

BLOCK FIVE							
# Shares	Granted	Vested	Option Price	Black/ Sholes	Married	Dissolved	Taxed
56,250	12/15/94	12/15/97	$47.00	$72.36	06/05/93	08/29/96	43%
Past	Accumulated and acquired entirely within the marriage.[3]						
Future	Granted 12/15/94 to Dissolved 08/29/96 / Granted 12/15/94 to Vested 12/15/97 = 56.83%						
Value	($72.36 - $47.00 x 56,250) (100% + 56.83% / 2) x 57% = $608,365						

BLOCK SIX							
# Shares	Granted	Vested	Option Price	Black/ Sholes	Married	Dissolved	Taxed
43,750	11/30/95	11/30/96	$67.94	$85.89	06/05/93	08/29/96	43%
Past	Accumulated and acquired entirely within the marriage.[3]						
Future	Granted 11/30/95 to Dissolved 08/29/96 / Granted 11/30/95 to Vested 11/30/96 = 74.50%						
Value	($85.89 - $67.94 x 43,750) (100% + 74.50% / 2) x 57% = $390,556						

BLOCK SEVEN							
# Shares	Granted	Vested	Option Price	Black/ Sholes	Married	Dissolved	Taxed
43,750	11/30/95	11/30/97	$67.94	$85.89	06/05/93	08/29/96	43%
Past	Accumulated and acquired entirely within the marriage.[3]						
Future	Granted 11/30/95 to Dissolved 08/29/96 / Granted 11/30/95 to Vested 11/30/97						= 37.25%
Value	($85.89 - $67.94 x 43,750) (100% + 37.25% / 2) x 57%						= $307,207

OPTIONS TOTAL VALUE	= $3,212,348

STOCK RETENTION SHARES

BLOCK ONE						
# Shares	Granted	Vested	Share Price	Married	Dissolved	Taxed
10,000	09/27/90	12/15/93	$66.00	06/05/93	08/29/96	32%
Future	Married 06/05/93 to Vested 12/15/93 / Granted 09/27/90 to Vested 12/15/93					= 16.36%
Value	$66.00 x 10,000 x 16.36% x 68%					= $73,424

BLOCK TWO						
# Shares	Granted	Vested	Share Price	Married	Dissolved	Taxed
20,000	09/26/91	12/15/93	$66.00	06/05/93	08/29/96	32%
Future	Married 06/05/93 to Vested 12/15/93 / Granted 09/26/91 to Vested 12/15/93					= 23.37%
Value	$66.00 x 20,000 x 23.37% x 68%					= $209,769

BLOCK THREE						
# Shares	Granted	Vested	Share Price	Married	Dissolved	Taxed
10,000	11/18/93	10/31/96	$66.00	06/05/93	08/29/96	32%
Future	Granted 11/18/93 to Dissolved 08/29/96					= 94.18%
	Granted 11/18/93 to Vested 10/31/96					
Value	$66.00 x 10,000 x 94.18% x 68%					= $422,680

BLOCK FOUR						
# Shares	Granted	Vested	Share Price	Married	Dissolved	Taxed
20,000	11/18/93	10/31/97	$66.00	06/05/93	08/29/96	32%
Future	Granted 11/18/93 to Dissolved 08/29/96					= 70.34%
	Granted 11/18/93 to Vested 10/31/97					
Value	$66.00 x 20,000 x 70.34% x 68%					= $631,372

BLOCK FIVE						
# Shares	Granted	Vested	Share Price	Married	Dissolved	Taxed
10,000	11/18/93	10/31/98	$66.00	06/05/93	08/29/96	32%
Future	Granted 11/18/93 to Dissolved 08/29/96					= 56.13%
	Granted 11/18/93 to Vested 10/31/98					
Value	$66.00 x 10,000 x 56.13% x 68%					= $251,911

BLOCK SIX						
# Shares	Granted	Vested	Share Price	Married	Dissolved	Taxed
20,000	12/15/94	12/15/97	$66.00	06/05/93	08/29/96	32%
Future	Granted 12/15/94 to Dissolved 08/29/96					= 56.83%
	Granted 12/15/94 to Vested 12/15/97					
Value	$66.00 x 20,000 x 56.83% x 68%					= $510,106

BLOCK SEVEN						
# Shares	Granted	Vested	Share Price	Married	Dissolved	Taxed
10,000	12/15/94	12/15/98	$66.00	06/05/93	08/29/96	32%
Future	Granted 12/15/94 to Dissolved 08/29/96					= 42.63%
	Granted 12/15/94 to Vested 12/15/98					
Value	$66.00 x 10,000 x 42.63% x 68%					= $191,323

BLOCK EIGHT						
# Shares	Granted	Vested	Share Price	Married	Dissolved	Taxed
10,000	12/15/94	12/15/99	$66.00	06/05/93	08/29/96	32%
Future	Granted 12/15/94 to Dissolved 08/29/96					= 34.10%
	Granted 12/15/94 to Vested 12/15/99					
Value	$66.00 x 10,000 x 34.10% x 68%					= $153,041

RETENTION SHARES TOTAL VALUE	= $2,443,626

OPTIONS & RETENTION SHARES TOTAL VALUE	= $5,655,974

1. The percentage that represents compensation for past services was accumulated and acquired entirely outside the marriage because the options were granted prior to the marriage.

2. The percentage that represents compensation for future services was accumulated and acquired entirely within the marriage because the options were granted and vested during the marriage.

3. The percentage that represents compensation for past services was accumulated and acquired entirely within the marriage because the prior options were granted during the marriage and the options at issue vested during the marriage.

DONALD RAY FISCEL, APPELLEE, V. RANDALL BEACH, DOING BUSINESS AS PROGRESSIVE RENTALS, APPELLANT.

578 N.W.2d 52

Filed May 22, 1998. No. S-96-1085.

1. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
2. ____. The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence.
3. ____. If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law.
4. **Judgments: Verdicts: Directed Verdict.** A motion for judgment notwithstanding the verdict may be granted when the movant's previous motion for directed verdict, made at the conclusion of all the evidence, should have been sustained.
5. **Negligence.** In Nebraska, winter snow and ice are a fact of life, and one does not automatically assume the risk by walking across a snow- or ice-covered parking lot.
6. ____. A plaintiff's acceptance of a risk is not voluntary if the defendant's conduct has left him or her no reasonable alternative course of conduct to exercise a right or privilege of which the defendant has no right to deprive him or her.
7. ____. Even if a plaintiff has knowledge of a dangerous condition, the condition cannot make him or her a captive in his or her own home.
8. ____. If the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless he or she exposes himself or herself to a risk of bodily harm, the plaintiff is not guilty of contributory negligence in so doing unless he or she acts unreasonably.
9. **Negligence: Jury Instructions: Appeal and Error.** The failure to instruct a jury with respect to the effects of its allocation of negligence in accordance with Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995) is prejudicial error.
10. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
11. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Saunders County: ALAN G. GLESS, Judge. Reversed and remanded for a new trial.

Terry K. Gutierrez, of Gast, Ratz & Gutierrez, P.C., for appellant.

John H. Sohl for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

This is a slip-and-fall lawsuit which appellee, Donald Ray Fiscel, filed against appellant, Randall Beach, doing business as Progressive Rentals, after Fiscel injured his lower back due to a slip and fall on an icy driveway in Beach's trailer park. Linda Fiscel also filed suit against Beach for loss of consortium; her claim is not at issue.

At the close of Fiscel's evidence, Beach moved for a directed verdict, arguing Fiscel was contributorily negligent and assumed the risk of walking on the snow- and ice-covered driveway; the court denied the motion. Beach presented his case and again moved for a directed verdict, which the court again overruled. The court then submitted the matter to the jury. The verdict announced that Fiscel and Beach were both negligent, 40 percent and 60 percent respectively.

The jury determined Fiscel sustained $63,500 in damages, but did not specify whether Fiscel should receive 100 percent or 60 percent of the $63,500. In an off-the-record conversation with several members of the jury, the district court determined Fiscel should receive the entire $63,500. Beach moved for judgment notwithstanding the verdict, which the court denied. Beach then appealed to the Nebraska Court of Appeals, and we removed the case to our docket pursuant to our power to regulate the caseloads of the Court of Appeals and this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

Rephrased and summarized, Beach's contentions are that the district court erred in overruling his motions for directed verdict and for judgment notwithstanding the verdict, and in entering judgment in favor of Fiscel for the entire $63,500.

In addressing Beach's first two assignments of error, we must determine whether the district court was correct in denying Beach's motions for directed verdict and judgment notwithstanding the verdict. The rules regarding such motions are well settled. A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.

Alexander v. Warehouse, 253 Neb. 153, 568 N.W.2d 892 (1997). The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. *Id.* If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Id.* In addition, a motion for judgment notwithstanding the verdict may be granted when the movant's previous motion for directed verdict, made at the conclusion of all the evidence, should have been sustained. *Farmers & Merchants Bank v. Grams,* 250 Neb. 191, 548 N.W.2d 764 (1996); *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994).

Resolving every controverted fact in favor of Fiscel and affording him the benefit of every reasonable inference deducible from the evidence, we find the following is disclosed: Fiscel was a resident in a mobile home located in a trailer park owned, operated, and maintained by Beach. On the day of the accident, the weather was below freezing and there was accumulated snow and ice on the ground. At approximately 2 p.m., Fiscel decided to go outside and start his car to prevent the battery and radiator from freezing. In an attempt to "kill two birds with one stone," Fiscel also took with him a small bag of garbage that he intended to throw away in a garbage receptacle after starting his car.

Geographically, Fiscel's mobile home was located on the northeast corner of a cul-de-sac-shaped gravel driveway. The garbage receptacle was located approximately 55-60 yards directly southwest of the trailer, and the car was located approximately halfway between the trailer and the garbage receptacle. The most direct route to the car and garbage receptacle required Fiscel to traverse the gravel driveway, which was on a slight incline. There were no sidewalks.

The evidence in the record indicates that the driveway was snowy, ice covered, and slippery and that it had not been plowed, salted, graveled, or treated with an abrasive substance. The evidence suggests that snow removal was Beach's responsibility, since the driveway was considered a common area, and that Beach had hired a maintenance man to maintain the trailer

park and driveway. However, snow and ice had remained for a period of least 4 weeks without plowing or treatment.

Fiscel was aware the driveway was snow- and ice-covered, and he took "very small steps" and walked slowly to ensure he would not fall. En route to the car and the garbage receptacle, Fiscel slipped on the snow and ice which had accumulated. As his feet slipped out from under him, Fiscel fell to the ground. Unable to brace himself with his hands, Fiscel fell directly on his hip, injuring his lower back.

Beach argues the motions for directed verdict and judgment notwithstanding the verdict should have been granted because Fiscel was either contributorily negligent or assumed the risk involved in traversing the driveway. Beach claims that Fiscel voluntarily traversed the driveway, even though he knew the driveway was ice- and snow-covered. Regardless of Beach's assertions, such claims regarding Fiscel's conduct do not comport with recent Nebraska case law.

In *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988), plaintiff filed suit when she slipped and fell on snow and ice in defendants' parking lot while attempting to enter her automobile after leaving defendants' office. At trial, the testimony indicated the weather was cold and cloudy and plaintiff knew the parking lot was snow- and ice-covered. Despite this knowledge, plaintiff attempted to leave defendants' office and enter her car. En route, plaintiff slipped and fell, injuring her lower back. Defendants moved for a directed verdict and later for judgment notwithstanding the verdict, both of which motions were overruled. On appeal, defendants argued the trial court erred in overruling the motions. We stated:

> There was evidence that the parking lot was icy and snow-packed on the date that plaintiff slipped and fell and that this condition had developed over a period of time. There was also evidence that this ice and compacted snow could have been removed; that the application of salt, sand, or other abrasives would have improved traction in the lot; and that such abrasives were not applied. With regard to defendants' knowledge of the lot's condition, evidence was adduced to show that one of the defendants walked

> across the lot from his car to the building each workday and thus was on notice of the slippery conditions.

Id. at 644, 428 N.W.2d at 496. We concluded that the testimony adduced during trial produced sufficient evidence to submit a question of fact to the jury.

Similarly, in *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994), we addressed a situation in which plaintiff knew of the danger created by an ice- and snow-covered parking lot and voluntarily exposed herself to the danger by exiting her car and proceeding to walk across the icy parking lot. Defendant claimed plaintiff assumed the risk. We reiterated that the evidence must show that the plaintiff knew of the danger, understood the danger, and voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's injury. We determined that defendant's assumption of the risk claim should have been submitted to the jury and stated that "[i]n Nebraska, winter snow and ice are a fact of life, and one does not automatically assume the risk by walking across a snow- or ice-covered parking lot." *Id.* at 706, 515 N.W.2d at 127. We further stated that a plaintiff's acceptance of a risk is not voluntary if the defendant's conduct has left him or her no reasonable alternative course of conduct to exercise a right or privilege of which the defendant has no right to deprive him or her. We concluded that whether plaintiff's actions were voluntary and whether defendant's conduct left plaintiff with a reasonable alternative course of conduct were questions of fact which should have been submitted to the jury.

Likewise, in *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W.2d 835 (1964), a tenant slipped and fell on ice at an apartment house entryway. We said that even if a plaintiff has knowledge of a dangerous condition, the condition cannot make him or her a captive in his or her own home. See *id.* We concluded that plaintiff had not assumed the risk because she had no other reasonable alternative course of conduct.

The same reasoning has also been applied in contributory negligence cases. In *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982), we addressed a situation wherein plaintiff slipped and fell on defendant's icy parking lot ramp. We concluded that " '[i]f the defendant's negligence has made the

plaintiff's exercise of a right or privilege impossible unless he exposes himself to a risk of bodily harm, the plaintiff is not guilty of contributory negligence in so doing unless he acts *unreasonably*.' " (Emphasis supplied.) *Id.* at 224, 322 N.W.2d 633. We held the trial court did not err in submitting the case to the jury and in denying defendant's motion for directed verdict.

Similarly, defendant in *Schwab, supra*, also contended plaintiff was contributorily negligent. We again rejected defendant's claim and stated that given the reasonable fashion in which plaintiff carefully picked her way out of the entrance to the apartment on the icy porch, defendant's motion for judgment notwithstanding the verdict was correctly denied and that the issue of comparative negligence was properly submitted to the jury.

In resolving every controverted fact in favor of Fiscel and affording him the benefit of every reasonable inference deducible from the evidence, it cannot be said as a matter of law that Fiscel assumed the risk or was contributorily negligent in traversing the ice- and snow-covered driveway. That is, whether Fiscel voluntarily accepted the risk of traversing the driveway, acted unreasonably, or had a reasonable alternative course of conduct were proper issues to be determined by the trier of fact. The district court's denial of Beach's motion for directed verdict was correct. See *Alexander v. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997). The district court's denial of Beach's motion for judgment notwithstanding the verdict was also correct. As we have stated, a motion for judgment notwithstanding the verdict may be granted only when the movant's previous motion for directed verdict, made at the conclusion of all the evidence, should have been sustained. See, *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996); *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994).

In Beach's final assignment of error, Beach argues the district court erred in entering judgment in favor of Fiscel for the full amount of the jury verdict, notwithstanding the jury's 40 percent versus 60 percent allocation of negligence.

The jury determined Fiscel was 40 percent negligent and Beach was 60 percent negligent. The jury also determined

Fiscel sustained $63,500 in damages; yet, the jury failed to indicate whether Fiscel should receive 100 percent or 60 percent of the $63,500. In an attempt to clarify this ambiguity, the district judge engaged in an off-the-record conversation with one or more jurors after the jury had been discharged. The jurors in question indicated that the jury intended Fiscel to receive the entire $63,500. The district court subsequently entered judgment reflecting this conversation. In this respect, Beach contends the district court's error lies in the judge's off-the-record conversation with the jury. However that may be, an overriding issue lies in the district court's failure to provide a proper verdict form and a written jury instruction regarding the effect of the allocation of negligence.

Six verdict forms were provided to the jury, only two of which were used, Nos. 4 and 6. Verdict form No. 4 provided for the allocation of negligence in the event the jury determined both parties were negligent and stated: "*We, the Jury duly impanelled and sworn in the above entitled cause do find* Both Randall Beach and Donald Fiscel were negligent. Randall Beach's negligence was 60%. Donald Fiscel's negligence was 40%." The jury thus allocated 40 percent negligence to Fiscel and 60 percent negligence to Beach.

Verdict form No. 6 provided a space for the jury to enter Fiscel's damages and stated: "*We, the Jury duly impanelled and sworn in the above entitled cause do find* Randall Beach was negligent and Donald Fiscel's negligence was less than 50% and, therefore, find for plaintiffs. Donald Fiscel's Damages are $63,500. Linda Fiscel's damages are $0." The jury determined Fiscel sustained $63,500 in damages. However, the jury was not provided a verdict form, a written jury instruction, or an oral instruction regarding the effect of its allocation of negligence.

This issue was recently addressed and resolved in *Wheeler v. Bagley, ante* p. 232, 575 N.W.2d 616 (1998). In *Wheeler*, we addressed a situation where the trial court failed to instruct the jury on the effect of the allocation of negligence as required by Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995). We determined the language contained in § 25-21,185.09, requiring the jury to be instructed regarding the effect of the allocation of negligence, was mandatory. We held that "the failure to instruct a

jury with respect to the effects of its allocation of negligence in accordance with § 25-21,185.09 is prejudicial error . . . ." *Wheeler, ante* at 241, 575 N.W.2d at 621.

In the case at bar, the district court's failure to instruct the jury regarding the effect of the allocation of negligence was neither assigned nor argued by either party. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id.*

We find the district court committed plain error by failing to instruct the jury or provide the jury with a verdict form regarding the effect of the allocation of negligence. We reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

SIDNEY OWEN, APPELLEE, V. AMERICAN HYDRAULICS, INC., AND AETNA CASUALTY & SURETY COMPANY, APPELLANTS.
578 N.W.2d 57

Filed May 22, 1998. No. S-97-837.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. ____: ____. The findings of fact made by a workers' compensation judge on original hearing have the effect of a verdict and are not to be disturbed on appeal unless clearly wrong.

4. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation: Liability.** Under Neb. Rev. Stat. §§ 48-120(5) and 48-134.01 (Reissue 1993) and Workers' Comp. Ct. R. of Proc. 63A (1995), issues may be referred to an independent medical examiner only after the employer's liability under the Nebraska Workers' Compensation Act has been established.
6. **Workers' Compensation: Proof.** In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of or occurring in the course of the employment proximately caused an injury which resulted in disability compensable under the act.
7. ____: ____. To recover workers' compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.
8. **Workers' Compensation.** A workers' compensation award cannot be based on possibility or speculation, and if an inference favorable to the claimant can be reached only on the basis thereof, then the claimant cannot recover.
9. **Workers' Compensation: Judgments: Appeal and Error.** Under the provisions of Workers' Comp. Ct. R. of Proc. 11 (1995), all parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which the judge relies. The decision shall provide the basis for a meaningful appellate review.

Appeal from the Nebraska Workers' Compensation Court. Affirmed and remanded with directions.

Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellants.

Sheldon M. Gallner and Laura L. Pattermann, of Gallner & Gallner, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

Following trial, a single judge of the Nebraska Workers' Compensation Court determined that Sidney Owen sustained an injury during the course and within the scope of his employment with American Hydraulics, Inc. (AHI), and awarded him temporary partial disability benefits and medical expenses. The trial court further found that because of conflicting medical evi-

dence, it could not determine certain issues without resort to guess and speculation; therefore, it ordered the parties to seek appointment of an independent medical examiner pursuant to Workers' Comp. Ct. R. of Proc. 63 (1995). AHI and its insurer, Aetna Casualty & Surety Company (Aetna), appealed to a review panel of the Workers' Compensation Court, which vacated the award because of what it perceived as ambiguous findings and remanded the case for the purpose of clarifying the ambiguity. AHI and Aetna appeal from the order of the review panel. We conclude that the review panel was correct in reversing the award, and we remand the cause with directions.

FACTUAL AND PROCEDURAL BACKGROUND

In his petition, Owen alleged that on or about April 3, 1995, while employed by AHI as a welder, he sustained "cumulative trauma injuries to his hands and upper extremities caused by the repetitive job duties associated with his employment." Owen further alleged that these injuries were "diagnosed as bilateral median proximal nerve entrapment syndrome, bilateral carpel [sic] tunnel nerve entrapment syndrome and bilateral cubital tunnel entrapment syndrome" and that these conditions precluded him from performing the duties of his employment and resulted in a permanent partial disability. In their answer, AHI and Aetna admitted that AHI employed Owen on the date of his alleged injury, but denied Owen's allegations concerning the occurrence of the injury and the nature and extent of injury and damage.

AHI manufactures and repairs coupling devices for railcars. Owen has been employed by AHI since 1983. In 1988 or 1989, Owen became a "shaft welder," which required repetitive handling of steel shafts between 29 and 41 inches long and weighing between 60 and 100 pounds. Beginning in March 1994, Owen experienced intermittent pain in both hands and arms. He mentioned this to his supervisor, but did not submit a workers' compensation claim at that time. By April 3, 1995, Owen was experiencing a burning sensation in his hands and shooting pain into his shoulders, which prevented him from grasping materials in his work. After Owen filed an accident report, AHI referred him to the Occupational Health Department of St.

Joseph Hospital in Omaha, where he was seen on eight or nine occasions. Owen was subsequently examined and treated by several other physicians. Although Owen was transferred to a position requiring less heavy lifting, he continued to experience pain in his hands and arms.

The medical evidence adduced at trial included reports and records from several physicians. Dr. David A. Clough, an orthopedic surgeon, examined Owen on March 4 and April 8, 1994, and on August 1, 1995. Based upon his examinations and his review of tests and examinations performed by other physicians, Clough was unable to formulate a diagnosis with respect to Owen's symptoms of pain in his hands and arms and, therefore, could not determine whether the symptoms were caused or aggravated by his work. Clough was also unable to express an opinion as to whether Owen had reached maximum medical improvement or whether his condition was of a permanent nature.

Dr. Jack A. McCarthy, also an orthopedic surgeon, examined and treated Owen from May 1995 until approximately February 1996. In a signed letter to Owen's attorney dated October 9, 1995, McCarthy stated:

> It would still be my thought that he has significant compromise over the forearm area. I think his job as a welder and the heavy associated work activities over the last several years did contribute to the development of his symptoms.
>
> . . . .
>
> We will continue to work with this gentleman. As a ball park figure, tenosynovitis of the upper extremity with symptoms such as Mr. Owen has usually, if consistent with lateral epicondylitis with mild peripheral nerve entrapment would have approximately a 10% permanent partial impairment to the involved upper extremity. This is obviously our best guess in light of the fact we are continuing to work through this with him. He may or may not come to additional intervention for either his median nerve, lateral epicondylar or dorsal wrist discomfort.

The record also contains a January 31, 1996, letter written by Dr. John M. Kalec reporting his examination of Owen. In the

letter, Kalec notes that Owen had no occupations other than his employment as a welder at AHI. Based on the history he obtained and physical examination he conducted, Kalec stated his impression that Owen suffered from "[b]ilateral median proximal nerve entrapment syndrome, as well as bilateral carpal tunnel nerve entrapment syndrome." In a February 21, 1996, letter to Owen's attorney, Kalec stated:

> It is my medical opinion that the repetitive work that Mr. Owen did at Rail Car Nebraska where he was a welder was a material and substantial factor in his bilateral arm problems. It was felt he had a bilateral median proximal nerve entrapment syndrome, as well as bilateral carpal tunnel nerve entrapment syndrome and bilateral cubital tunnel entrapment syndrome. I do feel he is in need of surgical correction.

Kalec opined that Owen had a combined total of "188% impairment of upper extremity," which he translated to a "113% impairment of the whole person."

Dr. James R. Rochelle, an orthopedic surgeon, examined Owen on September 6, 1996. In his report of that examination, he listed diagnoses of bilateral carpal tunnel syndrome, prior presentations of tendinitis and DeQuervain's syndrome, lateral epicondylitis of both elbows, possible presentation of pronator syndrome and radial tunnel syndrome, and dorsal ganglion cyst and degenerative joint disease of the radial-ulnar joint of the left wrist. Rochelle expressed his "strong opinion that these are work-related conditions" and noted that "[i]t certainly seems that the repetitive heavy work that he did at American Hydraulic [sic], Inc. over an eight-plus year period of time has caused and significantly aggravated these conditions." He concluded:

> In view of the fact that he has not had definitive treatment at this time, any rating that I might give him at this time is considered provisional. I consider that he has a ballpark of 10 to 15% of each of the upper extremities at the level of the forearms, possibly at the elbows would be his current disability rating.

On December 12, 1996, following trial, the judge determined that Owen "was injured in the course and scope of his employment on April 3, 1995, when he suffered from the effect of per-

forming repetitive functions that resulted in cumulative trauma and injuries to the hands, arms, muscles, ligaments and nerves bilaterally." Based upon evidence that McCarthy had restricted Owen to working half days from June 12 to August 11, 1995, the judge awarded benefits for a 50-percent temporary partial loss in earning capacity during that period, and ordered AHI and Aetna to pay certain hospital and medical expenses.

The judge then stated that "[t]he issue in this case is the nature and extent of [Owen's] injury" and noted the variance in the diagnoses and disability ratings expressed by the physicians who had examined Owen. The court concluded:

> The . . . medical evidence presented to the Court would require the Court to guess or speculate as to the exact nature of [Owen's] illness, his course of medical treatment, whether surgery is necessary or not, and the degree of impairment. The Court is not allowed to guess or speculate and it will not do so in this case.
>
> The Court will, therefore, require the parties to make application pursuant to Rule 63 for the appointment of an independent medical examiner to provide the parties with a sufficient learned and definite medical opinion as to the diagnosis and etiology of [Owen's] condition, together with an opinion as to whether or not that condition is related to [Owen's] employment and, if so, what course of medical treatment, including surgery if necessary, is appropriate and/or the degree of impairment, if any. In addition to the above, any other questions that the parties wish answered pursuant to Rule 63 shall be tendered to the independent medical examiner. This Court will retain jurisdiction of this case pending a report by the independent medical examiner to [Owen] and [to AHI and Aetna].
>
> If, after receipt of the independent medical examiner's report the parties are unable to agree on any of the above issues, a further hearing may be held upon motion by either party for such a determination by the Court.

On appeal by AHI and Aetna, two judges on the review panel of the Workers' Compensation Court found that the award was ambiguous in that the trial judge made a finding, without citing specific medical evidence, that Owen sustained an injury aris-

ing out of and in the course of his employment, but also found causation to be one of the unresolved issues to be referred to an independent medical examiner. The panel majority therefore concluded that the decision of the trial judge should be reversed and the case remanded to the trial judge "for the purpose of clarifying this obvious ambiguity." In addition, the same two judges concluded that the trial judge was "not clearly wrong in assigning an independent medical examination pursuant to Rule 63," but noted that under our holding in *Coco v. Austin Co.*, 212 Neb. 95, 321 N.W.2d 448 (1982), liability must first be established before the court may invoke its power to assign an independent medical examiner.

In a concurrence, the third judge on the review panel concluded that while the trial judge did not have authority under rule 63 to order the parties to arrange for an independent medical examination, it did have authority under Neb. Rev. Stat. § 48-120(5) (Reissue 1993) to obtain opinions from a physician or physicians appointed by the trial court to assist it in resolving any issue of medical fact or opinion. The concurring judge therefore determined that the case

> should be remanded to the trial judge for the appointment of a physician or physicians to render opinions requested by the trial court or in the alternative the trial court is authorized to make findings of fact as to whether or not [Owen] has reached maximum medical improvement and if so, the extent of [Owen's] impairment and/or loss of earning power.

AHI and Aetna appealed from the order of the review panel, and we removed the matter to our docket on our own motion pursuant to our authority to regulate the caseloads of the Nebraska Court of Appeals and this court.

ASSIGNMENTS OF ERROR

In this appeal, AHI and Aetna assign errors by the trial judge and the review panel. They contend that the trial judge erred by (1) requiring the parties to make application for the appointment of an independent medical examiner while retaining jurisdiction over the matter after failing to rule on the permanency of Owen's injury as well as his need for future medical treat-

ment, (2) ordering AHI and Aetna to pay temporary partial disability benefits after Owen failed to establish entitlement to such benefits, and (3) determining that Owen's injuries occurred as a result of an accident during the course of his employment with AHI. AHI and Aetna contend that the review panel erred by (1) determining that the trial judge did not err in ordering the appointment of an independent medical examiner and (2) failing to rule that the trial judge should have dismissed Owen's petition when the judge found that he could not determine the nature of Owen's injury.

STANDARD OF REVIEW

Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Cunningham v. Leisure Inn*, 253 Neb. 741, 573 N.W.2d 412 (1998); *Acosta v. Seedorf Masonry, Inc.*, 253 Neb. 196, 569 N.W.2d 248 (1997).

In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Cunningham v. Leisure Inn, supra*; *Thach v. Quality Pork International*, 253 Neb. 544, 570 N.W.2d 830 (1997); *Acosta v. Seedorf Masonry, Inc., supra*. The findings of fact made by a workers' compensation judge on original hearing have the effect of a verdict and are not to be disturbed on appeal unless clearly wrong. *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997); *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424 (1996).

An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995).

ANALYSIS

In order to resolve this appeal, we must first address the issue of when and under what circumstances the Workers' Compensation Court may require submission of medical issues to an independent medical examiner. Rule 63 provides in part:

> A. Once a dispute regarding medical, surgical, or hospital services furnished or to be furnished under the Nebraska Workers' Compensation Act has arisen any party may submit the dispute for a medical finding by an independent medical examiner. The court may also cause the employee to be examined by an independent medical examiner or other physician in order to assist it in resolving any issue of medical fact or opinion.

The statutory authority for the second sentence of this rule is § 48-120(5), which provides in part:

> Whenever the Nebraska Workers' Compensation Court deems it necessary, in order to assist it in resolving any issue of medical fact or opinion, it shall cause the employee to be examined by a physician or physicians selected by the compensation court and obtain from such physician or physicians a report upon the condition or matter which is the subject of inquiry.

In *Coco v. Austin Co.*, 212 Neb. 95, 99, 321 N.W.2d 448, 450 (1982), we interpreted this language to mean that the compensation court could request an opinion from a physician selected by the court "only in cases where liability has been established and there arise medical issues concerning such things as refusal of medical treatment or the necessity or sufficiency of medical treatment."

The statutory basis for the first sentence of rule 63A is Neb. Rev. Stat. § 48-134.01 (Reissue 1993). This statute authorizes the Workers' Compensation Court to "develop and implement an independent medical examiner system consistent with the requirements of this section." § 48-134.01(1). It further provides that an independent medical examiner "shall render medical findings on the medical condition of an employee and related issues as specified under this section." § 48-134.01(2). The next subsection of the statute provides:

> If the parties to a dispute cannot agree on an independent medical examiner of their own choosing, the compensation court shall assign an independent medical examiner from the list of qualified examiners to render medical findings *in any dispute relating to the medical condition of a claimant*, including, but not limited to, whether the injured employee is able to perform any gainful employment temporarily or permanently, what physical restrictions, if any, would be imposed on the employee's employment, whether the injured employee has reached maximum medical improvement, the existence and extent of any permanent physical impairment, and the reasonableness and necessity of any medical treatment previously provided, or to be provided, to the injured employee.

(Emphasis supplied.) § 48-134.01(3). This subsection differs from § 48-120(5) in that it enables a party to initiate the process of referring issues to an independent medical examiner and specifies the manner in which the examiner's report may be used. The examples of issues relating to the "medical condition of a claimant" as to which an independent medical examiner's opinion may be sought under this statute, while not exclusive, all pertain to the benefits to which a claimant is entitled and not to the issue of whether an entitlement exists. Therefore, consistent with our interpretation of § 48-120(5) in *Coco*, we interpret § 48-134.01 as applicable only to medical issues arising in cases where liability has been established. Neither of these statutes nor rule 63 permits the Workers' Compensation Court to appoint an independent medical examiner to express opinions on issues going to the determination of whether an employer is liable for workers' compensation benefits.

In this case, therefore, the trial judge would have had legal authority to refer medical issues to an independent medical examiner only if he had first made a finding that Owen met his burden of proving AHI and Aetna's liability. In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of or occurring in the course of the employment proximately caused an injury which resulted in disability compensable under the act. *U S*

West Communications v. Taborski, 253 Neb. 770, 572 N.W.2d 81 (1998); *Cunningham v. Prime Mover, Inc.*, 252 Neb. 899, 567 N.W.2d 178 (1997); *Dyer v. Hastings Indus.*, 252 Neb. 361, 562 N.W.2d 348 (1997). Moreover, to recover workers' compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. *Johnson v. Ford New Holland, ante* p. 182, 575 N.W.2d 392 (1998); *U S West Communications v. Taborski, supra*; *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997). A workers' compensation award cannot be based on possibility or speculation, and if an inference favorable to the claimant can be reached only on the basis thereof, then the claimant cannot recover. *Johnson v. Ford New Holland, supra*; *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

Like the majority on the review panel, we find it impossible to determine from the award whether the trial judge found that Owen met his burden of proving liability. Although the award contains a general finding that Owen sustained unspecified injuries to his hands and arms while in the course and scope of his employment, it also states that the issues which the trial judge could not resolve without resort to guess or speculation, which he therefore referred to an independent medical examiner, included "a sufficient learned and definite medical opinion as to the diagnosis and etiology of [Owen's] condition, together with an opinion as to whether or not that condition is related to [Owen's] employment . . . ." Because these opinions go to the issue of liability, they are not properly referable to an independent medical examiner under any circumstances. The fact that the trial judge considered these issues to be unresolved directly contradicts his general finding that Owen was "injured in the course and scope of his employment."

Neither party should prevail on the basis of an ambiguity. An order in a workers' compensation action must satisfy the requirements of Workers' Comp. Ct. R. of Proc. 11 (1995), which provides:

> All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and

> explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which the judge relies. The decision shall provide the basis for a meaningful appellate review.

In *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424 (1996), we determined that an order of dismissal did not comply with this rule because it was not possible to determine whether the trial judge concluded that the plaintiff did not suffer from an occupational disease, or that the plaintiff suffered from an occupational disease but failed to establish that it arose out of and in the course of his employment. Finding that this deficiency in the order precluded meaningful appellate review, we vacated the judgment of dismissal and remanded the cause to the compensation court with directions to enter an order complying with the requirements of rule 11.

Without specifically invoking rule 11, the review panel majority made a similar determination in the present case, and we conclude that it was correct. The contradictory findings in the trial court's award preclude meaningful appellate review by either the review panel or a higher appellate court. Without an order clearly and unambiguously stating whether Owen met his burden of proving AHI and Aetna's liability on the basis of the evidence offered at trial and, if Owen did, the evidence which the trial judge relied upon in making such finding, we cannot determine whether the evidence was sufficient to support the finding or whether referral of any issues to an independent medical examiner is permissible as a matter of law. We therefore affirm the judgment of the review panel reversing the award, and we remand the cause to the trial judge with directions to enter an order based upon the evidence adduced at trial which complies with the requirements of rule 11.

AFFIRMED AND REMANDED WITH DIRECTIONS.

VICTORIA L. BAKER, APPELLANT, V. FABIAN, THIELEN & THIELEN, A NEBRASKA PARTNERSHIP, FORMERLY KNOWN AS TAYLOR, FABIAN, THIELEN & THIELEN, ET AL., APPELLEES.

578 N.W.2d 446

Filed May 29, 1998. No. S-95-1133.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Directed Verdict.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
3. **Judgments: Verdicts.** In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
4. **Attorney and Client: Negligence: Proximate Cause: Proof.** There are three elements a plaintiff alleging attorney negligence must prove: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.
5. **Attorney and Client.** The general rule regarding an attorney's duty to his or her client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.
6. **Attorney and Client: Expert Witnesses: Judges.** The question whether an attorney breaches his or her duty of professional care to a client regarding evidentiary issues is a legal matter concerning which judges are required to be their own experts; it is for this reason that expert testimony concerning a question of law is generally not admissible into evidence.
7. **Attorney and Client.** An attorney who acts in good faith and with an honest belief that his or her actions are well founded in the law and in the best interests of his or her client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his or her state and on which reasonable doubt may be entertained by well-informed lawyers.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

James D. Sherrets, of Sherrets & Associates, for appellant.

Milton A. Katskee, of Katskee, Henatsch & Suing, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

Victoria L. Baker filed a petition against her former attorney, Barbara J. Thielen, and the law firm of Fabian, Thielen & Thielen, formerly known as Taylor, Fabian, Thielen & Thielen, alleging professional negligence in regard to Thielen's representation of Baker in an action against Baker's insurer, *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992) (*Baker I*). A jury returned a verdict in favor of Thielen, and judgment was entered thereon. Baker appeals, assigning several errors of law. Because the issue of whether Thielen was negligent in her representation of Baker is a question of law, we determine that the district court erred in submitting such issue to the jury rather than directing a verdict. We further determine that as a matter of law, Thielen was not professionally negligent. Therefore, despite the fact that the district court erred in failing to direct a verdict in favor of Thielen, such error was not prejudicial in view of the jury's verdict that was returned in favor of Thielen, and thus, we affirm the judgment of the district court.

FACTS

The antecedent lawsuit, *Baker I*, which forms the basis of Baker's legal malpractice claim was tried to a jury in May 1989. This lawsuit was occasioned when, on September 26, 1985, Baker's home suffered extensive fire damage and her insurer, St. Paul Fire & Marine Insurance Company (St. Paul), refused to compensate her for the damage sustained. St. Paul claimed that Baker was without insurance coverage because she had failed to pay her quarterly premium and that it had properly mailed to Baker a notice of cancellation. Baker, however, asserted that she had paid her premium and retained Thielen to recover the insurance proceeds that Baker claimed were due her.

At the *Baker I* trial, Baker testified that on July 15, 1985, she issued her check No. 1010 to St. Paul for her quarterly homeowner's insurance premium, placed this check in St. Paul's self-addressed envelope, put a stamp on the envelope, and mailed her payment by placing it in the mail chute at her place of employment, the Livestock Exchange Building in Omaha. Baker testified that on prior occasions, she had mailed her

insurance premiums as well as other bills in this same manner, that is, by placing them in the mail chute at the Livestock Exchange Building, and that such payments had always been received. Baker's check was never negotiated by St. Paul or anyone else. Proof that such check had been written was made by the introduction into evidence of Baker's checkbook ledger.

St. Paul adduced evidence by way of its business records. The business records established that Baker's insurance premium installment payment was due on July 28, 1985; that on August 7, Baker was sent a past due notice; and that on September 11, Baker was sent notice of cancellation by certified mail. Baker claimed that she never received notice of cancellation.

Thus, at the initial trial, both Baker and St. Paul relied on the rebuttable legal presumption that a letter properly addressed, stamped, and mailed reached the addressee in the usual course of the mails. St. Paul attempted to rebut the presumption in favor of Baker by showing that the entry in Baker's checkbook ledger for check No. 1010, which purportedly represented the check written to St. Paul, had previously been erased with St. Paul substituted as the new payee. Notwithstanding St. Paul's attempt to rebut the presumption, the jury returned a verdict in favor of Baker and awarded her $24,850. St. Paul appealed.

On appeal, this court reversed the judgment and remanded the cause to the district court with an order to dismiss. See *Baker I*. We held that as a matter of law, Baker had failed to produce sufficient evidence so as to invoke the presumption that St. Paul received Baker's premium payment. Relying on *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990), we concluded that Baker had failed to prove the necessary element that her payment had been placed with the U.S. mails when she failed to adduce any evidence that the mail chute in the Livestock Exchange Building was a regular U.S. Postal Service depository. Further, we held that as a matter of law, St. Paul mailed its notice of cancellation and was entitled to the presumption that Baker received it through the normal course of the mails.

With Thielen as counsel, Baker petitioned this court for rehearing. Baker argued that *Houska v. City of Wahoo, supra*,

had been decided after the trial of Baker's claim against St. Paul, and that in reaching our decision in *Houska v. City of Wahoo*, this court relied on cases from other jurisdictions which represented a statement of law different from Nebraska law at the time of her trial. Baker asserted that, in accordance with *Troy & Stalder Co. v. Continental Casualty Co.*, 206 Neb. 28, 290 N.W.2d 809 (1980), the state of Nebraska law at the time of her trial was that to invoke the presumption of receipt of mail by the addressee, a party must show only that the letter was properly addressed, stamped, and mailed. Thus, argued Baker, prior to the time of her trial, it was not a separate element of proof to show that such letter was also expressly placed in a regular U.S. Postal Service depository. We denied Baker's motion for rehearing.

Baker then retained new legal counsel and filed the instant professional negligence action, alleging that Thielen was negligent in failing to adduce evidence that the Livestock Exchange Building mail chute was a regular U.S. Postal Service depository. At this second trial, Baker adduced evidence that the Livestock Exchange Building mail chute was, in fact, a regular U.S. Postal Service depository and that Baker could have so testified had Thielen conducted her direct examination so as to elicit such testimony. Baker also adduced evidence in an attempt to show that the state of Nebraska law was such that in the exercise of her professional duty, Thielen should have known that an element of proof required in order to invoke the presumption of receipt of the mail was that the letter must be placed with the U.S. mails. As such, Baker contends, Thielen's efforts to identify the necessary elements of proof fell below the applicable standard of care, manifesting Thielen's professional negligence.

In regard to the issue of Thielen's breach of her professional duty, Baker offered the expert testimony of Omaha attorney Patrick Betterman. Betterman opined that *Houska v. City of Wahoo, supra*, and *Baker I* were not pronouncements of new law by this court and that Thielen should have known that a necessary element of proof so as to invoke the presumption of receipt of mail by the addressee was that the letter must be deposited with the U.S. mails. Because of Thielen's failure to

adduce proper proof, Betterman said, her representation of Baker fell below the applicable standard of care for attorneys in the Omaha area. Further, Betterman opined that Thielen's negligence was the proximate cause of Baker's damages because without such proof, this court could not affirm the jury's verdict.

In defense, Thielen offered the testimony of two expert witnesses, Omaha attorneys Charles Gotch and William Lamson. Both opined that Thielen's representation met the standard of care for the community because at the time of trial, Thielen offered sufficient proof so as to invoke the presumption of the receipt of mail by the addressee. Both were of the opinion that *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990), and *Baker I* changed Nebraska law as it existed at the time of trial.

At the close of the evidence, Baker and Thielen each made a motion for a directed verdict, which motions were respectively overruled. Baker asked the trial court to instruct the jury that Thielen was negligent as a matter of law, which request the trial court refused. The jury returned a general verdict for Thielen, and judgment was entered accordingly. After Baker's motion for judgment notwithstanding the verdict was overruled, she filed this appeal.

ASSIGNMENTS OF ERROR

Baker claims the trial court erred in (1) failing to direct a verdict for Baker at the close of evidence, (2) refusing to instruct the jury that Thielen was negligent as a matter of law for failing to adduce sufficient proof in the antecedent lawsuit, (3) failing to grant Baker's motion for judgment notwithstanding the verdict, (4) allowing Thielen's expert witnesses to testify as to the meaning of this court's decision in *Baker I* and the status of the law at the time of this decision and refusing to strike such testimony, (5) admitting into evidence the bill of exceptions from Baker's lawsuit against St. Paul, and (6) allowing Thielen to testify regarding her view of the merits of Baker's claim against St. Paul.

STANDARD OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Brams*

Ltd. v. Elf Enters., 253 Neb. 932, 573 N.W.2d 139 (1998); *Mandolfo v. Chudy*, 253 Neb. 927, 573 N.W.2d 135 (1998).

A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Martin v. Roth*, 252 Neb. 969, 568 N.W.2d 553 (1997); *Ethanair Corp. v. Thompson*, 252 Neb. 245, 561 N.W.2d 225 (1997). In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 556 N.W.2d 23 (1996); *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996).

ANALYSIS

Baker's assignments of error would logically divide into two separate categories for purposes of analysis. The first category includes those assignments premised on Baker's assertion that this court's decision in *Baker I* represents a finding that Thielen was negligent as a matter of law. The second category involves those assignments in which Baker asserts that the trial court erred in regard to the admission into evidence of certain exhibits and expert testimony. However, because our analysis leads us to the conclusion that Thielen was not professionally negligent as a matter of law, it is unnecessary for us to address and resolve the second category of assigned errors.

With regard to the first category of assigned errors, Baker asserts that Thielen's negligence was established as a matter of law by our decision in *Baker I*. There are three elements a plaintiff alleging attorney negligence must prove: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client. *McWhirt v. Heavey, supra.*

The general rule regarding an attorney's duty to his or her client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the perfor-

mance of the tasks which they undertake. *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996).

Baker argues that our decision in *Baker I* required the trial court to direct the jury to find that Thielen neglected her professional duty of care. Baker claims that this is so for two reasons. First, Baker contends that our holding in *Baker I* makes it clear that Thielen's representation of Baker fell below the applicable standard of professional care. Second, Baker asserts that by submitting to the jury the question of Thielen's negligence in this matter, the jury is then impermissibly required to decide a question of law.

In the instant case, we note that as to the matter of Thielen's performance in *Baker I*, three attorneys testified to a variety of opinions concerning what type of testimony should or should not have been adduced with respect to the mailing of the envelope in question. Expert testimony must be such as to assist the trier of fact to understand the evidence or to determine a fact in issue. Neb. Rev. Stat. § 27-702 (Reissue 1995). As in postconviction proceedings, the question whether an attorney breaches his or her duty of professional care to a client regarding evidentiary issues is a legal matter concerning which judges are required to be their own experts; judging the law is one of the most important judicial functions. See *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990). It is for this reason that expert testimony concerning a question of law is generally not admissible into evidence, and such testimony was improperly admitted in the instant case. See *Sports Courts of Omaha v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995) (expert testimony is relevant and admissible only if it tends to help trier of fact understand evidence or determine fact issue, and expert testimony concerning status of law does not tend to accomplish either of these goals).

Accordingly, Baker's assertion that the question whether Thielen breached her duty of professional care presents solely a question of law is correct in the context of the instant case. Thus, the trial court erred in submitting this issue to the jury for its resolution, rather than resolving the issue itself. When an attorney is charged with an error concerning a legal question,

the trial court must initially determine whether the attorney erred, i.e., in the instant case, whether Thielen erred in failing to adduce proper proof so as to invoke the presumption of delivery of mail to the addressee. Our decision in *Baker I* necessarily compels the conclusion that Thielen erred in that regard. However, the determinative issue that the trial court failed to decide was whether as a matter of law, Thielen was negligent in so erring. That is, would an attorney of ordinary skill, prudence, and diligence, utilizing reasonable care, have concluded prior to the trial of *Baker I* and our decision in *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990), that direct proof of deposit with an authorized U.S. Postal Service depository was necessary for the presumption of delivery of mail to the addressee to arise?

Baker argues that it was Thielen's duty to know the law and that her failure to identify the cases which would have informed her of the requisite elements necessary for proof so as to invoke the presumption constitutes a breach of Thielen's duty to Baker as a matter of law. As such, Baker claims that the trial court erred by not sustaining her motions for directed verdict and for judgment notwithstanding the verdict.

Certainly, there is a substantial responsibility for attorneys to educate themselves about general laws, statutes, and legal propositions considered well defined. This aspect of a lawyer's judgment has been characterized as merely " 'clerical or mechanical,' " since ignorance of such general legal principles is not excusable. 2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 17.4 at 502 (4th ed. 1996).

The instant case, however, presents the question of the extent to which an attorney must determine the status of a legal proposition that the attorney thought was settled in his or her jurisdiction.

> The aphorism that law is more an art than a science is illustrated best by the frequent misconception that particular legal principles are settled. The history of American jurisprudence reveals that legal customs, practices, or beliefs, which were respected for decades, can suddenly be found imprudent, outdated, or erroneous by a judicial decision. Thus, unsettled propositions may include propo-

> sitions that are apparently settled. The frequency of such frustrations for attorneys is well-documented in American jurisprudence.

Mallen & Smith, *supra*, § 17.11 at 521.

Other jurisdictions considering this question have concluded that an attorney who acts in good faith and with an honest belief that his or her actions are well founded in the law and in the best interests of his or her client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his or her state and on which reasonable doubt may be entertained by well-informed lawyers. *Collins v. Wanner*, 382 P.2d 105 (Okla. 1963). "A lawyer would need a crystal ball, along with his library, to be able to guarantee that no judge, anytime, anywhere, would disagree with his judgment or evaluation of a situation." *Denzer v. Rouse*, 48 Wis. 2d 528, 534, 180 N.W.2d 521, 525 (1970), *overruled on other grounds, Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983). We agree.

The presumption of delivery of mail to the addressee is well settled in this jurisdiction—a letter properly addressed, stamped, and mailed is presumed to have reached the addressee in the usual course of the mails. *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990); *Troy & Stalder Co. v. Continental Casualty Co.*, 206 Neb. 28, 290 N.W.2d 809 (1980); *Waite Lumber Co., Inc. v. Carpenter*, 205 Neb. 860, 290 N.W.2d 655 (1980); *City of Omaha v. Yancey*, 91 Neb. 261, 135 N.W. 1044 (1912); *National Masonic Accident Ass'n v. Burr*, 57 Neb. 437, 77 N.W. 1098 (1899). In *City of Omaha v. Yancey, supra*, we reasoned that testimony that a notice had been "mailed" implied that the requisite postage had been prepaid and affixed, since it would be a violation of an act of Congress to mail an item without the payment of postage.

Baker testified in *Baker I* that she placed the stamped, preaddressed envelope containing her premium payment into a mail chute running to the mailroom of the building in which she worked. While perhaps no act of Congress would be violated by depositing a properly addressed and stamped item in a non-U.S. Postal Service depository, since no one could reasonably assume that such an item would be delivered in the ordinary

course of the mails unless deposited in an authorized U.S. Postal Service depository, an attorney, prior to the trial of *Baker I* and our decision in *Houska v. City of Wahoo, supra*, could reasonably have concluded that the testimony in *Baker I* gave rise to the presumption. Indeed, at the time *Baker I* was tried, an Omaha attorney exercising reasonable care could have concluded, based on *Troy & Stalder Co. v. Continental Casualty Co., supra*, and prior case law, that in order to invoke the presumption of receipt of mail by an addressee, a party would need to show only that the letter was properly addressed, stamped, and mailed. In other words, prior to the trial in *Baker I*, this court had not specifically held that in order to invoke the presumption of receipt of mail by the addressee, there was a separate element of proof to show that such letter was also expressly placed in a regular U.S. Postal Service depository.

Thus, while Baker was correct that the trial court should have directed a verdict rather than allow the jury to impermissibly decide a question of law, we nonetheless conclude that a directed verdict should have favored Thielen rather than Baker. Therefore, even though the trial court erred in not directing a verdict as requested by Thielen, such error was not prejudicial in view of the jury's verdict in favor of Thielen.

As previously noted, it is unnecessary to address and resolve the evidentiary issues raised by Baker in light of our determination that the trial court should have directed a verdict in favor of Thielen at the close of the evidence.

JUDGMENT

Accordingly, we affirm the judgment of the district court.

AFFIRMED.

RANDY REEDER, APPELLANT, V. THE STATE OF NEBRASKA THROUGH THE DEPARTMENT OF SOCIAL SERVICES, APPELLEE.

578 N.W.2d 435

Filed May 29, 1998. No. S-96-937.

1. **Employer and Employee: Negligence: Liability.** Under the doctrine of respondeat superior, an employer is held vicariously liable for the negligent acts of an employee committed while the employee was acting within the scope of the employer's business.
2. **Independent Contractor: Words and Phrases.** An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used.
3. **Employer and Employee: Independent Contractor: Master and Servant.** Ordinarily, a person's status as an employee or an independent contractor is a question of fact. However, where the facts are not in dispute and where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law.
4. **Employer and Employee: Independent Contractor.** There is no single test for determining whether one performs services for another as an employee or as an independent contractor, and the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business. The right of control is the chief factor distinguishing an employment relationship from that of an independent contractor.
5. **Summary Judgment.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
6. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent upon the facts in a particular situation.
7. ____. Duty is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.
8. ____. Foreseeability is a factor in establishing a defendant's duty.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded for further proceedings.

Denzel R. Busick and Daniel R. Fridrich, of Luebs, Leininger, Smith, Busick & Johnson, for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

Randy Reeder, a recipient of public assistance for home health care services, brought this action against the State of Nebraska through its Department of Social Services (DSS) pursuant to Nebraska's State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996). Reeder contends that DSS is vicariously liable for the negligence of a nurse whom it approved to provide services for him. In the alternative, Reeder contends that DSS breached an independent duty to provide adequate nursing services. Reeder appeals from an order of the district court for Hall County entering summary judgment for DSS. We determine that while the district court correctly found as a matter of law that DSS owed no independent duty to provide nursing services to Reeder, it erred in entering summary judgment for DSS because of genuine issues of material fact with respect to Reeder's alternative theory of recovery based upon respondeat superior.

FACTUAL AND PROCEDURAL BACKGROUND

Viewing the evidence in a light most favorable to Reeder, as is required in appellate review of a summary judgment, the facts are as follows: On May 5, 1990, Reeder was in an automobile accident which left him paralyzed below the neck, with limited use of his hands. Reeder was released from the hospital on March 4, 1991, and, due to his disability, required home health care. Reeder learned that Sheri Perales, a licensed practical nurse (LPN), was seeking employment and asked her if she would be interested in supplying certain services for him. Perales accepted the job.

DSS administers various programs, including the Aged and Disabled Medicaid Waiver program, through which state and

federal funds are used to provide home and community-based services to elderly and disabled persons in Nebraska. Under these programs, individuals requiring assistance usually choose their own service providers, but if requested, DSS will furnish a list of potential providers. Before becoming eligible to receive compensation under programs administered by DSS, a service provider is required to complete certain documentation and obtain DSS approval. This process includes an interview with a DSS caseworker, during which the provider is given a manual detailing services covered by the program. In addition, the caseworker usually obtains references and conducts a police check on the provider.

After agreeing to accept the position with Reeder, Perales completed the documentation necessary to be approved by DSS as a medicaid service provider in the capacities of personal care aide (PCA) and LPN. No special training was required to be a PCA, but before Perales could begin providing services to Reeder as an LPN, it was necessary for DSS to ensure that her Nebraska license was current. In the "Medical Assistance Provider Agreement[s]" which Perales signed in order to be a provider of services under programs administered by DSS, she agreed to follow DSS policies and procedures. The regulations applicable to LPN's define "[c]overed [s]ervices" as those "ordered by the client's physician based on medical necessity." 471 Neb. Admin. Code, ch. 13, § 002 (1990). The regulations define "[s]killed nursing services" as "those services provided by a registered nurse or a licensed practical nurse which s/he is licensed to perform. Private-duty nursing may be provided in the client's home or current living arrangement." *Id.* The regulations require DSS local office personnel to obtain the physician's order for private-duty nursing services, "[a]uthorize the number of hours to be worked based on the physician's order and the client's medical need[,]" and submit certain documentation. 471 Neb. Admin. Code, ch. 13, § 005 (1990). The regulations also specify billing and payment procedures.

In March 1991, DSS obtained an order from Reeder's physician which stated that he required the services of an LPN for 1 to 2 hours per day and a PCA for 4 to 5 hours per day. Subsequently, DSS developed a care plan for Reeder detailing

the types and frequency of services required. Beyond the terms of the care plan, DSS allowed Reeder and Perales to decide the details of their arrangement, such as the hours Perales would perform her duties.

Perales testified that she believed DSS to be her employer, but she also stated that during the time she was paid by DSS, she was self-employed. Perales also testified that DSS caseworker Dorelle Wilson was her supervisor and that Wilson "assured that . . . the care was given and [Reeder] had somebody there for his needs." Perales testified that occasionally Wilson visited Reeder's home to "make sure things were going okay." If Perales had any problems, she would notify Wilson and request assistance. Perales also notified Wilson if she needed to work more hours than were approved under the care plan, because additional hours had to be approved in order to be reimbursed by DSS. Paula Greenfield, a DSS supervisor, testified that Perales was not prohibited from performing additional, noncovered services for Reeder, but that if Perales did so, Reeder was responsible for paying her.

Greenfield testified that DSS is concerned about the safety of its clients. DSS conducts police checks before approving care providers and refuses to use a provider in the future if DSS becomes aware of any improper activity. DSS monitors the activities of care providers by reviewing the timesheets submitted with their bills. The timesheets include a brief statement of what services were performed in the billing period and are signed by both the provider and the client. In the present case, Perales was paid by the hour. No income taxes were withheld from her paychecks, but Social Security and FICA taxes were paid by the State for both Perales and Reeder.

DSS considered medicaid service providers such as Perales to be independent contractors. Providers received no insurance or other benefits and were not paid for overtime, holidays, or sick days. Greenfield testified that DSS was an "agent for monitoring and payment" and for distributing funds under government programs.

In May 1991, while Perales was providing services to Reeder, he developed decubitus ulcers on his heels. Reeder and Perales decided to take Reeder to a podiatrist for treatment of

this condition. Perales notified Wilson that Reeder had been seen by the podiatrist regarding the decubitus ulcers. Perales followed the podiatrist's orders in caring for Reeder. The ulcers never healed properly, and an infection developed. Reeder underwent a lengthy period of hospitalization and treatment, and may require amputation of his feet.

On December 30, 1993, Reeder filed suit against DSS pursuant to the State Tort Claims Act, alleging that DSS was negligent "[i]n failing to give appropriate instructions and training to the nurse it approved for the care of the Plaintiff" and "[i]n failing to exercise reasonable care in supplying and providing nursing services to the Plaintiff." In its answer, DSS alleged that there was no negligence on the part of any of its employees and that Perales "was a licensed practical nurse functioning as an independent contractor under a provider agreement and as such is not an employee" for whose negligence the State could be liable under the State Tort Claims Act.

DSS moved for summary judgment. During a hearing on the motion, the district court confirmed that Reeder was proceeding on two alternative theories of recovery: first, Perales was an employee of DSS, and DSS was vicariously liable for her negligence under the doctrine of respondeat superior; or, alternatively, DSS breached an independent duty to select and train a nurse who was competent to provide the services required by Reeder. In granting the motion for summary judgment, the district court held as a matter of law that no employment relationship existed between DSS and Perales and that "[t]he level of care paid for by [DSS] and furnished to [Reeder] was the level of care set forth by [Reeder's] own medical doctors . . . and by agreeing to pay for such care the role of [DSS] was satisfied." After his motion for new trial was overruled, Reeder perfected this appeal, which we have transferred to our docket on our own motion pursuant to our authority to regulate the caseloads of the Nebraska Court of Appeals and this court.

ASSIGNMENTS OF ERROR

Reeder contends that the trial court erred in ruling as a matter of law (1) that Perales was an independent contractor and (2) that DSS fulfilled any duty it had with respect to Perales and did

not have an independent duty to provide adequate training and instructions for her.

STANDARD OF REVIEW

In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Brown v. Wilson*, 252 Neb. 782, 567 N.W.2d 124 (1997); *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997); *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Fales v. Books*, 253 Neb. 491, 570 N.W.2d 841 (1997); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

ANALYSIS

We address Reeder's alternative theories of recovery separately.

Respondeat Superior

Under the doctrine of respondeat superior, an employer is held vicariously liable for the negligent acts of an employee committed while the employee was acting within the scope of the employer's business. *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996). DSS contends that Perales was an independent contractor and not an employee of DSS. An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (1997); *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996).

Ordinarily, a person's status as an employee or an independent contractor is a question of fact. However, where the facts are not in dispute and where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law. *Kime v. Hobbs, supra*; *Pettit v. State, supra*. We have held that there is no single test for determining whether one performs services for another as an employee or as an inde-

pendent contractor and that the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business. The right of control is the chief factor distinguishing an employment relationship from that of an independent contractor. *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997); *Kime v. Hobbs, supra*; *Pettit v. State, supra.*

On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Kime v. Hobbs, supra*; *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997); *State Farm v. D.F. Lanoha Landscape Nursery*, 250 Neb. 901, 553 N.W.2d 736 (1996). Thus, the specific issue before us is not whether Perales was a DSS employee, but whether it can be determined as a matter of law that she was not.

Both parties rely on *Pettit v. State, supra*, a workers' compensation case in which the key issue was whether Pettit, who was injured while working as a "chore provider" for a DSS client under the Medicaid Waiver Program, was an employee of DSS. The facts in *Pettit* closely parallel those in this case. The Medicaid Waiver Program permits low-income clients to have the assistance of chore providers in their own homes as an alternative to nursing home care. Under this program, DSS serves as an intermediary between the client and the chore provider, ensuring that state and federal criteria and health and safety needs are met. DSS also distributes the state and federal funds used to pay the chore providers.

Pettit, who held a respite care certificate, was interviewed and approved by the client, who also had authority to terminate her assistance. DSS specifically advised Pettit that she was an independent contractor who worked for the client. Pettit's W-2 form listed the client as her employer and DSS as the client's agent. No federal income tax was withheld from Pettit's earnings. Pettit's job tasks were set out in a signed agreement between Pettit and DSS. In the agreement, Pettit agreed to provide service only as authorized by DSS standards. DSS also provided Pettit with a handbook which defined the services she was to provide to the client. DSS informed Pettit of what services needed to be performed, but Pettit and the client established the daily routine of how to get the tasks accomplished. On one occasion, DSS reprimanded Pettit for leaving the client alone in the bathtub.

Pettit was authorized to work a maximum of 40 hours per week and was responsible for recording her hours. She submitted a calendar showing the hours worked to DSS, which then paid her by mail. Pettit also received additional compensation directly from the client. Pettit was injured while serving as a chore provider, and DSS terminated her relationship with the client because the client's health and safety needs could no longer be met.

The Workers' Compensation Court held that Pettit failed to prove that she was an employee of DSS. The Court of Appeals reversed, and held as a matter of law that Pettit was a DSS employee. We reversed the decision of the Court of Appeals and held that the question whether Pettit was an employee or an independent contractor was a factual question and that the Workers' Compensation Court was not clearly wrong in finding that an employment relationship had not been proved. In reaching this conclusion, we specifically found that the record reflected "a factual dispute as to whether DSS had such control over Pettit as to create a DSS employer-employee relationship" and that "more than one reasonable inference can be drawn from the facts as to whether Pettit was an employee or an independent contractor." 249 Neb. at 674, 544 N.W.2d at 861.

Our review of the record in this case leads us to the same conclusion. Based upon the evidence summarized above, we

determine that more than one reasonable inference can be drawn as to the critical issue of the nature and degree of control exercised by DSS over Perales. In essence, DSS argues that this case is distinguishable from *Pettit* in that Perales provided health care to Reeder, while Pettit was merely a chore provider. While we agree that this fact is relevant to the issue of control, we do not regard it as determinative as a matter of law. We therefore conclude that the district court erred in finding as a matter of law that Perales was not an employee of DSS.

INDEPENDENT DUTY

Reeder argues that even if Perales was an independent contractor, DSS "had a separate, independent, and non-delegable duty to supply Mr. Reeder with a care provider fully capable of meeting all of his daily nursing needs." Reply brief for appellant at 3. Reeder contends that this duty arose from Neb. Rev. Stat. § 68-1513 (Reissue 1996), which states that DSS "shall review the needs of each family or disabled person receiving support under sections 68-1501 to 68-1519 on a regular basis, as established by the department, or upon the showing of a change of circumstances by the head of the family," and from Neb. Rev. Stat. § 68-1515 (Reissue 1996), which states that DSS "shall adopt and promulgate rules and regulations, as necessary, to implement sections 68-1501 to 68-1519, including . . . [s]tandards and procedures for determining approval of qualified programs and services . . . ." Reeder argues that because DSS caseworkers have sometimes contacted clients' physicians directly, Reeder's caseworker had a duty to contact Reeder's physician, rather than his podiatrist, when she learned that Reeder was suffering from decubitus ulcers.

The question whether a legal duty exists for actionable negligence is a question of law dependent upon the facts in a particular situation. *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995). In defining the concept of legal duty, we have quoted the following passage from W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53 (5th ed. 1984): " ' "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is

always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .'" *Anderson/Couvillon*, 248 Neb. at 658, 538 N.W.2d at 738 (quoting *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994)). Foreseeability is also a factor in establishing a defendant's duty. *Id.*

We do not read §§ 68-1513 and 68-1519 as conferring a duty upon DSS to directly provide or ensure a certain level of nursing care to persons who qualify for public assistance. Those sections are included in the Disabled Persons and Family Support Act, Neb. Rev. Stat. §§ 68-1501 to 68-1519 (Reissue 1996), pursuant to which DSS is authorized to provide financial support for equipment and services necessary to assist disabled persons in independent living situations, see § 68-1504. Read in this context, the statutory requirement that DSS review needs of aid recipients and develop standards and procedures for determining qualified programs and services is related to a statutory duty to provide compensation for health services, not a duty to provide the actual services. DSS caseworkers who serve clients receiving public assistance are not licensed health care professionals and are not authorized to make medical decisions or judgments. The fact that they maintain periodic contact with clients who receive health care benefits pursuant to the act and maintain a general interest in their welfare does not, in our judgment, amount to an undertaking to qualitatively assess or intervene in health care provided to the clients.

Reeder relies on *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs., supra*, in support of his argument that DSS had an independent duty to protect him from injury. In *Anderson/Couvillon*, we held that where DSS had specific knowledge about the dangerous propensities of a child whom it placed in a foster home, it had a duty to disclose this information in response to a direct question about the child's behavioral history posed by the prospective foster parent prior to placement. We reasoned that because DSS had ample information about the child's violent and abusive behavior, the risk of harm to other children in the prospective foster home was foreseeable, and therefore, DSS had a duty to respond truthfully to the specific inquiry made by the foster parent.

In this case, there is no evidence that DSS ever had knowledge that home nursing services provided by Perales posed any risk of injury to Reeder. Reeder's physician determined that Reeder required home nursing care at the level provided by an LPN, and DSS verified Perales' licensure by the state before compensating her for services she provided to Reeder. There is no evidence that Reeder or anyone else complained to DSS about any services provided by Perales, or that DSS was ever advised that Reeder's medical and nursing needs were not being met during the time period when his injuries allegedly occurred. Although there is evidence that Perales advised the DSS caseworker in May 1991 that Reeder had developed decubitus ulcers on his feet for which he sought treatment by a podiatrist, there is no evidence that Reeder, Perales, the podiatrist, or anyone else advised DSS that Reeder required a different or higher level of home nursing care. Under these circumstances, we conclude that DSS had no independent duty to take any affirmative action with respect to the nature or scope of health care services provided to Reeder in the absence of an employment relationship between DSS and Perales, the existence of which we do not decide.

In summary, we conclude that the district court was correct in holding, as a matter of law, that DSS had no independent duty to provide nursing services to Reeder. However, the district court erred in holding, as a matter of law, that Perales was not a DSS employee; therefore, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SCHRAM ENTERPRISES, INC., A NEBRASKA CORPORATION, APPELLANT, V. L & H PROPERTIES, INC., A NEBRASKA CORPORATION, APPELLEE.
578 N.W.2d 865

Filed May 29, 1998. No. S-96-1284.

1. **Easements: Deeds.** The construction of language in an easement deed is a question of law.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Equity: Quiet Title.** An action to quiet title sounds in equity.

4. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact an appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
5. **Easements: Conveyances.** The extent of an easement created by a conveyance is fixed by the conveyance.
6. **Easements: Parol Evidence.** If the language of an easement is clear and unambiguous, it may not be varied by parol evidence.
7. **Highways: Words and Phrases.** A roadway is the strip of land through which a road is constructed and which is physically altered, or the specific part of a road over which vehicular traffic travels.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

John A. Svoboda, of Gross & Welch, P.C., for appellant.

William G. Blake and, on brief, John F. Steinheider, of Hoch & Steinheider, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

This is an appeal from the Otoe County District Court's dismissal of the equity action of appellant, Schram Enterprises, Inc., to quiet title to a strip of real estate subject to the easement of appellee, L & H Properties, Inc. Appellant filed an appeal, and we removed this case to our docket pursuant to our authority to regulate the caseloads of the Nebraska Court of Appeals and this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). We affirm.

Appellant owns approximately three-fourths of Section 10, Township 8 North, Range 13 East of the 6th P.M., in Otoe County, Nebraska (Schram property). For visualization purposes, the Schram property can best be described as the north half and southeast quarter of Section 10. Appellee owns a tract of land located approximately in the middle of Section 10 (L & H property). Appellee also has an easement (subject tract), described as

> [b]eginning at the center of Section 10; thence South 02°54'23" East along the West line of the SE¼ to the S¼

corner; thence Easterly along the South line of said Section 10 for a distance of 150.00 feet; thence Northerly at right angles to the North right-of-way line of State Highway No. 2; thence North 47°54'23" West for a distance of 70.70 feet; thence North 02°54'23" West parallel to the said West line of the SE¼ to the North line of the SE¼ of Section 10; thence South 88°11'06" West along the said North line of the SE¼ to the center of Section 10, said point also being the point of beginning, containing 6.13 acres, more or less.

The subject tract extends from the L & H property, along the western edge of the southeast quarter of Section 10 (Schram property), to the southern border of Section 10, at Old Highway 2. See appendix.

On March 1, 1960, Louis W. Rodenbrock, Ora A. Beausang, and Thomas E. Beausang transferred, by deed, 15.27 acres of real estate to the United States of America, and Ora Beausang and Thomas E. Beausang transferred, by deed, 4.25 acres of real estate to the United States of America. These two parcels of land were utilized by the United States as a missile base and currently compose the L & H property. In addition, Edward J. W. Reese conveyed, by written instrument, a "perpetual and assignable exclusive easement and right-of-way in, upon, over and across the [subject tract] in the County of Otoe, State of Nebraska," to the United States of America for the purpose of "locat[ing], construct[ing], operat[ing], maintain[ing] and repair[ing] a roadway in, upon, over and across the [subject tract]."

On October 28, 1994, the Nebraska Department of Roads, for the purpose of constructing a new state Highway 2, condemned a portion of the Schram property (including the north 474 feet of the subject tract) and the southern portion of the L & H property. This condemned strip of real estate essentially divides Section 10 into northern and southern halves. The new Highway 2, a controlled access highway, removes appellee's ability to utilize the subject tract as an access route to the L & H property. As part of the condemnation action, the state also condemned an additional strip of the Schram property in order to provide a new access route to the L & H property.

Subsequently, appellant filed an action to quiet title to that portion of the subject tract which has not been condemned by

the state. Appellant asserts that (1) an easement created for a roadway is created for the particular purpose of ingress and egress, (2) the particular purpose of appellee's roadway easement ceased to exist when the subject tract no longer served as an access route to the L & H property, and (3) appellee's easement should be extinguished and all right and title to the subject tract should be quieted in appellant.

The district court determined that the easement had not been granted for the particular purpose of ingress and egress and that therefore, the purpose of the easement did not cease to exist when the Nebraska Department of Roads condemned a tract of property which effectively terminated appellee's ability to use his easement as an access route to his property but gave appellee an alternative access route to the L & H property. Since the purpose of the easement did not cease to exist, the district court concluded that appellee's easement should not be extinguished. This appeal followed.

Appellant asserts the trial court erred in (1) finding that the easement was not created for the purpose of providing ingress and egress to appellee's property; (2) finding that the easement was not tied to appellee's ability to access its property; (3) finding that the purpose for which the easement was created continued to exist after the October 28, 1994, condemnation action by the state; and (4) failing to grant appellant's prayer that the title to the land over which the easement was granted be quieted in appellant.

The construction of language in an easement deed is a question of law. *Fine Line, Inc. v. Blake*, 677 A.2d 1061 (Me. 1996). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Brams Ltd. v. Elf Enters.*, 253 Neb. 932, 573 N.W.2d 139 (1998); *Mandolfo v. Chudy*, 253 Neb. 927, 573 N.W.2d 135 (1998); *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb. 694, 573 N.W.2d 747 (1998); *Johnson v. School Dist. of Millard*, 253 Neb. 634, 573 N.W.2d 116 (1998).

An action to quiet title sounds in equity. *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of

the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact an appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *University Place-Lincoln Assocs. v. Nelsen*, 247 Neb. 761, 530 N.W.2d 241 (1995).

We must first consider whether the easement in the subject tract was conveyed for the particular purpose of ingress and egress.

The extent of an easement created by a conveyance is fixed by the conveyance. *County of Sarpy v. Iske*, 189 Neb. 621, 204 N.W.2d 146 (1973). In the absence of any evidence to the contrary, the terms of an easement must be given their plain and ordinary meaning, as an ordinary, average, and reasonable person would understand those terms. *University Place-Lincoln Assocs. v. Nelsen, supra.* If the language of an easement is clear and unambiguous, it may not be varied by parol evidence. *Nebraska Public Power Dist. v. Munderloh*, 225 Neb. 205, 403 N.W.2d 374 (1987).

In coming to the conclusion that appellee's easement is for the particular purpose of ingress and egress, appellant argues that we should focus on the circumstances surrounding the initial conveyance of this easement. In response, appellee asserts that we should focus on the terms of the conveyance. As stated above, the express terms of the conveyance govern our initial inquiry. The express language of the grant neither places a limitation of ingress or egress upon the easement, nor ties the easement to the ability to use the subject tract as an access route to the L & H property. The terms of the grant are very clear. Appellee has an easement in the subject tract for the purpose of locating, constructing, operating, maintaining, and repairing a roadway.

A roadway is the strip of land through which a road is constructed and which is physically altered, or the specific part of a road over which vehicular traffic travels. Webster's Third New International Dictionary 1963 (1993). See, *Lake Garda Improvement Assn. v. Battistoni*, 160 Conn. 503, 280 A.2d 877 (1971); *Shachunazarian v. Widmer*, 159 Cal. App. 2d 180, 323 P.2d 865 (1958); *Franck Bros., Inc. v. Rose*, 301 S.W.2d 806 (Mo. 1957). Appellant has not directed the court to, nor has our

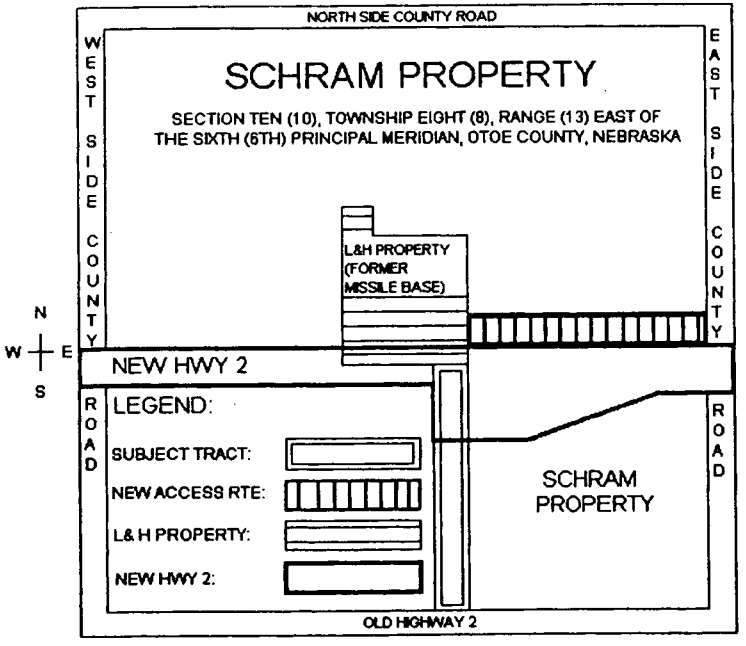
own research revealed, any case law which specifically states that an easement created for roadway purposes is created for the particular purpose of ingress and egress. The plain and ordinary meaning of the term "roadway" requires only that the subject tract be utilized as a strip of land through which a road is constructed and which is physically altered, or be the specific part of a road over which vehicular traffic travels.

The district court was correct in refusing to extinguish appellee's easement in the subject tract and quiet title in appellant, since the express terms of appellee's easement neither create the condition that the subject tract be utilized for the particular purpose of ingress and egress to the L & H property, nor tie the easement to the ability to access appellee's property.

Due to the foregoing, it is unnecessary to determine whether those purposes asserted by appellant have ceased to exist. Appellee's easement shall continue for its stated purpose. We affirm.

AFFIRMED.

APPENDIX



ENNY J. MARRS, APPELLANT, V.
SID KEELAN AND MARY KEELAN, APPELLEES.
578 N.W.2d 442

Filed May 29, 1998. No. S-97-204.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Patrick W. Healey, of Healey & Wieland Law Firm, for appellant.

Gary J. Nedved, of Keating, O'Gara, Davis & Nedved, P.C., for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Enny J. Marrs fell and was injured when she stepped into a hole or depression on property owned by Sid Keelan and Mary Keelan. The district court granted summary judgment in favor of the Keelans, and Marrs appeals.

SCOPE OF REVIEW

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Chalupa v. Chalupa, ante* p. 59, 574 N.W.2d 509 (1998).

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all

reasonable inferences deducible from the evidence. *Schade v. County of Cheyenne, ante* p. 228, 575 N.W.2d 622 (1998); *Chalupa v. Chalupa, supra.*

FACTS

Marrs' property is adjacent to the Keelans', and at one time, a privacy fence was located on the Keelans' property between the two houses. In his deposition, Sid Keelan stated that he had removed the fence prior to Marrs' injury. The fenceposts were approximately 4 inches square and extended into the ground approximately 2 feet. Sid Keelan testified that when he removed the fenceposts, he filled the postholes with dirt so that they would be level with the surrounding ground. Although he mowed in that area after the fence was removed, Sid Keelan did not notice where the fenceposts had been.

On October 20, 1991, Marrs was mowing her lawn and made a turn when she reached a point near the lot line where the fenceposts had been removed. As Marrs stepped backward, she caught her foot in a hole, fell backward, and fractured her left arm. In her deposition, Marrs stated that she had not looked behind her and had not seen the hole. She estimated that the hole was 1½ feet deep and stated that it was concealed by grass which had grown over it.

Marrs explained that she did not normally mow her lawn, but from the time the fence was removed, she may have done so one or two times. She had not had any problems when she mowed previously, but she testified that she fell while mowing on October 20, 1991, because grass covered the holes and she did not see them. Marrs said she knew there were some holes close to the lot line, but she did not know exactly where they were because when she mowed previously, Keelan had mowed, the grass was short, and she could see them. Marrs' affidavit stated that although she knew the Keelans had removed the fenceposts, leaving holes in the ground, she had assumed the Keelans filled the holes so it would be safe to mow or otherwise traverse the area.

Marrs' daughter testified by affidavit that after Marrs was injured, she observed a hole 7 to 8 inches deep near the area where Marrs had fallen. Grass had been allowed to grow over the area so that the hole was concealed by the grass. Two men

who had mowed Marrs' lawn for her also submitted affidavits which stated that during the course of being on the premises during the summer of 1991, they observed 4- by 4-inch holes where fenceposts had been removed close to the lot line. The grass over the holes was not always trimmed, so the holes were concealed.

Sid Keelan's deposition stated that after learning of Marrs' fall, he checked the area where she had fallen and observed that the dirt had settled in one of the holes, creating a small depression in the ground. This was the only hole in which the dirt had settled, and he was able to level the hole off with less than one shovelful of dirt.

Marrs' petition alleged that on October 20, 1991, she fell into a hole created and maintained by the Keelans which was allowed to become overgrown, constituting a hidden trap. She alleged that her injuries were proximately caused by the Keelans' negligence in failing to maintain the premises in a reasonably safe condition, causing or permitting the existence of and maintaining a condition in the nature of a hidden trap, failing to otherwise mark or warn her of the dangerous condition of the premises, failing to fill the hole, and failing to properly inspect the premises to ensure it was safe for its intended or reasonably expected use.

The Keelans' answer admitted that portion of Marrs' petition which alleged that Marrs stepped into a hole created and maintained by the Keelans which constituted a hidden trap. The Keelans generally denied the remainder of the petition and affirmatively alleged that the proximate cause of Marrs' injuries was her negligence in failing to keep a proper lookout.

The Keelans moved for summary judgment, and after a hearing on the motion, the district court granted judgment in favor of the Keelans and dismissed the action. The district court determined that Marrs was at most a licensee and that the Keelans owed a duty to Marrs only to refrain from injuring her by willful or wanton negligence or to warn Marrs of the hidden danger known to the Keelans but unknown or unobservable by Marrs. The district court found that

> even when construing the evidence in a light most favorable to the plaintiff, the facts here do not support a finding

of, or even infer, that the defendant's [sic] conduct was willful or wanton. Nor can liability be based upon a failure to warn since the plaintiff herself was aware of the post holes. There was no hidden peril.

ASSIGNMENT OF ERROR

Marrs asserts that the district court erred in sustaining the Keelans' motion for summary judgment.

ANALYSIS

Under the rule of law applicable to this case, the owner or occupant of a premises owes a licensee only the duty to refrain from injuring the licensee by willful or wanton negligence or designed injury, or to warn him or her of a hidden danger or peril known to the owner or occupant but unknown or unobservable by the licensee, who is required to exercise ordinary care. See *Alexander v. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997).

Marrs argues that we should apply the rule stated in *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), in which we eliminated the distinction between licensees and invitees by requiring a standard of reasonable care for all lawful visitors. In *Heins*, we stated that the rule stated therein would apply only to causes of action occurring after the date of the *Heins* decision. We find no merit in Marrs' argument that the failure to apply *Heins* retroactively is improper or otherwise unconstitutional.

It is not argued and there is no evidence from which it could be found that the Keelans acted with willful or wanton negligence. The only issue is whether the Keelans breached the duty to warn Marrs of a hidden danger or peril known to them but unknown or unobservable by Marrs. It is undisputed that Marrs fell because of a hole or depression covered with grass on the Keelans' property. The district court found that the dirt had settled and that there was a depression in the area of the postholes.

In *Alexander*, we explained that in order for a landowner to be liable to a licensee for failure to warn of a hidden danger or peril known to the landowner but unknown to the licensee, the licensee must show that the landowner had actual knowledge of the danger. Sid Keelan stated in his deposition that after he

removed the fenceposts, he filled the holes with dirt so that they would be level with the surrounding ground. He stated that until the time of the accident he had not specifically checked the area where the fenceposts had been removed. He further stated that although he had mowed in that area between the time the fence was removed and the time of the accident, he did not notice where the fenceposts had been.

However, Marrs presented evidence from which it can reasonably be inferred that Sid Keelan knew the holes existed. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Schade v. County of Cheyenne, ante* p. 228, 575 N.W.2d 622 (1998); *Chalupa v. Chalupa, ante* p. 59, 574 N.W.2d 509 (1998). Marrs' deposition stated that the holes were observable because Keelan had mowed, the grass was short, and the holes could be seen. Sid Keelan admitted that he had mowed the area before the accident. Therefore, it is reasonable to infer that Sid Keelan had actual knowledge of the danger.

Although Marrs has presented a genuine issue as to the Keelans' knowledge of the danger, the district court found that liability could not be based upon a failure to warn of the danger because the evidence showed that Marrs was aware of the holes. We agree. An owner or occupant of a premises is liable to a licensee for failure to warn him or her of a hidden danger or peril known to the owner or occupant but unknown or unobservable by the licensee, who is required to exercise ordinary care. See *Alexander v. Warehouse, supra.* It is undisputed that Marrs knew that the Keelans had removed the fenceposts and thereby left holes in the ground. While Marrs' affidavit states that she "assumed they had properly filled the holes so that it would be safe to mow and otherwise traverse such area," it cannot be inferred from this statement that Marrs lacked knowledge concerning the holes. Marrs testified in her deposition that prior to the day of the accident, she knew there were holes close to the lot line, but did not know exactly where they were. She explained that she knew the holes were there because when she mowed previously, she could see the holes.

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Chalupa v. Chalupa, supra.* Even when we view the evidence in the light most favorable to Marrs, it is clear that Marrs had seen the holes on prior occasions and, therefore, had knowledge of the danger. Therefore, the district court was correct in sustaining the Keelans' motion for summary judgment.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, C.J., dissents.

PEOPLES NATURAL GAS COMPANY, DIVISION OF UTILICORP UNITED INC., APPELLEE, V. THE CITIES OF BELLEVUE ET AL., APPELLANTS.

579 N.W.2d 510

Filed June 5, 1998. No. S-97-070.

1. **Public Utilities: Rates: Equity: Collateral Attack: Proof.** Suits over utility rates fixed under the Municipal Natural Gas Regulation Act, Neb. Rev. Stat. §§ 19-4601 through 19-4623 (Reissue 1997), are in equity, collaterally attacking the rate ordinances adopted by the municipalities in which the public utility has the burden to prove that the rates fixed were arbitrary, unreasonable, and confiscatory.
2. **Public Utilities: Rates: Words and Phrases.** A government-established rate for a public utility is confiscatory when the rate fails to produce a return on investment equal to the return realized on investments which have risks corresponding to those of the utility.
3. **Public Utilities: Rates.** A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.
4. ____: ____. The rate of return to a public utility should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate,

under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed, and injunction vacated and set aside.

Jeremiah D. Finnegan, of Finnegan, Conrad & Peterson, L.C., and Vincent M. Powers for appellants.

John E. Hubbard, Douglas J. Law, and Trenten P. Bausch, of Blackwell Sanders Matheny Weary & Lombardi, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

We, on our own motion, removed this appeal of a utility rate fixed under the provisions of the Municipal Natural Gas Regulation Act, Neb. Rev. Stat. §§ 19-4601 through 19-4623 (Reissue 1997), from the Nebraska Court of Appeals to our docket under our authority to regulate the caseloads of the two courts. The defendant-appellant municipalities, the Cities of Bellevue, Blair, Elkhorn, Gretna, LaVista, Papillion, Plattsmouth, Ralston, Valley, and Waterloo, urge that the district court erred in enjoining the implementation of their ordinances preventing the plaintiff-appellee utility, Peoples Natural Gas Company, from employing a deferred method of accounting for certain environmental cleanup costs to be incurred in the future as confiscating Peoples' property without constitutional due process. The municipalities' assignment of error having merit, we reverse, and direct that the injunction be vacated and set aside.

Suits over utility rates fixed under the act are in equity, collaterally attacking the rate ordinances adopted by the municipalities in which the public utility has the burden to prove that the rates fixed were arbitrary, unreasonable, and confiscatory. See *K N Energy, Inc. v. City of Scottsbluff*, 233 Neb. 644, 447 N.W.2d 227 (1989).

Peoples, a division of UtiliCorp United Inc., a Delaware corporation, supplies natural gas and services to a number of cities,

towns, and villages in Nebraska and in other states. Its Nebraska business is divided into three separate rate areas; the defendant municipalities compose rate area 1.

In June 1995, Peoples filed a notice of intent to increase its natural gas rates. The municipalities hired a consulting firm to review the proposed rate increases. The consulting firm recommended substantially lower rate increases than Peoples had requested. Negotiations produced a partial settlement resulting in a compromise rate increase yielding $780,000 in additional annual revenue for Peoples. Under this partial so-called "black box" settlement, the parties agreed to the rate increase without agreeing to, or being bound by, a rate base amount, a percentage rate of return, or allowable operating expenses. As the parties were unable to reach agreement as to how to treat the future costs of cleaning up contaminated former gas-manufacturing plant sites, that issue was preserved for possible litigation.

When Peoples purchased Minnegasco's Nebraska property, it also acquired five former plant sites. The sites were used to manufacture gas between the late 1800's and the 1940's. The use of natural gas rendered the plants obsolete, and the manufacturing of gas was phased out. None of the sites were used for gas production after 1949, and perhaps none were in production after 1940. The manufacturing process produced significant quantities of toxic chemicals which permeated the sites. The plants were often razed, and natural gas facilities were constructed at the same sites. These sites are contaminated and will have to be cleaned up by Peoples, which had no contaminated gas plant sites in Nebraska prior to the purchase. The sites are currently being used by Peoples as locations for a truck garage, storage facility, office building, power station, and service center.

The condition of the sites is currently being evaluated, and cleanup costs are estimated to range from $500,000 to $15 million. The remediation process involves a certain amount of interaction with Nebraska's Department of Environmental Quality, so that Peoples' control over the expense and timeframe of the operation is limited. Peoples' expert estimated the cleanup would be accomplished in less than 5 years.

When cleanup of the sites became an issue in the 1980's, Minnegasco obtained rate ordinances in Nebraska which

allowed it to defer the environmental costs. Deferred accounting is the process of incurring a cost, deciding that the tests of probable recovery from the ratepayers through the regulatory process have been met, deferring the cost as a regulatory asset rather than charging it to current earnings, and then presenting those costs for recovery at the next rate-fixing proceeding.

At the time of Peoples' purchase, Minnegasco had accumulated approximately $475,000 as a regulatory asset. This "asset" was purchased by Peoples, along with the rest of Minnegasco's Nebraska property. Peoples has spent approximately $550,000 in cleanup costs through September 1996 and has been allowed to defer environmental cleanup costs in Nebraska rate area 3. Testimony indicated that the rate area 1 portion of the regulatory asset bought from Minnegasco (about 13 percent of the total) was included in the settlement agreement so that it was included in the compromise rate increase.

In the settlement agreement, all expenses for the 1994 test year were settled. It appears that Peoples has two choices with respect to the cleanup costs. It can charge the cleanup costs against income and attempt to pass the cost on to ratepayers with an immediate request for a corresponding rate increase, or it can assume the cleanup expenses and pass them on to its stockholders. Not surprisingly, Peoples wishes to treat the site cleanup costs under a deferred accounting method that would allow it to seek inclusion of all the reasonable costs of such cleanup in a future rate adjustment.

A government-established rate for a public utility is confiscatory when the rate fails to produce a return on investment equal to the return realized on investments which have risks corresponding to those of the utility. *K N Energy, Inc. v. Cities of Broken Bow et al.*, 244 Neb. 113, 505 N.W.2d 102 (1993). As noted in *Bluefield Co. v. Pub. Serv. Comm.*, 262 U.S. 679, 692-93, 43 S. Ct. 675, 67 L. Ed. 1176 (1923):

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncer-

> tainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.

The act provides in § 19-4604 that "[e]very rate made, demanded, or received by any utility shall be just and reasonable." Section 19-4612(1) of the act provides:

> The municipality, in the exercise of its power under the [act] to determine just and reasonable rates for public utilities, shall give due consideration to the public need for adequate, efficient, and reasonable natural gas service and to the need of the utility for revenue sufficient to enable it to meet the cost of furnishing the service, including adequate provisions for depreciation of its utility property used and useful in rendering service to the public, and to earn a fair and reasonable return upon the investment in such property.

This case is unique because Peoples' rate of return is concealed within the settlement agreement. It is impossible, therefore, to determine exactly what Peoples' rate of return under the settlement will be. In an effort to fill that void, Peoples argues that as it requested a return of 13 percent and the municipalities' consultant suggested a return of 10.1 percent, the compromise rate of return must be somewhere in between that range. However, even if we accept that thesis, we are left with a record which does not establish the amount of a fair and reasonable rate of return.

For example, if the rate of return for a business in rate area 1 facing risks and uncertainties similar to Peoples is 9 percent, then the lack of deferred accounting could lower Peoples' rate of return by a full percentage point and still not render the rate confiscatory, as Peoples' rate of return would still be fair and reasonable.

In both *K N Energy, Inc. v. Cities of Broken Bow et al., supra*, and *K N Energy, Inc. v. City of Scottsbluff*, 233 Neb. 644, 447

N.W.2d 227 (1989), the public utility presented evidence of the rate of return of a comparable business, thus enabling us to determine whether the rates in question were confiscatory. The record in the instant case falls short of meeting Peoples' burden to establish that the rates fixed by the municipalities are arbitrary, unreasonable, and confiscatory.

Accordingly, as noted in the first paragraph hereof, we reverse the district court's decree and direct that the injunction be vacated and set aside.

REVERSED, AND INJUNCTION VACATED AND SET ASIDE.

STATE OF NEBRASKA, APPELLEE, V. AARON T. PATTNO, APPELLANT.
579 N.W.2d 503

Filed June 5, 1998. No. S-97-1147.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Sentences.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
3. **Judges.** The Nebraska Code of Judicial Conduct demands that judges conform to a higher standard of conduct than is expected of lawyers or other persons in society.
4. ____. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.
5. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
6. **Judges: Recusal.** A judge shall be disqualified if a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
7. **Judges.** Statements of religious expression by a judge or remarks which suggest that the judge dislikes the crimes committed by a defendant do not necessarily evidence improper bias or prejudice.
8. **Courts: Sentences.** Courts are well advised to rely upon the statutory guidelines for imposing sentences.
9. **Judges: Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation

for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

10. ____: ____. A sentencing judge has broad discretion as to the source and type of information, including personal observations, which may be used as assistance in determining the kind and extent of the punishment to be imposed.
11. ____: ____. A judge who relies upon his or her personal religious beliefs as a basis for a sentencing decision injects an impermissible consideration in the sentencing process.
12. **Judges: Sentences: Due Process.** If a judge's comments during sentencing could cause a reasonable person to question the impartiality of the judge, then the defendant has been deprived of due process and the judge has abused his or her discretion.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Sentence vacated, and cause remanded for resentencing.

Marc B. Delman for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

WHITE, C.J., CAPORALE, WRIGHT, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

NATURE OF CASE

Aaron T. Pattno pled guilty to sexual assault of a child, in violation of Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 1996), a Class IV felony. He claims that the sentence imposed was excessive because the judge read a passage from the Bible during sentencing which disparaged homosexuality and, therefore, manifested bias against Pattno because of his sexual orientation.

SCOPE OF REVIEW

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997).

An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

FACTS

Pattno, a 25-year-old male, met a 13-year-old boy referred to as "M.B." through a "chat room" on the Internet. Pattno met

secretly with M.B. for several months, and the two made plans for two overnight visits. During the second overnight visit, Pattno and M.B. kissed, undressed, and fondled each other.

On August 12, 1997, Pattno pled guilty to sexual assault of a child. A presentence investigation (PSI) was requested by the trial judge. The PSI revealed that Pattno had numerous traffic violations, including speeding, license suspension, and driving without an operator's license. Pattno had also been charged with writing bad checks on two occasions in 1996. Pattno had participated in a Big Brother/Big Sister program; worked for the Latch Key Program for the bicounty YMCA in Belleville, Illinois; and taught seventh graders in a religious education program. The PSI disclosed no prior history of child molestation or sexual assault.

A "sexual adjustment inventory" conducted on Pattno indicated signs of pedophilia. The report stated in part: "This client's response pattern on the Child Molest Scale is in the Problem Risk (70 to 89th percentile) range. Problematic child molest behavioral (pedophilia) indicators are present. Review court-related records carefully for prior sex-related offenses or convictions."

The PSI did not contain a sentencing recommendation because Pattno did not meet the threshold requirements to be considered for "Intensive Supervision Probation." The PSI did indicate that if probation was selected by the trial judge, certain terms were recommended. The report recommended that Pattno not be allowed to have unsupervised contact with anyone under the age of 16 and that he continue counseling, complete an offender's work program, tour the Lincoln Regional Center, and refrain from having a personal computer or any other electronic device that could be used to access electronic communications in his home.

A search of Pattno's home following his arrest disclosed pornographic material on the hard drive of his computer showing males, some teenagers, in erotic poses. Several e-mail communications between Pattno and M.B. were also discovered. The e-mail suggested that Pattno and M.B. shared a mutual affection for each other. There is evidence which suggests that Pattno continued to have contact with M.B. even after he was

arrested. Pattno allegedly went to the town where M.B. and his family vacationed and secretly met with M.B. There is no evidence which discloses that Pattno and M.B. had sexual contact after Pattno was arrested.

During sentencing on October 31, 1997, the trial judge noted that Pattno had met the victim over the Internet, and the judge then read a portion of Pattno's police statement. The statement contained details about the romantic relationship which had developed between Pattno and M.B., in addition to Pattno's account of the sexual contact with M.B.

Subsequently, the trial judge read the following biblical excerpt:

> "Ever since the creation of the world his invisible nature, namely, his external power and deity, has been clearly perceived in the things that have been made. So they are without excuse; for although they knew God they did not honor him as God or give thanks to him as God, but they became futile in their thinking and their senseless minds were darkened. Claiming to be wise, they became fools, and exchanged the glory of the immortal God for images resembling mortal man or birds or animals or reptiles.
>
> "Therefore God gave them up in the lusts of their hearts to impurity, to the dishonoring of their bodies among themselves, because they exchanged the truth about God for a lie and worshiped and served the creature rather than the Creator, who is blessed for ever [sic]. Amen.
>
> "For this reason God gave them up to dishonorable passions. Their women exchanged natural relations for unnatural, and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in their own persons the due penalty for their error."

Following the reading of the biblical passage, the trial judge stated that he had considered the circumstances of the case and the "nature . . . of the defendant" and found that imprisonment was necessary to protect the public and not to depreciate the seriousness of the crime. Pattno was sentenced to not less than 20 months' nor more than 5 years' imprisonment.

ASSIGNMENTS OF ERROR

Pattno claims the trial judge erred by expressing his religious views during sentencing, by expressing a bias against Pattno's sexual orientation during sentencing, and by not recusing himself from the sentencing.

ANALYSIS

Our ultimate determination is whether the trial judge abused his discretion by imposing a sentence that was based upon the judge's personal bias against Pattno's sexual orientation. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unjustly deprive a litigant of a substantial right and a just result. *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997).

Pattno argues that this court should presume that the trial judge was biased because his statements during sentencing violated the Nebraska Code of Judicial Conduct. The Code of Judicial Conduct demands that judges conform to a higher standard of conduct than is expected of lawyers or other persons in society. *In re Complaint Against Empson*, 252 Neb. 433, 562 N.W.2d 817 (1997). Pattno relies upon Canon 1 ("A Judge Shall Uphold the Integrity and Independence of the Judiciary"), Canon 2 ("A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities"), Canon 3 ("A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently"), and Canon 3B(5) ("A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so").

In summary, Pattno alleges that the trial judge violated the Code of Judicial Conduct and imposed a sentence which constituted an abuse of discretion. Pattno contends that the judge

pronounced the sentence in a manner which raised a question as to whether the judge's personal bias affected the severity of his sentence. Pattno argues that his clean criminal record, the unlikelihood of reoffense, and the circumstances surrounding his crime suggest that probation was an appropriate punishment.

A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997). In Nebraska, there is no clear rule regarding the proof a litigant must present before a judge is found to be biased. In some instances, we have held that actual bias must be shown. In other instances, we have allowed the litigant to presume that the judge was biased if the appearance of impropriety was present.

In *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), the impartiality of a judge was at issue when, prior to sentencing, the judge initiated an ex parte communication with the parents of the murder victim. The issue was whether the ex parte meeting caused the judge to have "some preconceived opinion or disposition toward the sentence to be imposed . . . ." *Id.* at 853, 420 N.W.2d at 702. We held that the ex parte communication raised questions about the judge's impartiality and that, therefore, the judge had to recuse himself if requested to do so by the parties.

In *Franks v. Franks*, 181 Neb. 710, 150 N.W.2d 252 (1967), we suggested that the appearance of impropriety may be sufficient to persuade a judge to disqualify himself. We stated that the proper administration of the law demands not only that judges refrain from actual bias, but that they avoid all appearances of unfairness.

However, in *State v. Ellefson*, 231 Neb. 120, 435 N.W.2d 653 (1989), we held that there must be a showing of actual prejudice before a judge will be declared biased. In *Ellefson*, the defendant, following his conviction, wrote letters to the judge, generally declaring that he had been wrongfully convicted. He then moved to have the court recuse itself from hearing the motion for postconviction relief on the grounds that the correspondence was of a threatening and accusatory nature and that the judge was biased against him and should not have heard the motion

for postconviction relief. We held that the defendant had the burden of showing that the court was actually biased or prejudiced and, hence, it was not sufficient to merely show that the court could have been biased or that an appearance of impropriety was created.

In *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993), we addressed what level of proof was needed to establish that an arbitrator was biased. We established that the partiality of an arbitrator was established when a " 'reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.' " *Id.* at 358, 495 N.W.2d at 43. We rejected the claim that a party claiming prejudice had to present " 'factual proof of bias.' " *Id.* We noted that one problem with strict application of the factual proof of bias approach is that absent an outright admission by a biased party, it may be impossible to show. We rejected the notion that partiality could be proved by the mere " 'appearance of bias' " and, instead, adopted the "reasonable person" test. *Id.* We noted that judges and arbitrators were both subject to the same ethical standards and proceeded to address whether an arbitrator's failure to disclose a possible conflict of interest proved bias or prejudice against one party.

The federal courts have consistently applied the standard that we adopted in *Dowd* for determination of whether a judge was biased against a defendant. Pursuant to 28 U.S.C. § 455(a) (1994), a judge shall be disqualified if a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown. See *Renteria v. Schellpeper*, 936 F. Supp. 691 (D. Neb. 1996). Therefore, under federal law, recusal is necessary if a reasonable person would harbor doubts about the judge's impartiality. See, also, *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) (proposing objective test of impartiality); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988) (holding that partiality is determined by whether reasonable person, knowing all facts, would question judge's impartiality); *U.S. v. Jordan*, 49 F.3d 152 (5th Cir. 1995) (holding that judge should have been recused

because reasonable person would harbor doubts about judge's impartiality); *U.S. v. Cooley*, 1 F.3d 985 (10th Cir. 1993) (holding that inquiry is whether reasonable person would harbor doubts as to judge's impartiality). But see *U.S. v. Nelson*, 952 F.2d 180 (8th Cir. 1991) (holding that defendant did not establish that judge had pervasive personal bias against defendant, and so impartiality was not questioned).

The reasonable person test adopted by this court in *Dowd* is a rational means of determining whether a judge is biased against a defendant. Therefore, in order for Pattno to prove that the trial judge was biased against him and that the judge should have recused himself from imposing a sentence, Pattno must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.

Pattno argues that the reading of the biblical scripture by the trial judge proved that he was biased against Pattno. The State argues that the judge's statements at sentencing did not reflect his personal views regarding homosexuality, but were merely personal observations made by the judge or, at least, were justified commentary on the heinousness of Pattno's crime. The State contends that since the sentence imposed on Pattno falls within the statutory guidelines, it is valid.

In *U.S. v. Bakker*, 925 F.2d 728 (4th Cir. 1991), the defendant was convicted of mail fraud, wire fraud, and conspiracy for encouraging persons to donate money to his television evangelism program. At sentencing, the judge stated: "'[Bakker] had no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from [sic] money-grubbing preachers or priests.'" (Emphasis omitted.) *Id.* at 740. The court of appeals, while noting that a sentencing judge has broad discretion in rendering a sentence, noted that such discretion must be exercised within the boundaries of due process. The court held that the sentencing judge exceeded these boundaries by imposing a sentence based on impermissible considerations. The court noted that a judge may not take into consideration a party's race or national origin in sentencing without violating due process. The court held that "similar principles

apply when a judge impermissibly takes his own religious characteristics into account in sentencing." *Id.* The court stated:

> Courts, however, cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing. . . .
>
> . . . .
>
> Yet, the fact remains that this case involves the explicit intrusion of personal religious principles as the basis of a sentencing decision; at least, that is not an unfair reading of the trial court's comments in this case. We recognize that a trial judge on occasion will misspeak during sentencing and that every ill-advised word will not be the basis for reversible error. In this case, however, our review of the sentencing transcript reveals comments that are, in the end, too intemperate to be ignored. Because an impermissible consideration was injected into the sentencing process, we must remand the case.

Id. at 740-41. We find the reasoning of *Bakker* helpful to our consideration of the trial judge's conduct in sentencing Pattno. Due process requires that sentencing judges consider only relevant information as the basis for a sentence. See *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990).

Since our focus is whether a reasonable person under these circumstances would question the trial judge's impartiality, we examine the facts and circumstances in that light. All crimes in Nebraska are statutory. Similarly, sentences imposed upon defendants convicted of a crime are also statutory. No statute in this state criminalizes sexual contact between consenting adults of the same gender. Thus, Pattno's crime is that he had sexual contact with a minor; not that he had sexual contact with another male. Therefore, the biblical scripture which the judge read was not relevant to the crime to which Pattno pled guilty, and it should not have been considered by the judge in determining an appropriate sentence.

Also problematic with the trial judge's use of biblical scripture is the fact that from its very inception, this country has recognized the importance of separation of church and state.

Allowing a court to recite scripture, and thereby proclaim its interpretation of that scripture, implies that the court is advancing its own religious views from the bench.

Statements of religious expression by a judge or remarks which suggest that the judge dislikes the crimes committed by a defendant do not necessarily evidence improper bias or prejudice. See, *Six v. Delo*, 885 F. Supp. 1265 (E.D. Mo. 1995), *affirmed* 94 F.3d 469 (8th Cir. 1996); *United States v. Baer*, 575 F.2d 1295 (10th Cir. 1978); *Poe v. State*, 341 Md. 523, 671 A.2d 501 (1996). However, courts are well advised to rely upon the statutory guidelines for imposing sentences. Reliance upon irrelevant material, such as the court's own religious beliefs, could convince a reasonable person that a court was biased or prejudiced.

The problem is that during Pattno's sentencing, the trial judge read a biblical scripture and then stated that he had considered the circumstances and the "nature . . . of the defendant" in reaching the sentence of not less than 20 months' nor more than 5 years' imprisonment. A reasonable person who heard the judge's comments could have questioned the judge's impartiality.

In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997). A sentencing judge has broad discretion as to the source and type of information, including personal observations, which may be used as assistance in determining the kind and extent of the punishment to be imposed. See *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991). However, relying upon one's personal religious beliefs as a basis for a sentencing decision injects an impermissible consideration in the sentencing process. See *U.S. v. Bakker*, 925 F.2d 728 (4th Cir. 1991).

When we examine the sentence in the context of Pattno's age, mentality, education, experience, social and cultural background, and past criminal record; the nature of the offense; and the amount of violence involved in the commission of the crime, the following facts are significant: At the time of the

occurrence, the victim was 13 years old. Although Pattno had no history of prior child molestation or sexual assault, the PSI revealed that he has had repeated contact with children, and the sexual adjustment inventory conducted revealed that he showed signs of pedophilia. There is evidence which suggests that Pattno continued to have contact with the victim even after he was arrested. The PSI did not contain a sentencing recommendation because Pattno failed to meet the threshold requirements to be considered for "Intensive Supervision Probation."

A Class IV felony is punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both. There is no minimum sentence of incarceration or fine required. As such, Pattno's sentence is clearly within the statutory limits and generally, in view of such facts, would not be an abuse of discretion.

However, because the trial judge interjected his own religious views immediately prior to sentencing, a reasonable person could conclude that the sentence was based upon the personal bias or prejudice of the judge. If a judge's comments during sentencing could cause a reasonable person to question the impartiality of the judge, then the defendant has been deprived of due process and the judge has abused his or her discretion.

Therefore, we vacate the sentence imposed upon Pattno and remand the cause with directions that he be resentenced by a different judge.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

CONNOLLY J., not participating.

PATRICIA A. HOSHOR, APPELLEE AND CROSS-APPELLANT, V. JIM A. HOSHOR, APPELLANT AND CROSS-APPELLEE.
580 N.W.2d 516

Filed June 12, 1998. No. S-96-1317.

1. **Jurisdiction.** Subject matter jurisdiction is a question of law for the court.
2. **Jurisdiction: Judgments: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.

3. **Modification of Decree: Appeal and Error.** The determination as to modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion.
4. **Attorney Fees: Appeal and Error.** The decision to award attorney fees rests within the trial court's discretion. On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
5. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
6. **Divorce: Property Division: Pensions.** When the trial court orders the equitable division of the marital estate, the marital estate includes only that portion of a pension which is earned during the marriage. Contributions to pensions before marriage or after dissolution are not assets of the marital estate.
7. **Courts: Jurisdiction: Property Settlement Agreements: Property Division: Pensions.** A trial court, in the exercise of its broad jurisdiction with regard to approval and enforcement of property settlement agreements under Neb. Rev. Stat. § 42-366(2) (Reissue 1993), has the power to approve and incorporate into a consent decree a conscionable term in the parties' agreement to divide pension benefits earned by a spouse after the termination of the marriage, even though the trial court has no statutory power to order such a division in a contested case.
8. **Modification of Decree: Judgments.** A consent decree is usually treated as an agreement between the parties and is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties.
9. **Divorce: Modification of Decree: Property Settlement Agreements.** Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified as to such property provisions, in the absence of fraud or gross inequity.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Gregory C. Scaglione and David M. Dvorak, of Koley, Jessen, Daubman & Rupiper, P.C., for appellant.

Neil W. Schilke, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

The marriage of Patricia A. Hoshor and Jim A. Hoshor was dissolved in 1982 pursuant to a consent decree. The decree pro-

vides that "[the wife] should receive one-fourth of any payments received from the pension and retirement plan by [the husband] at the time such payments are received." In 1996, the wife filed an application for entry of a Qualified Domestic Relations Order (QDRO), authorizing the plan administrator to distribute one-fourth of the husband's pension payments to her. The husband filed a responsive pleading to the application, objecting to the requested QDRO. The husband further filed a cross-application to modify the decree, alleging that the district court lacked jurisdiction in the original decree to authorize the distribution of pension benefits earned by him after the termination of the parties' marriage or, alternatively, that the decree should be modified to limit the wife to pension benefits earned during the marriage. Finding that jurisdiction was proper and that the decree was clear and unambiguous, the district court entered a QDRO, entitling the wife to one-fourth of any pension payments received by the husband without offsetting postdivorce accumulations to the pension. Because we determine that a trial court has jurisdiction to approve and incorporate into a consent decree a term in a property settlement agreement to divide pension benefits earned after the termination of the marriage and because the district court did not abuse its discretion in refusing to modify the consent decree, we affirm the judgment of the district court.

BACKGROUND

Patricia A. Hoshor and Jim A. Hoshor were married in 1957 and were divorced on July 23, 1982, pursuant to a consent decree. Paragraph 10 of the consent decree provides that "[the husband] is the beneficiary of a pension and retirement plan . . . . [The wife] should receive one-fourth of any payments received from the pension and retirement plan by [the husband] at the time such payments are received." No appeal was taken by either party from the entry of the consent decree.

At the request of the plan administrator and in anticipation of the husband's February 1998 retirement, the wife, on August 20, 1996, filed an application for entry of a QDRO, authorizing the plan administrator to distribute one-fourth of the husband's pension payments to her. The husband filed a responsive plead-

ing to the application, alleging that the wife was only entitled to one-fourth of the value of his pension plan as of July 23, 1982, the date of the divorce decree. The husband further filed a cross-application to modify the consent decree to limit the wife to her pro rata share in the pension benefits earned during the parties' marriage. In this regard, the husband asserted that the district court lacked jurisdiction to enter the consent decree, as well as the QDRO, because Nebraska law provides that a court may include in the marital estate only that portion of a pension existing at the time of the dissolution.

Following a bench trial, the district court found that jurisdiction was proper with respect to the 1982 dissolution proceedings and that even if the decree was erroneous, the husband could not collaterally attack the original decree in the instant proceeding. In addition, the district court, upon finding that the decree was clear and unambiguous, entered a QDRO consistent with the decree, distributing one-fourth of any pension payments received by the husband to the wife without offsetting postdivorce accumulations to the pension. Finally, the district court denied the wife's request for the payment of attorney fees as a result of frivolous or bad faith conduct on the part of the husband or his counsel. The husband appeals, and the wife cross-appeals.

STANDARD OF REVIEW

Subject matter jurisdiction is a question of law for the court. *Miller v. Walter*, 247 Neb. 813, 530 N.W.2d 603 (1995). A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *Big John's Billiards v. Balka, ante* p. 528, 577 N.W.2d 294 (1998); *Bonge v. County of Madison*, 253 Neb. 903, 573 N.W.2d 448 (1998).

The determination as to modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion. *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995). Furthermore, the decision to award attorney fees rests within the trial court's discretion. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994);

Meyers v. Meyers, 222 Neb. 370, 383 N.W.2d 784 (1986). On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *DeVaux v. DeVaux, supra.* A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997).

ASSIGNMENTS OF ERROR

The husband assigns as error: (1) The district court lacked jurisdiction to enter the consent decree, as well as the QDRO, authorizing the plan administrator to distribute to the wife pension benefits earned by him after the termination of the parties' marriage and (2) the district court abused its discretion in refusing to modify the consent decree to limit the wife to one-fourth of the pension benefits earned by him during the parties' marriage.

In her cross-appeal, the wife contends that the district court abused its discretion in denying her request for an award of attorney fees.

ANALYSIS

A consent decree is treated as an agreement between the parties. *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992). The provision of the consent decree at issue in the instant case provides that "[the husband] is the beneficiary of a pension and retirement plan . . . . [The wife] should receive one-fourth of any payments received from the pension and retirement plan by [the husband] at the time such payments are received." The husband asserts that the district court lacked jurisdiction to approve a term in the parties' agreement to divide pension benefits earned by him after the termination of the parties' marriage because Nebraska law provides that such property is not included in the marital estate. The husband further contends that even if jurisdiction is proper, the consent decree should be modified to limit the wife to one-fourth of the pension benefits earned by him during the parties' marriage.

The wife, on the other hand, claims that the plain language of the consent decree dictates that she is entitled to one-fourth of the pension benefits when they are ultimately determined and distributed to the husband, regardless of whether there has been an increase in the pension benefits because of postdivorce events. The wife contends that at the time of dissolution, the value of the pension plan was unascertainable, and thus, the parties agreed that she would receive one-fourth of the pension benefits when they were ultimately determined and distributed to the husband. Therefore, we must decide whether a trial court has the power to approve a settlement agreement entered into by parties to a divorce that divides pension benefits to be potentially earned by a spouse after the termination of the parties' marriage. If the court has the power to approve such a settlement agreement, we must further decide whether the consent decree in the instant case should be modified to limit the wife to that portion of the pension benefits earned by the husband during the parties' marriage.

JURISDICTION

Neb. Rev. Stat. § 42-366(8) (Reissue 1993) provides:

> If the parties fail to agree upon a property settlement which the court finds to be conscionable, the court shall order an equitable division of the marital estate. The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans . . . owned by either party . . . .

In interpreting § 42-366(8), we have held that when the trial court orders the equitable division of the marital estate, the marital estate includes only that portion of a pension which is earned during the marriage. See, *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997); *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996). Contributions to pensions before marriage or after dissolution are not assets of the marital estate. *Shockley v. Shockley, supra.*

While it is clear that the court may not order the division of pension benefits earned after the termination of the parties' marriage as such property is not a part of the marital estate, it was the parties, rather than the court, who in the instant case

agreed that the wife should receive a share in pension benefits to be potentially earned by the husband after the termination of the parties' marriage. The court, upon finding the agreement conscionable, approved the prior actions of the parties in agreeing to grant the wife a share in pension benefits to be potentially earned by the husband after the termination of the parties' marriage. See, § 42-366(2) ("the terms of the agreement . . . shall be binding upon the court unless it finds . . . that the agreement is unconscionable"); *Pascale v. Pascale*, 229 Neb. 49, 424 N.W.2d 890 (1988). Nevertheless, the husband claims that when the court determines that the agreement is conscionable and gives its approval to the agreement, the court is asserting its jurisdiction over the division of the marital estate. Thus, the husband argues that because a court does not have the statutory authority or jurisdiction to divide nonmarital pension benefits in a contested case, that part of the decree granting the wife a share in the pension benefits to be potentially earned by the husband after the termination of the parties' marriage is null and void. We disagree.

The Court of Appeals of Texas, in *Boyett v. Boyett*, 799 S.W.2d 360 (Tex. App. 1990), construed a similar statutory provision wherein the divorce decree, pursuant to the parties' property settlement agreement, awarded the wife one-half of the husband's retirement benefits to be received in the future. The husband requested that the decree be reformed to limit the wife to one-half of the retirement benefits valued as of the date of the parties' divorce. The husband argued that it was an impermissible divestment of his separate property to give his wife one-half of his monthly retirement payments that included nonmarital increases.

In rejecting the husband's argument, the Texas court stated that the divestiture of separate property is not allowed when the parties' marital estate is divided by the court; however, separate property can be divided by the parties to a divorce who are free to bargain away their separate property in settlement agreements. The court held that "with a binding settlement agreement before it, the [lower] court [properly] . . . divide[d] the estates of the parties by setting forth the property settlement agreement in the decree . . . finding the agreement to be just and fair . . . ."

Id. at 363-64. The court stated that "[c]ourt approval of such agreements does not operate as a divestiture of a party's separate property." *Id.* at 364.

We are likewise persuaded that in the instant case, while the district court did exercise its jurisdiction in determining if the agreement of the parties was conscionable, the district court did not exceed its statutory authority in approving the division of pension benefits to be potentially earned by the husband after the termination of the parties' marriage. Pursuant to the settlement agreement before it and in the proper exercise of its broad jurisdiction with respect to approval and enforcement of property settlement agreements in marriage dissolutions, § 42-366(2), the district court merely gave its approval to the parties' prior actions in agreeing to a term that granted the wife a share of potential postmarital portions of the husband's pension and incorporated the parties' agreement into the consent decree.

It was unnecessary for the district court to exercise its authority under § 42-366(8) to divide the marital estate of the parties, since the division was already accomplished by the parties themselves. Because parties to a divorce are free to bargain away their separate property, the court did not err in approving and incorporating into the decree a provision allowing the wife a share in the nonmarital portion of the husband's pension. Thus, we hold that a trial court, in the exercise of its broad jurisdiction with regard to approval and enforcement of property settlement agreements under § 42-366(2), has the power to *approve* and *incorporate* into a consent decree a conscionable term in the parties' agreement to divide pension benefits earned by a spouse after the termination of the marriage, even though the trial court has no statutory power to *order* such a division in a contested case.

Other jurisdictions have also concluded that parties to property settlement agreements may agree to terms which the trial court lacks the authority to order in a contested matter. For example, in *In re Marriage of Woodford*, 254 Mont. 501, 503, 839 P.2d 574, 575 (1992), the parties' separation agreement contained the following provision: " 'Upon the Husband taking full retirement, the monthly federal government retirement benefit paid to the Husband shall be split equally with the Wife for

the balance of her life.' " The lower court, in finding the agreement conscionable, gave its approval to the foregoing term and incorporated it into the divorce decree. Subsequently, the husband filed a motion for the entry of a QDRO, proposing that the wife was limited to 50 percent of the retirement benefits earned during the marriage because benefits earned after the termination of the marriage are not included in the marital estate.

The *Woodford* court held that the husband's proposed QDRO did not conform to the separation agreement. As support for its holding, the court found that

> [t]he plain and unambiguous language of the [property settlement agreement] provided that [the husband's] monthly federal government retirement pension "shall be split equally with the Wife for the balance of her life." It [did] not state on what date [the husband's] earnings or contributions to his retirement fund should not be taken into account for the division and distribution of retirement payments. . . .
>
> The parties were represented by counsel and understood the terms of the agreement. [Citation omitted.] [The wife] [was] entitled to the benefit of her bargain. [The husband's] proposed QDRO was nothing more than an attempt to modify the original separation agreement.

Id. at 505, 839 P.2d at 576-77.

Similarly, in *Wahl v. Wahl*, 945 P.2d 1229 (Alaska 1997), the issue was whether the lower court erred in interpreting the divorce decree to give the wife one-third of the husband's entire retirement annuity because that annuity included benefits the husband earned after the parties' divorce. Paragraph seven of the parties' property settlement agreement, as incorporated into the divorce decree, provided that the husband will pay the wife " '33-1/3 percent of his retirement with the Federal government.' " *Id.* at 1231. The *Wahl* court held that the lower court properly concluded that the divorce agreement entitled the wife to one-third of the husband's entire retirement annuity.

In so holding, the court gave its approval to the lower court's adoption of the wife's interpretation of the decree. Her interpretation was that the parties agreed that she would receive one-third of the entire annuity " 'based on the estimate that [the hus-

band] had completed 2/3 of his working career at the time of the divorce and [the wife] was entitled to 1/2 of whatever he earned at the date of divorce, or 1/3 of the balance at the end of his career.' " *Id.* The court found that the plain language of the agreement supported the wife's and the lower court's interpretation of the decree. Specifically, the court stated that "[t]he plain language of the contract refers to [the husband's] 'retirement,' without limiting that term to retirement benefits earned during the marriage. This suggests that [the wife] is entitled to one-third of [the husband's] entire retirement." *Id.*

In the instant case, the husband argues that because the consent decree does not indicate when the accrued pension benefits are to be valued, the consent decree should be interpreted to limit the wife to that portion of the pension benefits earned during the marriage. However, because the plain language of the parties' settlement agreement refers to the husband's pension plan, without limiting that term to pension benefits earned during the marriage, we conclude that the trial court was correct in finding that the parties intended that the wife would be entitled to the pension benefits that were earned by the husband both during the parties' marriage and after dissolution. Thus, the husband's first assignment of error is without merit.

MODIFICATION

The husband next claims that the district court abused its discretion in refusing to modify the consent decree to limit the wife to one-fourth of the pension benefits earned by him during the parties' marriage.

A consent decree is usually treated as an agreement between the parties and is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties. *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992). Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified as to such property provisions, in the absence of fraud or gross inequity. *Pascale v. Pascale*, 229 Neb. 49, 424 N.W.2d 890 (1988);

Colson v. Colson, 215 Neb. 452, 339 N.W.2d 280 (1983). In the present case, the husband asserts that gross inequity will result unless the consent decree is modified to limit the wife to one-fourth of the pension benefits existing as of the date of the termination of the parties' marriage, rather than to give the wife one-fourth of the pension benefits when ultimately obtained by the husband.

The only evidence in the record regarding the value of the husband's pension benefits is that, based on the husband's anticipated February 1998 retirement date, the present value of the pension benefits as of the date of the termination of the parties' marriage is $71,822.20. Noticeably absent from the record is any evidence regarding the value of the pension benefits at the time of the modification hearing, with such value also based on the husband's anticipated February 1998 retirement date. Therefore, because we cannot ascertain from the record whether and to what extent the amount the wife would receive under the decree is greater than the amount the wife would receive if the decree were modified in accordance with the husband's request, we cannot determine whether gross inequity will result to the husband if the decree is enforced as written to allow the wife one-fourth of any pension payments actually obtained by the husband.

Moreover, even though the husband claims that a gross inequity would occur absent a modification, the scant record before us would just as easily support a contrary conclusion. That is, at the time of the parties' divorce, the wife was entitled to an equitable share of the husband's pension benefits, since pension benefits earned during the marriage are part of the marital estate. However, for whatever reason, including the possibility that the present value of the husband's pension benefits could not be ascertained at the time of the divorce, the parties agreed that the wife would be entitled to receive one-fourth, and not one-half, of the pension benefits when actually obtained by the husband. The parties were represented by counsel at the time the settlement agreement was entered into and understood the terms of the agreement. The wife is entitled to the benefit of her bargain. We therefore conclude, after a de novo review of the record, that the husband failed to prove that a gross inequity

would result if the consent decree is not modified. The district court did not abuse its discretion in refusing to modify the original consent decree.

WIFE'S CROSS-APPEAL

In her cross-appeal, the wife asserts that the district court erred in failing to award her attorney fees as a sanction against the husband or his counsel for resisting her application for a QDRO. On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). The issue of whether a trial court has the jurisdiction to approve a term in an agreement between parties to a divorce dividing nonmarital pension benefits was one of first impression in this jurisdiction. We cannot say, based on the nature of this case, that the husband asserted a nonmeritorious defense in resisting the QDRO on the grounds that the trial court lacked jurisdiction to enter the consent decree, as well as the QDRO, authorizing the distribution of nonmarital pension benefits. Therefore, we determine that it was not an abuse of discretion for the district court to deny the wife's request for an award of attorney fees.

CONCLUSION

For the foregoing reasons, we affirm the order of the district court entering a QDRO entitling the wife to one-fourth of any pension payments received by the husband without offsetting postdivorce accumulations to the pension. We further conclude that the trial court did not abuse its discretion in (1) refusing to modify the original consent decree and (2) refusing to award the wife attorney fees.

AFFIRMED.

GERTRUDE PARKER, APPELLANT, V. LANCASTER COUNTY SCHOOL DISTRICT NO. 001, ALSO KNOWN AS LINCOLN PUBLIC SCHOOLS, ET AL., APPELLEES.

579 N.W.2d 526

Filed June 12, 1998. No. S-97-131.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot

assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.

2. **Negligence: Contracts: Contractors and Subcontractors: Damages: Liability.** Under the accepted work doctrine, a construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner.
3. **Negligence: Contractors and Subcontractors.** An exception to the accepted work doctrine exists in situations where the parties dealt with inherently dangerous elements or the defect at issue was latent and could not have been discovered by the owner or employer.
4. **Negligence.** Generally, stairs, steps, and unmarked curbs are not inherently dangerous.
5. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

William A. Wieland, of Healey Wieland Law Firm, for appellant.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, for appellees Architectural Partnership, P.C., and Architectural Partnership, Inc.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ., and BLUE, D.J., Retired.

CONNOLLY, J.

The district court for Lancaster County sustained a demurrer to the appellant's amended petition on the bases that the amended petition failed to state a claim and that the causes of action were misjoined. The appellant stood on the amended petition, and the district court dismissed the lawsuit. We affirm.

BACKGROUND

The appellant, Gertrude Parker, filed an amended petition alleging that while an invitee, she was injured on October 1, 1995, when she fell in the entryway to the dining room of the Hulda Roper School, an elementary school that is a part of Lancaster County School District No. 001, also known as Lincoln Public Schools (LPS). Parker filed suit against the appellees, The Architectural Partnership, P.C., and The

Architectural Partnership, Inc. (collectively partnership), and LPS, alleging that her fall was caused by an unmarked and unguarded ramp or floor riser in the entryway to the dining room. In her amended petition, Parker stated that LPS is a political subdivision and that an action under the Political Subdivisions Tort Claims Act had been filed against LPS. However, the amended petition then stated that "LPS will be served with summons upon the denial of [Parker's] claim or inaction on [Parker's] claim and upon further amendment to the allegations contained in this Amended Petition."

Parker's amended petition further alleged that the partnership planned, designed, and supervised the construction of the school prior to October 1, 1995, and that the partnership was negligent in failing to use reasonable care in (1) designing a reasonably safe entryway, (2) guarding or barricading the floor riser, and (3) marking or otherwise warning of the presence of the floor riser. Parker alleged that her injuries were caused by this negligence and were foreseeable.

The partnership demurred to the amended petition on the bases that it failed to state a claim and that the causes of action were misjoined. The district court sustained the demurrer on both grounds and allowed Parker 14 days to file a second amended petition. Parker stood on her amended petition, the action was subsequently dismissed with prejudice, and Parker now appeals.

ASSIGNMENTS OF ERROR

Parker assigns that the district court erred in sustaining the partnership's demurrer on the grounds that the amended petition failed to state a claim and that the causes of action were misjoined.

STANDARD OF REVIEW

In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997); *Larson v. Demuth*, 252 Neb. 668, 564 N.W.2d 606 (1997).

ANALYSIS

The partnership contends that in the absence of fraud or special circumstances, privity of contract between Parker and the partnership is required in order for Parker to state a cause of action. Parker contends that privity should not be required in order for her to state a cause of action against the partnership for negligence.

The general rule is that a construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner. *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993); *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984); *Stover v. Ed Miller & Sons, Inc.*, 194 Neb. 422, 231 N.W.2d 700 (1975). This principle has been referred to as the "accepted work doctrine." See *Pickens v. Tulsa Metropolitan Ministry*, 951 P.2d 1079 (Okla. 1997).

The accepted work doctrine and its exceptions have been specifically applied to suits brought by third parties against architects. See, *id.*; *Hiatt v. Brown*, 422 N.E.2d 736 (Ind. App. 1981); *Cox v. Ray M. Lee Co., Inc.*, 100 Ga. App. 333, 111 S.E.2d 246 (1959). In the instant case, Parker has not alleged any continuing control over the school by the partnership after October 1, 1995.

This court has recognized an exception to the accepted work doctrine in situations where the parties dealt with inherently dangerous elements or the defect at issue was latent and could not have been discovered by the owner or employer. *Delicious Foods Co. v. Millard Warehouse, supra*; *Erickson v. Monarch Indus., supra.*

This court has described "inherently dangerous" in terms of being a special or peculiar risk. Such a risk has been defined as "one that 'differ[s] from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community. . . .'" *Kime v. Hobbs*, 252 Neb. 407, 417, 562 N.W.2d 705, 713 (1997). It has been held that generally, stairs, steps, and unmarked curbs are not

inherently dangerous. See, *Like v. Pierce*, 326 Ark. 802, 934 S.W.2d 223 (1996) (steps and gravel not inherently dangerous and gravel contained no substance making walkway unreasonably dangerous); *Benaquista v. Municipal Housing Auth.*, 212 A.D.2d 860, 622 N.Y.S.2d 129 (1995) (stairs not considered to be inherently dangerous); *Gorin v. City of St. Augustine*, 595 So. 2d 1062 (Fla. App. 1992) (unmarked curb not inherently dangerous).

Applying the accepted work doctrine, Parker did not allege that any exceptions to that doctrine applied. Rather, Parker alleged only that the existence of the riser itself or a failure to barricade or mark it caused her injuries. Accordingly, the district court was correct in sustaining the partnership's demurrer.

An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Crider v. Bayard City Schools*, 250 Neb. 775, 553 N.W.2d 147 (1996); *Pilot Investment Group v. Hofarth*, 250 Neb. 475, 550 N.W.2d 27 (1996). Thus, having determined that the amended petition failed to state a cause of action, we need not consider the issue of misjoinder of actions.

AFFIRMED.

WRIGHT, J., not participating.

SMITH BARNEY, INC., AND ROBERT NIXON, APPELLEES, V. PAINTERS LOCAL UNION NO. 109 PENSION FUND ET AL., APPELLANTS.
579 N.W. 2d 518

Filed June 12, 1998. No. S-97-350.

1. **Actions: Brokers: Breach of Contract: Negligence.** A suit against a stockbroker, that is to say, a broker-dealer, under a contract involving interstate commerce, alleging negligence and breach of the agreement or fiduciary duty is governed by federal law, not by Nebraska's Constitution, statutes, or case law.
2. **Federal Acts: Insurance: Actions.** The federal Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (1994), preempts state law with respect to actions brought to clarify rights to benefits or to enforce rights arising under a plan coming within the purview of the act.
3. **Actions: Courts: Jurisdiction.** A suit may not be removed to federal court on the basis of a federal defense, including the defense of preemption.

4. **Federal Acts: Arbitration and Award: Contracts.** The federal Arbitration Act, 9 U.S.C. § 1 et seq. (1994), brings within its purview contracts involving interstate commerce.
5. ____: ____: ____. The federal Arbitration Act, 9 U.S.C. § 1 et seq. (1994), creates a body of federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the act and represents a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.
6. **Arbitration and Award: Contracts.** Arbitration is a matter of contract, and one cannot be required to submit to arbitration any dispute which one has not agreed so to submit.
7. **Constitutional Law: Waiver: Intent.** A party has a constitutional right to adjudication of a justiciable dispute, and the law will not find a waiver of that right absent direct and explicit evidence of actual intent of a party's agreement to do so.
8. **Federal Acts: Arbitration and Award: Courts: Contracts.** The federal Arbitration Act, 9 U.S.C. § 1 et seq. (1994), prohibits a court from compelling arbitration unless the court first satisfies itself that the issue is referable to arbitration under such an arbitration clause; whether an issue is to be decided by arbitration is a matter of the parties' contractual intent.
9. ____: ____: ____: ____. Under the federal Arbitration Act, 9 U.S.C. § 1 et seq. (1994), unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by a court, not an arbitrator.
10. **Federal Acts: Arbitration and Award: Contracts: Presumptions: Courts: Time: Waiver.** Under the federal Arbitration Act, 9 U.S.C. § 1 et seq. (1994), there is a presumption that the courts decide arbitrability questions involving a time bar, unless the parties have clearly and unmistakably decided otherwise; however, outside time bar questions, the opposite presumption applies, and any doubt concerning the scope of arbitrable issues is to be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.
11. **Securities Regulation: Arbitration and Award: Time.** Under §§ 1, 15, and 35 of the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., whether a claim or controversy was timely submitted is to be determined by the arbitrator.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed, vacated, and set aside, and cause remanded for dismissal.

Gail E. Boliver, of Boliver Law Firm, for appellants.

Kathleen M. Quinn, of Kutak Rock, and David R. Wilson, of Knudsen, Berkheimer, Richardson & Endacott, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and MCCORMACK, JJ., and HASTINGS, C.J., Retired, and BLUE, D.J., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

In this declaratory judgment action, the district court granted summary judgment to the plaintiffs-appellees, Smith Barney, Inc., and Robert Nixon, a former employee of Smith Barney's predecessor, and permanently enjoined the defendants-appellants, Painters Local Union No. 109 Pension Fund, and James King, Larry Curtice, and Robert Briggs, Jr., in their capacities as trustees for the fund, from arbitrating whether a dispute arising under the agreement the fund had entered into with Smith Barney's predecessor through Nixon is time barred. Without opposition, the fund and the trustees successfully moved to bypass the Nebraska Court of Appeals, and assert, in summary, that the district court erred in (1) exercising jurisdiction and (2) ruling the dispute to be nonarbitrable. Although the first assignment of error is without basis, the second is meritorious. We therefore reverse, vacate, and set aside the decree, and remand the cause for dismissal.

II. SCOPE OF REVIEW

As is determined hereinafter in part IV(2), the agreement in question involves interstate commerce. A suit against a stockbroker, that is to say, a broker-dealer, alleging negligence and breach of the agreement or fiduciary duty under such an agreement is governed by federal law, not by Nebraska's Constitution, statutes, or case law. See *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993). Moreover, the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (1994), has preempted state law with respect to actions brought to clarify rights to benefits or to enforce rights arising under a plan coming within the purview of the act. *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996). We therefore look to federal law for the scope of our review and are bound by the rule that under such law, the determination of arbitrability turns on contract interpretation, which is a question of law and therefore subject to plenary or de novo review by an appellate court. *PaineWebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996); *State of N.Y. v. Oneida Indian Nation of New York*, 90 F.3d 58 (2d Cir. 1996).

III. FACTS

In 1986, the fund engaged Shearson Lehman Brothers Inc. as its investment adviser. Shearson later became part of Smith Barney; we therefore hereafter refer to the subject transactions as if they at all times involved Smith Barney. Smith Barney had the fund sign a standard agreement which contained an arbitration clause requiring the fund to take any disagreements it might have with Smith Barney to arbitration.

The clause reads, in relevant part: "[A]ny controversy arising out of or relating to my accounts . . . shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. . . ." All parties agree that the association's Code of Arbitration Procedure is adopted by reference into the client agreement by the arbitration clause.

Section 1 of the code declares that the code is prescribed and adopted by the association "for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association . . . ." Section 15 provides in part: "No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy." Section 35 of the arbitration code reads, in relevant part: "The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties."

The securities in question were purchased between January 1987 and February 1989. On December 15, 1995, the fund filed an arbitration claim with the association against Smith Barney and Nixon for breach of fiduciary duty, fraudulent misrepresentation, and failure to supervise. On February 20, 1996, Smith Barney and Nixon filed this action.

IV. ANALYSIS

1. Exercise of Jurisdiction

While the underlying dispute in this action implicates the federal retirement act, the suit seeks declaratory and injunctive

relief under the statutes of this state. Therefore, this action brings the federal retirement act into play only as part of the fund's defense. Since a suit may not be removed to federal court on the basis of a federal defense, including the defense of preemption, *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983), the district court possessed and properly exercised subject matter jurisdiction. See, also, *Smith Barney, Inc. v. Painters Local Union No. 109*, 976 F. Supp. 1293 (D. Neb. 1996) (affirms magistrate's remand of this case to state court).

2. ARBITRABILITY

(a) General Nature of Agreement to Arbitrate

The federal Arbitration Act, 9 U.S.C. § 1 et seq. (1994), brings within its purview contracts involving interstate commerce. §§ 1 and 2. See, also, *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984); *Lippus v. Dahlgren Mfg. Co.*, 644 F. Supp. 1473 (E.D.N.Y. 1986); *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996). Smith Barney is a Delaware corporation having its principal place of business in the State of New York and conducts a nationwide business, as did its predecessor. The fund is located and managed in Nebraska, and the trustees are Nebraska residents. As the parties' agreement in the instant case empowered Smith Barney to advise the fund in investment matters, the transactions in question clearly involved interstate commerce. Accordingly, the act governs all questions arising under the client agreement before us. See *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993).

The arbitration act creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [a]ct" and represents "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

The U.S. Supreme Court has held that arbitration " 'is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' "

AT&T Technologies v. Communications Workers, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). A party has a constitutional right to adjudication of a justiciable dispute, and the law will not find a waiver of that right absent " 'direct and explicit evidence of actual intent' " of a party's agreement to do so. *McCarthy v. Azure*, 22 F.3d 351, 358 n.9 (1st Cir. 1994). The arbitration act prohibits a court from compelling arbitration unless the court first satisfies itself that the issue is referable to arbitration under such an arbitration clause. 9 U.S.C. § 3. Thus, whether an issue is to be decided by arbitration is a matter of the parties' contractual intent. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995). In *Mastrobuono*, the U.S. Supreme Court held that the arbitration act not only declared a national policy favoring arbitration, but actually withdrew the power from the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.

Therefore, the threshold question in the instant case is which body is empowered to determine the arbitrability of this case, a judicial tribunal or an arbitrator. As noted in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995):

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, [citations omitted], so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate.

(Emphasis in original.)

When deciding whether the parties agreed to arbitrate a certain matter, including arbitrability, courts generally are to apply ordinary state law principles governing the formation of contracts. *First Options of Chicago, Inc., supra.*

As noted in *First Options of Chicago, Inc.*, 514 U.S. at 945, the question of who should decide arbitrability is "rather

arcane" and may commonly be overlooked during negotiations. See, also, *AT&T Technologies, supra.* Therefore, courts should hesitate to transform silence or ambiguity into an agreement to arbitrate arbitrability. The basic objective in this area is to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties. *First Options of Chicago, Inc., supra.* Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by a court, not an arbitrator. *AT&T Technologies, supra.*

In *AT&T Technologies, supra*, and *First Options of Chicago, Inc., supra*, the U.S. Supreme Court created a presumption that the courts would decide arbitrability questions involving a time bar, unless the parties had clearly and unmistakably decided otherwise. However, outside of time-bar questions, the opposite presumption applies, and any doubt concerning the scope of arbitrable issues is to be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. *Moses H. Cone Hospital, supra.*

(b) Intent as to Time Bar

The pivotal issue therefore becomes whether the arbitration code clearly and unmistakably assigns to arbitrators the power to determine what "occurrence or event" gave rise to the claim.

Five federal circuit courts of appeal have ruled that a court must decide the applicability of the § 15 time bar: *Smith Barney, Inc. v. Sarver*, 108 F.3d 92 (6th Cir. 1997); *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith*, 78 F.3d 474 (10th Cir. 1996); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381 (11th Cir. 1995); *Painewebber Inc. v. Hofmann*, 984 F.2d 1372 (3d Cir. 1993); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992).

Based upon *PaineWebber Inc. v. Allen*, 888 F. Supp. 53 (E.D. Va. 1993), *aff'd mem.* 45 F.3d 427 (4th Cir. 1995), Smith Barney would also place the Fourth Circuit in this camp. Therein, a district court within that circuit held that the 6-year time bar was a substantive eligibility question for the courts to decide and that it ran from the date of purchase of the investment. However,

another district court within the circuit held in *Humphrey v. Prudential Ins. Co. of America*, No. Civ.A.2:92CV178, 1993 WL 275213 (E.D. Va. Jan. 8, 1993), *appeal dismissed, Humphrey v. Prudential Securities Inc.*, 4 F.3d 313 (4th Cir.), that timeliness under the 6-year time bar was a procedural question falling under the purview of the contract and must be decided by the arbitrators. As the Fourth Circuit has not yet issued a fully reasoned opinion on the question, the issue is unresolved in that circuit.

Five other federal circuit courts have held that the arbitrator should decide the time-bar question: *PaineWebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750 (5th Cir. 1995); *FSC Securities Corp. v. Freel*, 14 F.3d 1310 (8th Cir. 1994); *O'Neel v. National Ass'n of Securities Dealers*, 667 F.2d 804 (9th Cir. 1982).

In the first of this latter series of cases, the Ninth Circuit in *O'Neel, supra*, found a clear expression of intent in § 35 that the issue of timeliness be submitted to arbitration. In the next case in point of time, the Eighth Circuit in *Freel, supra*, also focused on the language of § 35 empowering the arbitrators " 'to interpret and determine the applicability of all provisions of this Code . . . .' " *Freel* at 1312. The *Freel* court viewed this as a " 'clear and unmistakable expression' " of an intent to commit the interpretation of all provisions under the arbitration code, including § 15 time-bar issues, to arbitration. *Id.* The *Freel* court also observed that if the parties wanted to limit the scope of arbitration more than is provided in § 35, they could have easily contracted around its broad scope. The *Freel* holding has been followed by a number of state courts, including *Mid-State Securities v. Edwards*, 309 N.J. Super. 73, 706 A.2d 773 (1998); *Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75 (Iowa 1997); *Matter of Noel R. Shahan Trust*, 188 Ariz. 74, 932 P.2d 1345 (Ariz. App. 1996); *Nettleton v. Edward D. Jones & Co.*, 904 S.W.2d 409 (Mo. App. 1995); and *Gaines v. Financial Planning Consultants*, 857 S.W.2d 430 (Mo. App. 1993).

Matter of Noel R. Shahan Trust concluded:

> Because we find nothing in the Code that removes § 15 from the scope of § 35, we agree with the following statement in *FSC Securities Corp. v. Freel*, 14 F.3d 1310, 1313

> (8th Cir. 1994): "In no uncertain terms, section 35 commits interpretation of all provisions of the NASD Code to the arbitrators. . . . [W]e see no reason not to apply section 35 to the arbitrators' decision regarding the application of section 15."

Id. at 77, 932 P.2d at 1348.

In *Boone, supra*, the Fifth Circuit characterized time bars as part of the procedural requirements to arbitration and, as such, to be decided by arbitration. In accordance with the teachings of *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995), the First Circuit in *Elahi, supra*, employed a two-step process to determine whether parties intended time bars to be settled by an arbitrator or the courts. It asked first whether the parties entered into a valid arbitration agreement and whether the arbitration agreement covered the subject matter of the underlying dispute. The *Elahi* court concluded that

> where the parties have clearly agreed to arbitrate the subject of the underlying dispute between them, as the parties [had done], it is unlikely that they intended other issues related to the dispute, such as the timeliness of the submission of the claim, to affect the "arbitrability" of the dispute.

Elahi at 600.

The contract in *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996), did not incorporate the arbitration code. However, the Second Circuit held that the contract clause assigning to arbitration "'*[a]ny and all controversies* . . . concerning any account'" was clear evidence of the parties' intent to have the arbitrator determine arbitrability. (Emphasis in original.) *Id.* at 1199. It determined that the broad "any and all controversies" language was "inclusive, categorical, unconditional and unlimited" and that "[t]he words 'any and all' are elastic enough to encompass disputes over whether a claim is timely and whether a claim is within the scope of arbitration." *Id.* It also noted that had the contract incorporated the arbitration code, § 35 would have committed all issues, including arbitrability and timeliness, to arbitration. It pointed out in addition that as PaineWebber had drafted the agreement, any ambiguities

should be construed against it. The Second Circuit observed as well that its decision did not harm the party seeking the protection of the § 15 time bar. That party's appropriate remedy would be to defend the arbitration action on timeliness grounds under § 15, not attempt to get arbitration enjoined.

We find the cases holding time-bar issues to be arbitrable the more persuasive. For example, in the earliest decision holding otherwise, *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992), the court based its conclusion that courts must decide the time-bar issue upon three bases: First, it read the words "'eligible for submission to arbitration'" (emphasis omitted) in § 15 as meaning cognizable or within the jurisdiction of the arbitrator and concluded that claims over 6 years old were not substantively eligible for submission to the arbitrator. 957 F.2d at 513. Second, it read a 1988 letter from an association staff attorney, stating that the association "'"will not process a claim that falls wholly outside the six year period,"'" as evidence that the association itself considered § 15 to be a jurisdictional bar. 957 F.2d at 512. Last, it concluded that § 35 of the arbitration code was not a clear and unmistakable expression of the parties' intent to give arbitrators the power to decide time-bar issues.

The problem with the *Sorrells* court's interpretation of the "eligible for submission" language is that the interpretation results in the court's predetermining the outcome of the controversy in order to decide what the forum should be. The *Sorrells* decision concluded that the "occurrence" in question was the security purchase rather than any later fraud or deception. By defining the occurrence, the court thereby arrived at the conclusion that the arbitrator had no jurisdiction when the crucial legal question which was to be decided by the court or arbitrator was: What constituted the occurrence, the purchase or subsequent actions? The *Sorrells* court assumed, without analysis, that the "occurrence or event" was the stock purchase. However, even if that were correct, if all controversies under the contract are directed to arbitration, then the occurrence controversy should have gone to arbitration for determination.

Leaving aside the question of how much weight should be given the letter from an association staff attorney (the letter had

been entered into evidence in an earlier Seventh Circuit case, *PaineWebber Inc. v. Farnam*, 870 F.2d 1286 (7th Cir. 1989)), the statement that the association "will not process a claim that falls wholly outside the six year period" is not helpful. After all, the fund's argument is that its claim falls within the 6-year period because the acts of fraud and violations of fiduciary duty that were allegedly committed occurred after the purchases and within the 6-year period prior to the bringing of the claim. Barring claims that fall wholly outside the 6-year period would not bar the fund's claims if an arbitrator were to agree with the fund's definition of when the critical events occurred.

The Seventh Circuit reiterated its *Sorrells* decision this year in *Miller v. Flume*, No. 97-1127, 1998 WL 128443 (7th Cir. Mar. 24, 1998), reasoning that both interpretations and determinations about applicability of the arbitration code are steps that take place after the threshold determination of arbitrability has occurred. It repeated its *Sorrells* conclusion that § 35 is not the kind of clear and unmistakable language needed to show parties intended arbitrators to determine arbitrability. Similarly, the courts in *Smith Barney, Inc. v. Sarver*, 108 F.3d 92 (6th Cir. 1997), and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381 (11th Cir. 1995), concluded that § 35 of the code did not establish a clear and unmistakable intent that the timeliness of an arbitration clause should be determined by the arbitrators rather than by the courts.

In *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 513 (3d Cir. 1990), the Third Circuit relied, in part, upon an analysis of the "eligible for submission" sentence contained in rule 603 of the New York Stock Exchange Department of Arbitration, which is almost identical to § 15 of the arbitration code:

> "Eligible" is defined as "fitted or qualified to be chosen or used" or "worthy to be chosen or selected." *Webster's Third New International Dictionary* 736 (1966). "Submission" is defined as the act of "commit[ting something] for consideration, study, or decision." Id. at 2277. Interpolating these definitions into the text of Rule 603, the relevant portion of the rule would state that, after six years, a dispute "shall [not] be worthy to be chosen or selected for [the] consideration, study, or decision [of] arbitration."

Therefore, the Third Circuit concluded that "this expanded reading of Rule 603 unambiguously supports [the] conclusion that the parties intended to bar from arbitration disputes raised more than six years after the events giving rise to them." *Hartmann*, 921 F.2d at 513.

The Third Circuit went further in *Painewebber Inc. v. Hofmann*, 984 F.2d 1372, 1379 (3d Cir. 1993), noting that "§ 15 can reasonably be read in only one way—as a substantive limit on the claims that the parties have contracted to submit to arbitration." However, *Hofmann* did not stop with the assumption made by some courts that the occurrences in question were the purchases. It acknowledged that there are a number of events which may trigger the commencement of the 6-year time-bar period and laid out a method for determining timeliness:

> [T]here will inevitably be claims that can fairly be characterized as either independent causes of action or as tolling/discovery arguments. In view of the general presumption of arbitrability, *see id.*, the court should, as a benchmark, generally accept a party's statement as to what constitutes a cause of action and permit the arbitration of that claim *as long as* the asserted cause of action is not *clearly* a mere tolling or discovery argument. However, when the stated cause of action is patently nothing more than an attempt to toll the six year period, the court must enjoin the arbitration of that claim.

(Emphasis in original.) *Id.* at 1381.

While the *Hofmann* court noted that some of the claims in that case obviously had occurred prior to the time bar, it remanded other claims to the district court for a determination of whether they were arbitrable, i.e., whether the events occurred after the time bar and warned the trial court " 'not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous,' " the merits of the claims were to be left to the arbitrator. *Id.* at 1381, quoting *AT&T Technologies*, 475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). Other courts which have, like *Hofmann*, remanded to have the trial court determine when the claims "arose" include *Cogswell v. Merrill Lynch,*

Pierce, Fenner & Smith, Inc., 78 F.3d 474 (10th Cir. 1996), and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, supra.*

In *Cogswell, supra*, the 10th Circuit criticized the Eighth Circuit's decision in *FSC Securities Corp. v. Freel*, 14 F.3d 1310 (8th Cir. 1994), focusing on the fact that § 35 says nothing specific about whether the arbitrator or the court should decide whether a claim is arbitrable under § 15. That analysis is not particularly persuasive. Section 35 provided that the arbitrator " 'shall be empowered to interpret and determine the applicability of all provisions under this Code.' " *Cogswell* at 480. The plain reading of that language is that the arbitrator is empowered to interpret all of the provisions of the code, including the § 15 provision concerning what claims are "eligible" for arbitration.

The *Cogswell* court also reasoned that under statutory interpretation principles, specific provisions take precedence over general provisions, and that § 15 is a specific provision. However, the Tenth Circuit does not explain how §§ 15 and 35 conflict. Section 15 lays out the time bar for claims, but does not indicate whether a court or an arbitrator should interpret and apply this time bar. Section 35 does not specifically mention § 15, but declares that all provisions of the code will be determined by an arbitrator. There is no conflict; the two sections address different issues.

3. Summary

In the absence of a controlling U.S. Supreme Court decision on the matter, we are persuaded that the entire client agreement, viewed as a whole, including the incorporation of the arbitration code, means considering § 35 of the code in conjunction with §§ 1 and 15 thereof and that time-bar issues are therefore arbitrable.

V. JUDGMENT

Accordingly, as first noted in part I, the decree of the district court is reversed, vacated, and set aside, and the cause is remanded for dismissal.

REVERSED, VACATED, AND SET ASIDE, AND CAUSE REMANDED FOR DISMISSAL.

GERRARD and STEPHAN, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, v. JEREMY G. BURNETT, APPELLANT.

579 N.W.2d 513

Filed June 12, 1998. No. S-97-748.

1. **Statutes: Appeal and Error.** Statutory interpretation presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Constitutional Law: Postconviction.** The Nebraska Postconviction Act applies only where a prisoner has sustained such a denial or infringement of constitutional rights that the judgment is void or voidable.
3. **Postconviction: Proof.** A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
4. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
5. **Criminal Law: Statutes: Legislature.** In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so.
6. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language, or to read anything plain, direct, and unambiguous out of a statute.
7. **Postconviction: Sentences.** Matters relating to sentences imposed within statutory limits are not a basis for postconviction relief.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Custer County, RONALD D. OLBERDING, Judge. Judgment of Court of Appeals affirmed.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

Jeremy G. Burnett entered a plea of no contest to an amended information charging him with manslaughter under Neb. Rev.

Stat. § 28-305 (Reissue 1995) for killing Matthew Armour while operating a motor vehicle in an unlawful manner. Burnett's conviction and sentence of 10 to 15 years' imprisonment were summarily affirmed by the Nebraska Court of Appeals. Burnett then filed this action for postconviction relief in the district court for Custer County, asserting that he was denied effective assistance of counsel during his sentencing and direct appeal and that his sentence exceeded the statutory limits. The district court denied Burnett's motion for postconviction relief, and the Court of Appeals affirmed. The matter is now before us on Burnett's petition for further review. We affirm.

FACTS

At approximately 3 a.m. on July 2, 1995, Armour was walking west on the shoulder of the eastbound lane of Highway 2 between Berwyn and Broken Bow, Nebraska. Burnett was driving west on Highway 2 when he crossed the centerline and struck Armour, resulting in Armour's death. Burnett was charged with manslaughter under § 28-305(1). In an amended information, the State alleged that Burnett killed Armour unintentionally and without malice while in the commission of an unlawful act, to wit, failure to drive on the right half of a roadway, in violation of Neb. Rev. Stat. § 60-6,131 (Reissue 1993), or careless driving, in violation of Neb. Rev. Stat. § 60-6,212 (Reissue 1993). Burnett entered a plea of no contest. There was no plea agreement with regard to Burnett's sentence.

During the hearing in which Burnett entered his plea, the judge informed Burnett that manslaughter is a Class III felony, carrying a maximum sentence of 20 years' imprisonment, a $25,000 fine, or both, and a minimum sentence of 1 year's imprisonment. At a subsequent hearing, Burnett was sentenced to 10 to 15 years' imprisonment and was charged the costs of the action.

Burnett filed a direct appeal, which was summarily affirmed by the Court of Appeals, and we denied Burnett's petition for further review. Subsequently, Burnett filed a motion for postconviction relief, asserting that his sentence exceeded the statutory limits for convictions involving the unintentional killing of another while operating a motor vehicle. Burnett also alleged

that he was denied effective assistance of counsel because his appointed counsel failed to adequately research issues related to his sentencing, argue those issues to the court, and preserve error for appeal. The district court denied Burnett's motion for postconviction relief, and the Court of Appeals summarily affirmed. We granted Burnett's petition for further review.

ASSIGNMENTS OF ERROR

Restated, Burnett asserts that the district court erred in (1) failing to find that Burnett's sentence exceeded the statutory limits for convictions involving the unintentional killing of another while operating a motor vehicle, (2) failing to find that Burnett was denied effective assistance of counsel, (3) failing to conduct an evidentiary hearing on the allegations made in Burnett's motion for postconviction relief, and (4) failing to find that Burnett's sentence was an abuse of the district court's discretion and, therefore, excessive.

STANDARD OF REVIEW

Statutory interpretation presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *PLPSO v. Papillion/LaVista School Dist.*, 252 Neb. 308, 562 N.W.2d 335 (1997); *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

ANALYSIS

The Nebraska Postconviction Act applies only where a prisoner has sustained such a denial or infringement of constitutional rights that the judgment is void or voidable. *State v. Hall*, 249 Neb. 376, 543 N.W.2d 462 (1996); *State v. Sims*, 244 Neb. 771, 509 N.W.2d 6 (1993). A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Hall, supra.*

Initially, the State argues that Burnett's motion for postconviction relief should be denied because the sentencing issues raised were previously litigated and rejected in Burnett's direct appeal or, in the alternative, were not raised in his direct appeal and were therefore waived. It is true that a motion for postcon-

viction relief may not be used to obtain further review of issues already litigated or to raise issues that could have been raised on direct appeal. *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997); *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996); *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995). However, the State's contentions lack merit, because Burnett's postconviction action raises for the first time the effectiveness of Burnett's counsel, an issue that could not have been raised on direct appeal because Burnett argues that his original attorney was ineffective during his direct appeal as well as at sentencing. The very nature of Burnett's ineffectiveness claim requires this court to inquire into the sentencing issues raised by Burnett, because his attorney's effectiveness depends upon the merits of those issues. See, *State v. Ohler*, 219 Neb. 840, 366 N.W.2d 771 (1985); *State v. Williams*, 218 Neb. 618, 358 N.W.2d 195 (1984) (reaching merits of claims underlying claim of ineffective assistance of counsel even though not raised on first postconviction motion, because defendant claimed counsel ineffective during first postconviction action).

To sustain a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998); *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). Burnett asserts that his attorney's performance was deficient in that he failed to research and raise issues that would have resulted in a substantially shorter sentence. In this regard, Burnett relies on the holdings in *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986), and *State v. Retzlaff*, 223 Neb. 811, 394 N.W.2d 295 (1986). In *Roth*, the defendant was convicted of manslaughter in violation of § 28-305, a Class III felony, for killing another while operating a motor vehicle. Roth argued that his conviction should be reversed because the adoption of Nebraska's motor vehicle homicide statute, see Neb. Rev. Stat. § 28-306 (Reissue 1995), impliedly repealed § 28-305 with regard to deaths caused by motor vehicles. We rejected this

argument, noting that it is not uncommon for a single act to constitute the violation of multiple criminal statutes. We held that in these situations, a prosecutor may choose the statute under which he wishes to seek a conviction.

However, we held that Roth's sentence of 3 to 7 years' imprisonment for manslaughter constituted plain error. At the time of Roth's conviction, Neb. Rev. Stat. § 39-669.20 (Reissue 1984) provided:

> Any person, convicted of manslaughter or mayhem resulting from his operation of a motor vehicle, or of motor vehicle homicide, shall be (1) fined in a sum not exceeding five hundred dollars, (2) imprisoned in the county jail for not to exceed six months, or (3) both so fined and imprisoned.

We noted that this statute provided a specific penalty for the crime at issue, while § 28-305 was a general statute applicable to all manslaughters whether committed while operating a motor vehicle or otherwise. Applying the principle that the general law yields to the specific where general and specific provisions of a statute conflict, *Bass v. County of Saline*, 171 Neb. 538, 106 N.W.2d 860 (1960), we held that Roth's sentence must comply with § 39-669.20 despite the fact that he was convicted of manslaughter, a Class III felony carrying a maximum penalty of 20 years' imprisonment and a $25,000 fine.

Burnett contends that *Roth* controls his case. He claims that although he pled no contest to manslaughter under § 28-305, a Class III felony under these facts, his attorney should have argued for a sentence in accordance with the lesser penalties prescribed for motor vehicle homicide found in § 28-306. We disagree. Burnett's argument ignores the fact that § 39-669.20 was repealed by the Legislature prior to his conviction. See 1986 Neb. Laws, L.B. 153. Burnett argues that § 39-669.20 was not in fact repealed, but that it was renumbered and is now a part of the motor vehicle homicide provisions of § 28-306. This contention is erroneous, because the specific penalty found in § 39-669.20 for manslaughter resulting from the operation of a motor vehicle is not contained in § 28-306. Rather, § 28-306 defines the crime of motor vehicle homicide and outlines the penalties for that crime without reference to the crime of

manslaughter. The Legislature's act of repealing § 39-669.20 eliminated the statutory conflict that necessitated deference to the specific penalty of § 39-669.20 in *Roth*. Without such a conflict, the district court was required to sentence Burnett in accordance with § 28-305, the statute under which he was charged and convicted.

Burnett's reliance on *State v. Retzlaff*, 223 Neb. 811, 394 N.W.2d 295 (1986), is likewise misplaced. That case involved a prosecution for motor vehicle homicide under § 28-306 which occurred prior to the legislative repeal of § 39-669.20. We held that because §§ 28-306 and 39-669.20 specified conflicting penalties for the same offense, § 28-306 implicitly repealed the portion of § 39-669.20 that provided a penalty for motor vehicle homicide. *Retzlaff* is inapplicable to manslaughter under § 28-305(1), the offense of which Burnett was convicted.

In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so. *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). At the time of Burnett's offense, manslaughter and motor vehicle homicide were separate offenses defined by separate statutes, each with its own penalty provision. Unlike the circumstances in *Roth*, here there was no statutory provision prescribing a lesser penalty for manslaughter where the predicate unlawful act involved the operation of a motor vehicle. While it is true that under the present statutory scheme the same conduct could result in substantially different criminal penalties depending upon whether one is charged and convicted of manslaughter or motor vehicle homicide, such potential disparity exists by virtue of the unambiguous language of the statutes which define the two offenses. It is not within the province of a court to read a meaning into a statute that is not warranted by the language, or to read anything plain, direct, and unambiguous out of a statute. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996); *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995).

The representation provided by Burnett's original counsel cannot be deemed ineffective by virtue of his failure to argue for a sentence within the range prescribed by § 28-306, because such an argument would have been contrary to law. Our decision in *Roth* made it clear that a defendant could be charged and

convicted of manslaughter despite the fact that his criminal act might also qualify as motor vehicle homicide. There would have been no legal basis for a contention that Burnett should be sentenced in accordance with the penalties prescribed for an offense other than that for which he was charged and convicted. As a result, Burnett failed to demonstrate that his counsel's performance was deficient, and the district court did not err in denying Burnett's motion for postconviction relief.

Burnett claims that even if his sentence is within the statutory range, it should be vacated because the district court abused its discretion. We have consistently held that matters relating to sentences imposed within statutory limits are not a basis for postconviction relief. *State v. Evans*, 218 Neb. 849, 359 N.W.2d 790 (1984); *State v. Webb*, 218 Neb. 238, 352 N.W.2d 624 (1984). See, also, *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992). Consequently, this issue is not properly before this court.

CONCLUSION

Burnett is not entitled to postconviction relief because he did not meet his burden of proving a violation of his constitutional rights. The judgment of the district court is therefore affirmed.

AFFIRMED.

PENNY M. HARTWIG, APPELLANT, V.
OREGON TRAIL EYE CLINIC ET AL., APPELLEES.
580 N.W.2d 86

Filed June 19, 1998. No. S-95-1025.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
3. **Negligence: Damages: Mental Distress.** Where a physical injury has been sustained, a plaintiff may recover damages for mental suffering and anxiety reasonably resulting from such physical injury.
4. **Actions: Negligence: Proof.** In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.

5. **Negligence: Proximate Cause.** Foreseeability that affects proximate cause relates to the question whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's alleged breach of duty.
6. **Negligence: Damages: Mental Distress: Proof.** A plaintiff may adduce proof and potentially recover damages for the mental anguish of reasonably fearing AIDS resulting from a physical injury when the plaintiff may have been exposed, via a medically sufficient channel of transmission, to the tissue, blood, or body fluid of another in circumstances where the identity of the patient upon whom the contaminated needle or instrument was used is unknown, and when it is impossible or impracticable to ascertain whether any such tissue, blood, or body fluid may be HIV positive.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded for a new trial on the issue of damages.

Michael W. Meister, of Meister & Segrist, for appellant.

John K. Sorensen, of Sorensen & Zimmerman, P.C., for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

INTRODUCTION

Appellant, Penny M. Hartwig, was stuck by two used hypodermic needles that were negligently placed in an ordinary trash receptacle in the medical clinic she was cleaning. Hartwig brought a negligence action against appellees, Oregon Trail Eye Clinic, Dr. Judson C. Martin, and Dr. Thomas J. Roussel (Clinic), seeking to recover damages for, inter alia, the anxiety and mental suffering that resulted from her fear of testing positive for human immunodeficiency virus (HIV) and contracting acquired immunodeficiency syndrome (AIDS) as a result of the Clinic's negligence. The trial court sustained the Clinic's pretrial motion in limine and prohibited Hartwig from presenting evidence to the jury regarding her mental anguish because the court determined that in order to recover damages for mental anguish, Hartwig was required to prove actual exposure to HIV, not merely potential exposure. After the jury returned a $3,000 verdict for Hartwig's physical pain and suffering, Hartwig filed

a motion for new trial. Upon denial of the motion for new trial, Hartwig appealed.

The question presented by this case is whether a plaintiff who sustains a minimal physical injury, such as a needle stick, when such physical injury was caused by the defendant's negligence, may recover damages for anxiety and mental suffering occasioned by the plaintiff's fear of testing HIV positive and contracting AIDS, absent a showing of actual exposure to blood or body fluid infected with HIV. For the reasons that follow, we answer this question in the affirmative, and we accordingly reverse the order of the trial court denying Hartwig's motion for new trial and remand Hartwig's causes of action for a new trial limited solely to the issue of damages.

FACTUAL BACKGROUND

Hartwig's employer, Merry Maids, entered into an agreement with the Clinic to provide cleaning services for its medical facility. Hartwig was assigned to clean the Clinic on the first night of the contract. In order to collect the Clinic's nonmedical waste, Hartwig carried a large trash bag from room to room, collected the small trash bags from the individual waste receptacles, and placed the small trash bags into the large trash bag. After collecting a few small trash bags, Hartwig picked up the large collector trash bag, and in so doing, it inadvertently swung against her thigh. Hartwig instantly felt a stinging sensation and, looking down, observed a needle protruding from the area of the trash bag that contacted her leg.

Hartwig told a Clinic employee that she had been stuck with a needle disposed of in the nonmedical waste. The Clinic employee treated Hartwig's injury by swabbing the injured area with alcohol and placing a Band-Aid over the puncture. Hartwig said that the Clinic employee then asked her to retrieve the needle from the trash bag. As Hartwig reached into the trash bag to recover the needle, she was stuck by another needle. The Clinic employee treated this injury in the same manner as the other. Hartwig testified that both needle sticks drew a small amount of blood. Hartwig finished cleaning the Clinic that evening without further incident.

Two days later, Hartwig received a telephone call from a registered nurse employed by Regional West Medical Center in the

area of epidemiology and infectious disease control. The nurse had been informed by the Clinic of Hartwig's accident and contacted Hartwig so that they could discuss the risks associated with a needle stick. The nurse told Hartwig that she was at risk for HIV and hepatitis B infection because of the needle sticks. The nurse provided Hartwig with pamphlets and other information concerning additional risks associated with a needle stick, such as the fact that sexual intercourse with her husband would place him at risk of HIV infection and that her children as well as her husband were at risk of infection through exposure to her body fluids.

In order to treat her possible exposure to infectious disease, Hartwig received four different injections over a period of time, vaccinating her against hepatitis and tetanus. Hartwig was also told that she would have to submit to four blood tests to determine whether she had been infected with HIV. The first test was conducted immediately to determine whether Hartwig was HIV positive prior to sustaining her injury at the Clinic. The subsequent tests were to be performed 3 months, 6 months, and 1 year from the time of the accident. A negative test after 3 months indicated a 95-percent probability that Hartwig was not infected with HIV, and a negative test after 6 months indicated a 99½-percent probability that Hartwig was not infected. Ultimately, Hartwig did not test positive for HIV on any occasion.

The Clinic was unable to positively ascertain the identity of the patient or patients upon whom the needles were used. The record is not clear as to why, but it is uncontroverted that the needles which caused Hartwig's injuries were never tested to determine whether they were contaminated with HIV-infected tissue, blood, or body fluid.

Hartwig filed suit against the Clinic to recover damages for her physical injuries consequent to the needle sticks as well as the anxiety and mental suffering resulting from her fear of HIV infection. Assigned to Hartwig was her husband's loss-of-consortium claim. Prior to trial, the district court sustained the Clinic's motion in limine to exclude testimony concerning Hartwig's mental anguish occasioned by her fear that she had indeed been infected with HIV. The court concluded that to

recover such damages, Hartwig would have to prove actual exposure to HIV.

By way of offers of proof at trial, Hartwig offered the deposition testimony of her husband, Roger Hartwig, who, if allowed to testify, would have stated that during the 6-month period after her accident, Hartwig would disappear into a room and cry for hours on end, was impatient with their children, and showed no affection for him or their children. He would also have testified that Hartwig was shunned by their friends because of the friends' irrational fear of HIV infection. Hartwig also offered the deposition testimony of her psychologist, Dr. Charles Howard, who, if allowed to testify, would have told the jury that Hartwig was under extreme stress and anxiety as a result of her fear of contracting AIDS. Howard also would have testified that Hartwig's counseling sessions ceased shortly after her 3-month blood test came back HIV negative, since much of Hartwig's anxiety dissipated with the knowledge that there was a 95-percent probability that she was not infected with HIV. The trial court sustained the Clinic's objection to each of Hartwig's offers of proof.

At the close of the evidence, the trial court sustained Hartwig's motion for a directed verdict as to the Clinic's negligence. However, regarding the issue of damages, the court instructed the jury that it

> may not award any damages to [Hartwig] for anxiety, emotional distress or mental suffering alleged to have been sustained or incurred by her or her husband, Roger Hartwig, as the result of fear of contracting AIDS or fear or anxiety of testing positive for the presence of the HIV virus or other infectious disease.

The jury returned a $3,000 verdict in favor of Hartwig, and judgment was entered accordingly. Hartwig's motion for new trial was overruled, and she timely appealed. Because of the issue presented, we granted Hartwig's petition to bypass and transferred the case to our docket.

ASSIGNMENTS OF ERROR

Hartwig assigns as error the trial court's (1) refusing to allow Hartwig to present evidence in regard to mental anguish and

emotional distress resulting from her reasonable fear of contracting AIDS caused by the Clinic's negligence; (2) instructing the jury that it could not award damages to Hartwig for anxiety, emotional distress, or mental suffering sustained by her or her husband resulting from her fear of contracting AIDS caused by the Clinic's negligence; and (3) overruling Hartwig's motion for new trial.

STANDARD OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *J.C. Penney Co. v. Balka, ante* p. 521, 577 N.W.2d 283 (1998); *Martindale v. Weir, ante* p. 517, 577 N.W.2d 287 (1998).

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Wheeler v. Bagley, ante* p. 232, 575 N.W.2d 616 (1998); *Barnett v. Peters, ante* p. 74, 574 N.W.2d 487 (1998).

ANALYSIS

The question presented in this matter is purely one of law: Whether a plaintiff who sustains a minimal physical injury, caused by the defendant's negligence, may recover damages for anxiety and mental suffering occasioned by his or her fear of testing HIV positive and contracting AIDS, absent a showing of actual exposure to blood or body fluid infected with HIV. We note that in her amended petition, Hartwig pled a cause of action in simple negligence resulting from the Clinic's failure to properly dispose of medical waste, not a cause of action for negligent infliction of emotional distress.

Hartwig argues that Nebraska law has long recognized the basic legal proposition that where mental suffering and anguish accompany a physical bodily injury, such mental suffering and anguish are compensable in damages. The Clinic, for the most part, does not take issue with this basic proposition. However, the Clinic argues that the physical bodily injury must be of sufficient severity, such that it could reasonably be expected to produce mental suffering, and that the mental suffering must directly result from the physical injury.

Hartwig correctly asserts that this court has allowed an injured party to recover damages for anxiety and mental suffering occasioned by a physical injury. See, *Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964), *overruled on other grounds, Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994); *Southwell v. DeBoer*, 163 Neb. 646, 80 N.W.2d 877 (1957); *Omaha Street R. Co. v. Emminger*, 57 Neb. 240, 77 N.W. 675 (1898); *American Water-Works Co. v. Dougherty*, 37 Neb. 373, 55 N.W. 1051 (1893). In *Baylor v. Tyrrell, supra*, we made clear that the longstanding rule in Nebraska is that where a physical injury has been sustained, a plaintiff may recover damages for mental suffering and anxiety reasonably resulting from such physical injury.

However, this rule and our prior cases do not directly address the Clinic's argument. In this regard, the Clinic contends that only a severe injury can reasonably cause anxiety and mental suffering sufficient for compensation. Accordingly, the Clinic asserts that it is only when a plaintiff such as Hartwig is actually exposed to HIV that such plaintiff suffers a severe injury for which it is reasonable to conclude that anxiety and mental anguish are a consequence.

This argument is the basis of the "actual exposure" rule, which the Clinic asserts is the majority rule, having been adopted in 13 jurisdictions. Although the Clinic is correct in claiming that the actual exposure rule is the majority rule, the application of this rule has not been as widespread as the Clinic suggests—particularly when one considers the wide variety of factual contexts in which the "fear-of-AIDS" question has been presented.

The vast majority of the fear-of-AIDS cases have been pled as negligent infliction of emotional distress claims. Only a handful of cases have been tried on the theory presented in the instant appeal—as parasitic damages consequent to a physical injury. See, *Marchica v. Long Island R. Co.*, 31 F.3d 1197 (2d Cir. 1994); *Macy's Cal., Inc. v. Superior Court*, 41 Cal. App. 4th 744, 48 Cal. Rptr. 2d 496 (1995); *Russaw v. Martin*, 221 Ga. App. 683, 472 S.E.2d 508 (1996); *Castro v. New York Life Ins. Co.*, 153 Misc. 2d 1, 588 N.Y.S.2d 695 (1991). "Parasitic damages" are described as damages occasioned by anxiety specifi-

cally due to a reasonable fear of a future harm attributable to a physical injury caused by the defendant's negligence. See *Potter v. Firestone Tire and Rubber Co.*, 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993). Nonetheless, although not directly on point, the fear-of-AIDS cases pled as negligent infliction of emotional distress causes are useful in regard to an analysis and application of the actual exposure rule advocated by the Clinic.

For the most part, those jurisdictions that have required an actual exposure to HIV as a prerequisite to recovery for mental distress damages do so in order to objectively quantify the reasonableness of a plaintiff's fear of contracting AIDS. See *Russaw v. Martin*, 221 Ga. App. at 686, 472 S.E.2d at 512 (stating that "[t]o allow recovery for emotional injuries and mental anguish, without any proof whatsoever that [plaintiff] was actually exposed to HIV or hepatitis is per se unreasonable").

In order for one to have an actual exposure to HIV, there is a necessary confluence of two factors. First, there must be an exposure to tissue, blood, or body fluid infected with HIV, and second, the exposure to the infected tissue, blood, or body fluid must be by way of a channel of communication or transmission deemed medically or scientifically sufficient to cause an HIV infection. When both factors are capable of proof or disproof, the actual exposure rule functions as a viable means through which the reasonableness of a plaintiff's fear of AIDS may be objectively tested.

For example, it is certainly reasonable to fear AIDS if one has been exposed via a medically recognized channel of transmission to blood known to be HIV positive. See *Johnson v. W.Va. University Hospitals*, 186 W. Va. 648, 413 S.E.2d 889 (1991). Conversely, it is unreasonable to fear AIDS when one is exposed to HIV-positive blood or body fluid by means other than a medically recognized channel of transmission, see *Funeral Serv. by Gregory v. Bluefield Hosp.*, 186 W. Va. 424, 413 S.E.2d 79 (1991), *overruled on other grounds, Courtney v. Courtney*, 190 W. Va. 126, 437 S.E.2d 436 (1993), or when, although exposed by a medically recognized channel of transmission, the blood or body fluid is not HIV positive, see *Russaw v. Martin, supra.*

Many of the cases cited by the Clinic in support of the actual exposure rule involve this sort of factual context, that is, cases in which HIV exposure and a medically sufficient channel of transmission were capable of proof or disproof. Cases where no sufficient channel of transmission was identified include *Barrett v. Danbury Hospital*, 232 Conn. 242, 654 A.2d 748 (1995); *K.A.C. v. Benson*, 527 N.W.2d 553 (Minn. 1995); *Ordway v. County of Suffolk*, 154 Misc. 2d 269, 583 N.Y.S.2d 1014 (1992); and *Funeral Serv. by Gregory v. Bluefield Hosp., supra*. Cases where the exposure was to uninfected tissue, blood, or body fluid include *Russaw v. Martin, supra*; *Kaufman v. Physical Measurements Inc.*, 207 A.D.2d 595, 615 N.Y.S.2d 508 (1994). Cases where there was no allegation of exposure to infected blood and such was capable of proof include *Neal v. Neal*, 125 Idaho 617, 873 P.2d 871 (1994); *Doe v. Surgicare of Joliet, Inc.*, 268 Ill. App. 3d 793, 643 N.E.2d 1200 (1994); *Hare v. State*, 173 A.D.2d 523, 570 N.Y.S.2d 125 (1991); *Doe v. Doe*, 136 Misc. 2d 1015, 519 N.Y.S.2d 595 (1987); and *Seimon v. Becton Dickinson & Co.*, 91 Ohio App. 3d 323, 632 N.E.2d 603 (1993). A case where there was actual exposure to contaminated blood through a medically sufficient channel of transmission and recovery was allowed is *Johnson v. W.Va. University Hospitals, supra*.

Application of the actual exposure rule in such cases is inapposite to the case at bar for the reason that it is not unreasonable to fear HIV infection or AIDS when one such as Hartwig is exposed via a medically sufficient channel of transmission to the tissue, blood, or body fluid of another and it is impossible or impracticable to ascertain whether that tissue, blood, or body fluid is in fact HIV positive. When this narrower factual issue is examined, the actual exposure rule is neither the majority rule nor persuasive in the context of the instant case.

The Clinic cited three cases in which courts have required that a plaintiff must suffer an actual exposure to HIV-infected blood or body fluid as a prerequisite for recovery of emotional damages notwithstanding the fact that it was impossible or impracticable to ascertain whether the suspected infectious agent was contaminated.

In *Burk v. Sage Products, Inc.*, 747 F. Supp. 285 (E.D. Pa. 1990), the district court concluded that under Pennsylvania law, a plaintiff may recover for injuries stemming from a fear of contracting an illness after exposure but not for injuries arising from a mere fear of initial exposure. In addition, the court observed that it was extremely unlikely that one who tests HIV negative 6 months after exposure will ever become infected and that the plaintiff tested HIV negative on five occasions during the 1-year period after he was allegedly stuck by the needle. The court stated that it was "reluctant to allow someone to recover for fear of contracting a disease after it has become substantially likely that he will not develop the illness." *Id.* at 288.

In *Macy's Cal., Inc. v. Superior Court*, 41 Cal. App. 4th 744, 48 Cal. Rptr. 2d 496 (1995), the California Court of Appeals held that an ordinary needle stick does not give rise to parasitic damages for emotional distress and mental suffering unless a hazardous foreign substance is introduced into the body through the needle and causes detrimental changes to the body. Absent such detrimental change, in order to recover damages for a fear of contracting an illness, the plaintiff's fear must result from knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop such illness in the future due to the exposure.

In *Carroll v. Sisters of Saint Francis*, 868 S.W.2d 585 (Tenn. 1993), the Tennessee Supreme Court held that actual exposure to HIV is a prerequisite to recovery of emotional damages based on the fear of contracting AIDS. The court reasoned that because the law has been reticent to allow juries to award damages based only on mental or emotional trauma, due to the inherent subjective nature of these claims, the actual exposure rule functions as an objective measure necessary to test the authenticity of a plaintiff's fear-of-AIDS claim.

The logical flaw running through this line of cases is the failure of these courts to recognize the fact that modern medicine treats a *potential exposure* to HIV virtually the same as it treats an *actual exposure* to HIV. When a person such as Hartwig is *potentially* exposed to HIV through a medically viable channel of transmission, the applicable standard of medical care requires that such person conduct his or her life as if they were

actually exposed to HIV-positive tissue, blood, or body fluid until such a time that a blood test reveals, to a certain statistical level of confidence, that such person is HIV negative.

We think it inconsistent to suggest that during the period of time in which such person is required by competent medical advice to conduct his or her life as though he or she were HIV infected, the law would conclude that it is unreasonable, speculative, fanciful, or whimsical for such person to have a real and intense fear that he or she is HIV positive and may suffer a slow, agonizing death from AIDS. The cases requiring an actual exposure when such is incapable of proof fail to give deference to the fact that from the time of exposure until after successive blood tests indicate that such a person is HIV negative, the genuineness of that person's mental anguish resulting from a fear of AIDS is medically beyond dispute.

Those cases which reject the actual exposure rule do so because the courts are cognizant of the medical realities associated with HIV infection. In *Faya v. Almaraz*, 329 Md. 435, 620 A.2d 327 (1993), an HIV-positive oncological surgeon was sued by two former patients. Both plaintiffs found out about their surgeon's condition from a newspaper article published more than a year after their surgeries. Each patient immediately underwent blood tests to discover whether she was HIV positive. Both tested HIV negative.

In their lawsuit, the plaintiffs sought to recover damages for their fear of contracting AIDS. The trial court dismissed the complaints for failing to allege a legally compensable injury. The Maryland Court of Appeals reversed. After discussing the medical realities of HIV infection and the relevant fear-of-AIDS case law, the court held:

> In the instant case, we cannot say that appellants' alleged fear of acquiring AIDS was initially unreasonable as a matter of law, even though the averments of the complaints did not identify any actual channel of transmission of the AIDS virus. But *Burk's* requirement that plaintiffs must allege actual transmission would unfairly punish them for lacking the requisite information to do so.
>
> Appellants' *continued* fear of contracting AIDS may, however, be unreasonable after they tested HIV-negative

> upon learning of Dr. Almaraz's illness, which was well over a year after their last contacts with the physician. . . . Once appellants learned of their HIV-negative status more than a year after their respective surgeries, the possibility of their contracting AIDS from Dr. Almaraz became extremely unlikely and thus, as a matter of law, might be deemed unreasonable. Therefore, appellants may only recover for their fear and its physical manifestations which may have resulted from Almaraz's alleged negligence for the period constituting their reasonable window of anxiety—the period between which they learned of Almaraz's illness and received their HIV-negative results.

(Emphasis in original.) *Id.* at 455-56, 620 A.2d at 336-37.

In considering a Federal Employers' Liability Act (FELA) claim, the court in *Marchica v. Long Island R. Co.*, 31 F.3d 1197 (2d Cir. 1994), rejected application of the actual exposure rule where the plaintiff suffered a precipitating physical injury. In this case, the claimant was stuck by a discarded hypodermic needle with blood in the syringe when he attempted to extinguish a smoldering pile of debris lying at the bottom of a shaftway. The railroad disposed of the syringe as a matter of policy before the blood could be sampled for testing.

After examining the developing fear-of-AIDS case law, the court concluded that the actual exposure rule is simply a means of ensuring the genuineness of the claim. Recognizing that FELA provides for a broader recovery than may be obtained pursuant to common-law negligence, the court held that "a FELA plaintiff who has suffered a physical impact may recover for a fear of developing AIDS if the impact caused by the defendant's negligence occurred under circumstances that would cause a reasonable person to develop a fear of AIDS." *Id.* at 1206.

In *Castro v. New York Life Ins. Co.*, 153 Misc. 2d 1, 588 N.Y.S.2d 695 (1991), the plaintiff, an employee of a cleaning contractor, was stuck in the thumb by a used hypodermic needle negligently disposed of by the defendant. The defendant sought summary judgment, claiming that a cause of action may not be maintained solely on the basis of a risk or fear of developing AIDS in the future absent evidence that evinces a suffi-

cient degree of probability that the disease will manifest itself—in other words, absent actual exposure.

In denying the defendant's motion, the trial court concluded that for a plaintiff to recover for mental anguish arising from a fear of AIDS, he or she must prove that the condition suffered was a direct result of the defendant's breach of a duty and that the breach was the proximate cause of the mental anguish.

> Prospective consequences must be expected to flow with reasonable certainty from the harm. [Citation omitted.] An unfounded fear that some harm will result in the future is not compensable [citations omitted].
>
> If a claim can be tied to a distinct event which could cause a reasonable person to develop a fear of contracting a disease like AIDS, there is a guarantee of genuineness of the claim. It is only where the causal connection between the original injury and the ultimate damage may be said to be too tenuous that an original wrongdoer will be freed from liability for the ultimate damage.
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> . . . .
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> The overwhelming consensus of medical opinion is clear: the HIV virus is not spread casually. Rather, it has specific and well-known modes of transmission . . . .
>
> . . . .
>
> Here, Castro's claim for mental anguish and "AIDS Phobia" is directly tied to the date on which she allegedly received the hypodermic puncture to her right thumb. Given the massive informational campaign waged by federal, state and local health officials over the last few years in an effort to educate the public about this dreadful disease, any reasonable person exposed to this information who is stuck by a used and discarded hypodermic needle and syringe from which blood was apparently drawn could develop a fear of contracting AIDS . . . .

Id. at 5-6, 588 N.Y.S.2d at 697-98. See, also, *Madrid v. Lincoln County Medical Center*, 122 N.M. 269, 278, 923 P.2d 1154, 1163 (1996) (stating that "[s]ound public policy supports recognition of a cause of action for emotional-distress damages in favor of one who fears that the negligence of another has

caused him or her to contract HIV through a medically sound channel of transmission").

Nebraska law provides that in order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 573 N.W.2d 739 (1998); *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997). As noted earlier, where a physical injury has been sustained, a plaintiff may recover damages for mental suffering and anxiety reasonably resulting from such physical injury. *Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964). In particular, foreseeability that affects proximate cause relates to the question whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's alleged breach of duty. *Sacco v. Carothers, supra.* We cannot say, as a matter of law, that one's fear of testing HIV positive and contracting AIDS is unreasonable when one suffers an injury in a manner by which medical science has concluded that HIV could be communicated.

We recognize that application of the actual exposure rule in instances where both a medically viable channel of transmission and the nature of the suspected infectious agent are capable of proof or disproof offers an objective measure of reasonableness and genuineness in regard to one's claim of a fear of contracting AIDS. However, application of the actual exposure rule is antithetical to the goal of objective quantification of the reasonableness and genuineness of one's claimed fear of AIDS in circumstances where (1) the identity of the patient upon whom the contaminated needle or instrument was used is unknown and (2) it is impossible or impracticable to prove or disprove that the suspect tissue, blood, or body fluid was in fact HIV positive, even though the injury occurred via a medically sufficient channel of transmission.

We therefore hold that a plaintiff may adduce proof and potentially recover damages for the mental anguish of reasonably fearing AIDS resulting from a physical injury when the plaintiff may have been exposed, via a medically sufficient channel of transmission, to the tissue, blood, or body fluid of another in circumstances where the identity of the patient upon

whom the contaminated needle or instrument was used is unknown, and when it is impossible or impracticable to ascertain whether any such tissue, blood, or body fluid may be HIV positive. There is no reason in law, policy, or fact why Hartwig should not be allowed the opportunity to prove to a jury that, at least for a certain "window of anxiety," her fear of HIV infection and contracting AIDS was reasonable and genuine and that it resulted in mental suffering occasioned by a physical injury for which she may receive compensation. The applicable "window of anxiety" in fear-of-AIDS cases is the period from the time of possible exposure to that point when a plaintiff knows or should know that he or she is not infected with HIV. See *Williamson v. Waldman*, 150 N.J. 232, 696 A.2d 14 (1997).

In the instant case, the trial court determined as a matter of law that Hartwig's physical injury was caused by the Clinic's negligence. There is also the convergence of three factors which are requisite to our holding: (1) Hartwig was potentially exposed to tissue, blood, or body fluid of other unidentified persons by being stuck by discarded hypodermic needles; (2) it was impossible or impracticable to determine whether the needles were in fact contaminated with HIV-positive blood; and (3) needle sticks are a medically sufficient channel of transmission of HIV. After the needle sticks, Hartwig was told by a medical professional to conduct her life as if she were HIV positive until a series of blood tests indicated that she was not HIV positive. The lack of severity of Hartwig's physical injury bears no relationship whatsoever to the reasonableness or genuineness of her fear of HIV infection or of contracting AIDS. Instead, the medical realities of HIV infection required Hartwig to act as though she were HIV positive until medical evidence told her that she could resume her normal life.

For the foregoing reasons, we conclude that the trial court erred in sustaining the Clinic's motion in limine and in excluding testimony concerning Hartwig's mental anguish occasioned by her fear that she had been infected with HIV. Thus, the trial court abused its discretion when it denied Hartwig's motion for new trial. We note that the Clinic did not appeal the trial court's determination of its negligence as a matter of law; therefore, the issue of the Clinic's negligence need not be retried.

CONCLUSION

As a result, we reverse the order of the trial court denying Hartwig's motion for new trial and remand Hartwig's causes of action, including her husband's assigned loss-of-consortium cause of action, for a new trial limited solely to the issue of damages.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

FOOTE CLINIC, INC., A NEBRASKA CORPORATION, APPELLANT, V. CITY OF HASTINGS, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

580 N.W.2d 81

Filed June 19, 1998. No. S-96-587.

1. **Special Assessments: Collateral Attack: Fraud: Jurisdiction.** A property owner may collaterally attack a special assessment if such attack is limited to a challenge based on fraud, actual or constructive; a fundamental defect; or want of jurisdiction.
2. **Special Assessments: Proof.** A property owner attacking the validity of a special assessment as void has the burden of establishing its invalidity.
3. **Declaratory Judgments.** An action for declaratory judgment is sui generis, and whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
4. **Special Assessments: Collateral Attack: Equity: Appeal and Error.** A collateral attack on a special assessment is a proceeding in equity, which an appellate court reviews de novo on the record. In all appeals of such actions, the appellate court must retry the issues of fact involved and reach an independent conclusion as to the findings required under the pleadings and all the evidence, without reference to the conclusion reached by the district court or the fact that there may be some evidence in support thereof.
5. **Special Assessments: Municipal Corporations: Improvements.** The power and authority delegated to municipalities to construct improvements and levy special assessments for their payment is to be strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority and the manner of exercise thereof is resolved against the city and in favor of the taxpayer.
6. **Statutes: Legislature: Intent.** The legislative intent is the cardinal rule in the construction of statutes. In construing a statute, the legislative intent is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately.

7. **Special Assessments: Municipal Corporations: Statutes.** Although the terminology has evolved from "jurisdiction" to "authority," the Nebraska Supreme Court has established that a city lacks authority to levy special assessments when the city fails to comply with the requisite statutory steps for authorizing such assessments.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges, on appeal thereto from the District Count for Adams County, BERNARD SPRAGUE, Judge. Judgment of Court of Appeals reversed, and cause remanded.

Arthur R. Langvardt, of Langvardt & Valle, for appellant.

Bradley J. White, of Helmann, Sullivan & White, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

The Nebraska Court of Appeals affirmed the judgment of the district court for Adams County determining that the Hastings Downtown Business Improvement District (BID) was validly created by appellee, City of Hastings, Nebraska, pursuant to the Business Improvement District Act, Neb. Rev. Stat. § 19-4015 et seq. (Reissue 1997). See *Foote Clinic, Inc. v. City of Hastings*, 97 NCA No. 47, case No. A-96-587 (not designated for permanent publication). We granted further review, and we reverse and remand.

In March 1986, acting on the recommendation of its business improvement district board and its planning and zoning commission, the Hastings City Council declared its intention to establish the BID by adopting resolution No. 1010. In April 1986, after notice and a public hearing, the Hastings City Council passed ordinance No. 2964 creating the BID.

Since 1990, appellant, Foote Clinic, Inc., has been the owner of a commercial building located within the BID. In the years 1993 through 1995, Paul Powers, president of the clinic, filed written objections to the assessments levied against the clinic because, in part, the clinic was not receiving any type of benefit from the assessments. In addition, Powers appeared before the Hastings City Council to protest the assessments levied

against the clinic. However, the clinic never directly appealed the findings of the city council or the special assessments levied against it. The clinic now challenges the creation and formation of the BID on the grounds that the resolution and ordinance adopted by the Hastings City Council did not sufficiently set forth the improvements to be made within the BID, the estimated costs of these improvements, and the method of special assessment to be applied in the BID.

The resolution adopted by the Hastings City Council, when considering the improvements to be made in the BID, simply restated the uses authorized by the act. The resolution estimated a cost of $49,000 for the employment of a "Coordinator-Director" and "the creation and implementation of a plan for improving the general architectural design of the public areas" in the BID. The resolution proposed a special assessment system whereby

> [a]ll real property located in the District, zoned for commercial or industrial use, shall be divided into three classes, as set forth in the attached map. The amount of the special assessment for each class of property shall be calculated in accordance with the following formula:
>
> Assessed value of individual property divided by total assessed value of all taxable property in that class of property times total special assessment for that class of property equals individual special assessment.

The ordinance, when considering the improvements to be made, provided for the following:

> a) Employment of a Coordinator/Director for the public activities of the District.
>
> b) Creation and implementation of a plan for improving the general architectural design of public areas in the District.
>
> c) The development of any public activities and promotion of public events in the District area.
>
> d) Improvement of any public place or facility in the District area, including landscaping and plantings.
>
> e) Construction or installation of lighting, benches, or other seating furniture and any useful or necessary public improvement.

f) Any other project or undertaking for the betterment of the public facilities in the District area, whether the project be capital or noncapital in nature.

The ordinance does not specify the costs of the improvements, nor does the act so require. The method of assessment repeats the formula stated in the resolution.

The clinic asserts the Court of Appeals erred in holding that (1) the city's resolution and ordinance creating the BID set forth all required information as to the method of special assessment to be employed, (2) the city was authorized by §§ 19-4015 through 19-4038 to divide properties within the district into separate classes for purposes of levying special assessments, and (3) the resolution and ordinance creating the BID complied with the authorizing statutes even though not specifying the projects to be undertaken by the BID and their estimated costs.

A property owner may collaterally attack a special assessment if such attack is limited to a challenge based on fraud, actual or constructive; a fundamental defect; or want of jurisdiction. *North Platte, Neb. Hosp. Corp. v. City of North Platte*, 232 Neb. 373, 440 N.W.2d 485 (1989). The property owner attacking the validity of a special assessment as void has the burden of establishing its invalidity. *NEBCO, Inc. v. Board of Equal. of City of Lincoln*, 250 Neb. 81, 547 N.W.2d 499 (1996).

An action for declaratory judgment is sui generis, and whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Main Street Movies v. Wellman*, 251 Neb. 367, 557 N.W.2d 641 (1997). A collateral attack on a special assessment is a proceeding in equity, which an appellate court reviews de novo on the record. *North Platte, Neb. Hosp. Corp. v. City of North Platte, supra*. In all appeals of such actions, the appellate court must retry the issues of fact involved and reach an independent conclusion as to the findings required under the pleadings and all the evidence, without reference to the conclusion reached by the district court or the fact that there may be some evidence in support thereof. *Iverson v. City of North Platte*, 243 Neb. 506, 500 N.W.2d 574 (1993).

We have continuously held that the power and authority delegated to municipalities to construct improvements and levy

special assessments for their payment is to be strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority and the manner of exercise thereof is resolved against the city and in favor of the taxpayer. See, *Iverson v. City of North Platte, supra*; *Garden Dev. Co. v. City of Hastings*, 231 Neb. 477, 436 N.W.2d 832 (1989); *Turner v. City of North Platte*, 203 Neb. 706, 279 N.W.2d 868 (1979); *Matzke v. City of Seward*, 193 Neb. 211, 226 N.W.2d 340 (1975), *overruled on other grounds, First Assembly of God Church v. City of Scottsbluff*, 203 Neb. 452, 279 N.W.2d 126 (1979); *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph*, 163 Neb. 687, 81 N.W.2d 159 (1957).

The legislative intent is the cardinal rule in the construction of statutes. *Matzke v. City of Seward, supra.* In construing a statute, the legislative intent is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately. *Id.*

Although the terminology has evolved from "jurisdiction" to "authority," we have established that a city lacks authority to levy special assessments when the city fails to comply with the requisite statutory steps for authorizing such assessments. See, *Iverson v. City of North Platte, supra*; *Garden Dev. Co. v. City of Hastings, supra*; *North Star Lodge #227 v. City of Lincoln, supra*; *Turner v. City of North Platte, supra*; *Matzke v. City of Seward, supra*; *Campbell v. City of Ogallala*, 183 Neb. 238, 159 N.W.2d 574 (1968); *Sanitary & Improvement Dist. v. City of Ralston*, 182 Neb. 63, 152 N.W.2d 111 (1967); *Chicago, St. P., M. & O. Ry. Co. v. City of Randolph, supra*; *Moss v. City of Fairbury*, 66 Neb. 671, 92 N.W. 721 (1902).

Since the clinic asserts that the substance of the resolution and ordinance does not comply with the act, the outcome of this case rests on determining what a city council is required to include in a resolution of intention to create a business improvement district and the ordinance adopting such a district. Therefore, we turn our focus to those sections of the act which provide the requirements for creating a business improvement

district and set forth the steps authorizing the levy of special assessments for the improvements made within the district.

Initially, the mayor, with the approval of the city council, must appoint a business improvement board. § 19-4021. The board then makes recommendations to the city council for the establishment of a plan or plans for improvements in the business area. *Id.* Once the city council receives the recommendations of the board and the planning commission, the city council may establish one or more business improvement districts by adopting a resolution of intention to establish a district or districts. § 19-4024. The resolution must contain the following information:

> (1) A description of the boundaries of any proposed district;
>
> (2) The time and place of a hearing to be held by the city council to consider establishment of a district or districts;
>
> (3) The proposed public facilities and improvements to be made or maintained within any such district; and
>
> (4) The proposed or estimated costs for improvements and facilities within any district, and the method by which the revenue shall be raised. If a special assessment is proposed, the resolution also shall state the proposed method of assessment.

Id.

In May 1979, when § 19-4024 first came into effect, the statute required a city council's resolution of intention to set forth, as stated in subsection (4), only the "method by which the revenue shall be raised." As a result, while construing § 19-4024(4) in *North Star Lodge #227 v. City of Lincoln*, 212 Neb. 236, 322 N.W.2d 419 (1982), we held the city of Lincoln acted prematurely by stating a specific method for applying special assessments in its resolution of intention to establish a business improvement district. We concluded the only proper choice for a city council to make at the resolution stage is between a general license and occupation tax and a special assessment tax. *North Star Lodge #227 v. City of Lincoln, supra.* In response, the Legislature added the following sentence to § 19-4024(4) during the 1983 legislative session: "If a

special assessment is proposed, the resolution also shall state the proposed method of assessment."

After adopting the resolution, the city council must give a notice of hearing by publishing the resolution in a newspaper of general circulation in the city and by mailing a complete copy of the resolution to each owner of taxable property as shown on the latest tax roles. § 19-4025. Following the hearing, the city council may then establish a district by adopting an ordinance stating its intention to that effect. § 19-4029. The ordinance establishing any district or districts must contain the following information:

> (1) The number, date, and title of the resolution of intention pursuant to which it was adopted;
>
> (2) The time and place the hearing was held concerning the formation of such district;
>
> (3) A statement that a business improvement district has been established;
>
> (4) The purposes of the district, and the public improvements and facilities to be included in such district;
>
> (5) The description of the boundaries of such district;
>
> (6) A statement that the businesses and professions in the area established by the ordinance shall be subject to the general business occupation tax or that the real property in the area will be subject to the special assessment authorized by sections 19-4015 to 19-4038;
>
> (7) The proposed method of assessment to be imposed within the district or the initial rate of the occupation tax to be imposed; and
>
> (8) Any penalties to be imposed for failure to pay the tax or special assessment.

Id.

Once the district is created, "[a] city may levy a special assessment against the real estate located in such district . . . for the purpose of paying all or any part of the total costs and expenses of performing any authorized work . . . ." § 19-4030. The total amount of the assessments levied under the act "shall not exceed the total costs and expenses of performing the authorized work." § 19-4033.

The clinic, through its third assigned error, asserts that the resolution and ordinance did not comply with the act because of the city council's failure to specifically set forth the improvements to be made in the BID and the estimated costs of those improvements. We agree with the clinic's assertion that the Hastings City Council's resolution fails to comply with the requirements of the act. A strict construction of § 19-4024(3) and (4) and a thorough consideration of the entire act clearly show the Legislature's intent to provide the persons affected by the creation of a business improvement district with notice of the improvements to be performed, the estimated or proposed costs of such improvements, and an opportunity to protest and terminate any such action. In coming to this conclusion, we pay particular attention to the entire process required by the act.

As stated above, the mayor initially creates a board which makes recommendations for a plan or plans for improvement and then submits recommendations to the city council. When the city council announces its intention to create a business improvement district by passing a resolution stating such, the city council must set forth, among other requirements, the "proposed public facilities and improvements to be made or maintained" within the district and their "proposed or estimated costs." The city council may then establish a district only after giving notice and an opportunity to be heard to those affected.

The aforementioned improvement and cost language, read in conjunction with the notice provisions, clearly indicates the Legislature's intent to require a city council to set forth the proposed improvements and their respective costs in the resolution of intention; otherwise, the notice provisions of the act would become obsolete because those affected would not be able to make an intelligent and informed protest during the hearing phase of the creation of a district. See *City of Mattoon v. Stump*, 414 Ill. 319, 111 N.E.2d 551 (1953) (determining that act's requirements that resolution set forth proposed improvements and costs thereof are jurisdictional; that without compliance, no valid assessment can be made; and that improvements must be so described that property owner can obtain general understanding of what is to be done).

The conclusion that a city council must give notice as to the proposed improvements and their costs finds further support in §§ 19-4031 and 19-4033. The former allows assessments to be levied only for authorized work, and the latter limits the amount of the assessment to equal the cost of the authorized work. In addition, the Legislature amended § 19-4024(4) to require the resolution of intention to include the proposed method of the assessment. When viewed in its entirety, the act clearly contemplates a step-by-step process whereby the persons affected by the creation of the district receive notice of its improvements and costs.

Therefore, when considering resolution No. 1010 of the Hastings City Council in light of § 19-4024(3) and (4) and the entire act read as a whole, we find that the city council failed to properly set forth the proposed improvements and their estimated costs. We hold the creation of the district was improper, the city lacked the necessary authority to levy special assessments due to its failure to comply with the necessary statutory steps required by the act, and any and all assessments arising therefrom are void.

The foregoing analysis being dispositive, we do not reach the clinic's first and second assignments of error. Accordingly, we reverse and remand.

REVERSED AND REMANDED.

STEVE VACCARO ET AL., APPELLEES, V.
CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.
579 N.W. 2d 535

Filed June 19, 1998. No. S-96-1019.

1. **Injunction: Equity.** An action for a mandatory injunction is in equity.
2. **Equity: Appeal and Error.** In equity actions, an appellate court reviews the factual findings de novo on the record and reaches a conclusion independent of the findings of the trial court.
3. **Judgments: Appeal and Error.** As to questions of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Courts: Jurisdiction: Administrative Law.** No generalized determination can be made concerning whether the doctrine of exhaustion of administrative remedies constitutes a jurisdictional requirement.

5. **Administrative Law.** The exhaustion of administrative remedies doctrine presents a flexible concept which must be tailored to the circumstances of the particular case.
6. **Municipal Corporations: Ordinances: Courts: Equity: Jurisdiction.** A city's ordinances cannot limit the district court's equity jurisdiction.
7. **Equity.** Equitable remedies are generally not available where there exists an adequate remedy at law.
8. **Words and Phrases.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.
9. **Courts: Trial: Parties.** A trial court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others or by saving their rights, but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.
10. **Courts: Parties: Equity: Appeal and Error.** When it appears that all the parties necessary to a proper and complete determination of an equity cause are not before the court, an appellate court may remand the cause for the purpose of having such parties brought in.
11. **Courts: Trial: Parties: Equity: Appeal and Error.** When it appears that all the parties necessary to a proper and complete determination of an equity cause are not before the court, an appellate court may decide the case on the merits so long as doing so does not adversely affect the rights of the absent parties.
12. **Courts: Trial: Parties: Appeal and Error.** When all the necessary parties are not before the trial court, but the plaintiffs have had their day in court and the reversal and dismissal of a judgment in their favor does not adversely affect the rights of the absent parties but merely restores the situation to what it was prior to the commencement of the action, it is appropriate to resolve the matter on appeal and not multiply litigation.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges, on appeal thereto from the District Court for Douglas County, THEODORE L. CARLSON, Judge. Judgment of Court of Appeals affirmed.

Sheri E. Cotton, Assistant Omaha City Attorney, for appellant.

Thomas F. Dowd, of Dowd & Dowd, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

The plaintiffs-appellees, Steve Vaccaro, Leland Drum, and Henry Brooks, unsuccessful applicants for newly created

employment positions, obtained from the district court a mandatory injunction requiring the defendant-appellant employer, City of Omaha, to reopen its selection process for the positions in question, as more particularly set forth hereinafter. Urging, in summary, that the evidence did not support the district court's decree either in fact or in law, the city appealed to the Nebraska Court of Appeals. That court concluded that the plaintiffs had failed to exhaust the administrative appeal process available under the city's ordinances, and consequently reversed the district court's decree and dismissed the action. *Vaccaro v. City of Omaha*, 6 Neb. App. 410, 573 N.W.2d 798 (1998). The plaintiffs thereupon successfully sought further review by this court, challenging the Court of Appeals' determination that the district court lacked jurisdiction. Although the district court did not lack jurisdiction, it erred in ruling as it did. We therefore affirm the judgment of the Court of Appeals.

II. SCOPE OF REVIEW

An action for a mandatory injunction is in equity. *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988). In equity actions, an appellate court reviews the factual findings de novo on the record and reaches a conclusion independent of the findings of the trial court. *Presto-X-Company v. Beller*, 253 Neb. 55, 568 N.W.2d 235 (1997). However, as to questions of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Veskerna v. City of West Point, ante* p. 540, 578 N.W.2d 25 (1998).

III. FACTS

The manager of the city's detention facility determined that the then-existing six detention technician II positions should be eliminated and the new position of detention supervisor be created, and asked that the city's personnel department advertise the newly available positions, test the applicants, and develop a hiring list from which candidates might be selected. At the time, Vaccaro, Drum, Petra B. Young, Laura A. Kincaid, and Ruth M. Herndon were detention technician IIs; Brooks was a detention technician I.

The personnel department established an eligibility list, which named the individuals who participated in the examina-

tion process and ranked them based on their examination scores, preliminary interview scores, and veterans' points. The list ranked, among others, Morgan L. Larson 1st; West B. Critz 2d; Drum 5th; Robert L. Stungis, Jr., 6th; Vaccaro 7th; Herndon 9th; Young 11th; Kincaid 12th; and Brooks 14th. The personnel department then forwarded a candidate list to the manager, advising that he was required to further interview the candidates listed. Without conducting any interviews, the manager selected three men, Larson, Critz, and Stungis.

After Young, Kincaid, and Herndon, all women, filed discrimination charges against the city, the manager sent a request to the personnal department, asking for a list of candidates to be interviewed to fill three additional detention supervisor positions. From those listed in the second candidate list, the manager and deputy chief, following interviews, selected Young, Kincaid, and Herndon.

As originally filed, the plaintiffs' petition prayed that the city be enjoined from appointing Young, Kincaid, and Herndon, and be ordered to appoint the plaintiffs. At the commencement of trial, the plaintiffs were permitted to orally amend their prayer to require "the [c]ity to go back and retest all eligible individuals in accordance with the requirements . . . and take into consideration . . . employment background, sick leave usage and everything else" required under the law. The plaintiffs testified that they did not question the initial examination process that resulted in the eligibility list, but challenged the propriety of the appointment process resulting in the selection of the three women.

Concluding that the plaintiffs had been subjected "to a parallel agenda" negating "their rights in regard to the interview process," the district court decreed that all qualified candidates from the second candidate list so desiring "be reinterviewed" and that such "reinterviews and reappointments, if necessary" take place within 60 days.

IV. ANALYSIS

1. JURISDICTION

We begin by addressing the jurisdictional issue, noting that no generalized determination can be made concerning whether the doctrine of exhaustion of administrative remedies consti-

tutes a jurisdictional requirement. We agree with the observation in *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1984), that the doctrine presents a flexible concept which must be tailored to the circumstances of the particular case. As noted by the U.S. Supreme Court in *McCarthy v. Madigan*, 503 U.S. 140, 144, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992):

> Of "paramount importance" to any exhaustion inquiry is congressional intent. [Citation omitted.] Where Congress specifically mandates, exhaustion is required. [Citations omitted.] But where Congress has not clearly required exhaustion, sound judicial discretion governs. [Citations omitted.] Nevertheless, even in this field of judicial discretion, appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.

As a consequence, where the statute did not require the exhaustion of administrative remedies, we held such exhaustion was not a jurisdictional prerequisite to instituting legal action. *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996). On the other hand, under a statute providing that before allowing certain claims against a city, specified administrative procedures were to be followed, we held that the procedures constituted a condition precedent to filing suit. *Halbleib v. City of Omaha*, 222 Neb. 844, 388 N.W.2d 60 (1986). We have also held that a demand for action upon the responsible officers of a governmental subdivision or municipal corporation is ordinarily a condition precedent to filing a taxpayer suit for the recovery of funds on behalf of such subdivision or corporation. *Sesemann v. Howell*, 195 Neb. 798, 241 N.W.2d 119 (1976).

The plaintiffs in the instant case sought, and the district court granted, equitable relief. The city's ordinances cannot limit the district court's equity jurisdiction. See *Drennen v. Drennen*, 229 Neb. 204, 426 N.W.2d 252 (1988). However, equitable remedies are generally not available where there exists an adequate remedy at law. Thus, the question becomes whether the ordinances provide such a remedy. An adequate remedy at law

means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Pilot Investment Group v. Hofarth*, 250 Neb. 475, 550 N.W.2d 27 (1996); *Clayton v. Nebraska Dept. of Motor Vehicles*, 247 Neb. 49, 524 N.W.2d 562 (1994).

Omaha Mun. Code, ch. 23, art. II, § 23-72 (1980), provides: "The personnel director shall receive and consider any complaints or protests from employees or department heads concerned with the administration of the provisions of this chapter."

The code further provides that an employee is to take a grievance to the department head, and if that fails to produce an acceptable solution, the employee may appeal to the personnel director for review and submission to the personnel board. § 23-77. An employee who is suspended, removed, or reduced in classification or pay has "the right to appeal to the personnel board not later than ten (10) days after receiving notice of such action." § 23-71. Article I, § 23-1 of the code defines "grievance" as "[a] misunderstanding or disagreement between an employee and the city, as employer, arising out of a belief on the part of the employee that he is being treated unfairly in regard to the terms or conditions of his employment."

The plaintiffs' claims do not involve the terms or conditions of their employment. They are simply attacking the propriety of the selection process used to fill vacancies open to the general public. Thus, § 23-77 does not apply. Neither are the plaintiffs claiming that they were improperly suspended, removed, or reduced in classification or pay. Therefore, neither does § 23-71 apply. In short, nothing in the code provides that a candidate applying for a position open to the public may appeal an unfavorable hiring decision to the personnel board.

Consequently, the city's ordinances do not provide an adequate remedy at law, and the district court properly entertained this action. However, that determination does not end our jurisdictional inquiry, for notwithstanding that the prayer of the amended petition put the promotions won by Young, Kincaid, and Herndon at risk of being rescinded, they were not made parties to this action.

A trial court may determine any controversy between the parties before it when it can be done without prejudice to the rights

of others or by saving their rights, but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in. See Neb. Rev. Stat. § 25-323 (Reissue 1995). Because the plaintiffs' petition put Young, Kincaid, and Herndon at risk, the district court erred in not ordering them to be added as necessary parties.

When it appears that all the parties necessary to a proper and complete determination of an equity cause were not before the court, an appellate court may remand the cause for the purpose of having such parties brought in. See, *Koch v. Koch*, 226 Neb. 305, 411 N.W.2d 319 (1987); *Workman v. Workman*, 167 Neb. 857, 95 N.W.2d 186 (1959). However, an appellate court also may decide the case on the merits so long as doing so does not adversely affect the rights of the absent parties. See *Werth v. Buffalo County Board of Equalization*, 187 Neb. 119, 188 N.W.2d 442 (1971). As observed in *Werth*, when the plaintiffs have had their day in court and the reversal and dismissal of a judgment in their favor does not adversely affect the rights of the absent parties but merely restores the situation to what it was prior to the commencement of the action, it is appropriate to resolve the matter on appeal and not multiply litigation.

2. Sufficiency of Evidence

We therefore move on to a consideration of issues presented by the city's contention that the evidence does not sustain the district court's findings and decision.

Article VI, § 6.01 of the Omaha Home Rule Charter of 1956 states: "All employes [sic] of the city shall be appointed with reference only to their qualifications and fitness for employment in the city service." Article III, § 23-191 of the code specifies:

> All regular appointments to positions in the classified service shall be made according to merit and fitness. Merit and fitness shall be ascertained insofar as practicable by examinations which shall be prepared by or under the direction of the personnel director and shall relate to those matters which will test fairly the capacity and fitness of candidates to discharge efficiently the duties of the positions for which examinations are held.

The code distinguishes between competitive examinations and promotional examinations, and the parties disagree as to

which type of examination was held. Section 23-198 provides that competitive examinations

> relate to those matters which fairly test the capacity and fitness of the persons examined to discharge the duties of the position sought by them. Examinations may be assembled or unassembled and may include written, oral, physical, or performance test, or any combination of these. Written or physical agility competitive examinations shall have a minimum pass/fail point . . . . The examinations may take into consideration such factors as education, experience, aptitude, knowledge, character, physical fitness or any other qualifications or attributes which in the judgment of the personnel director enter into the determination of the relative fitness of applicants.

Section 23-1 defines a "promotional examination" as "[a]n examination for positions in a particular class, admission to which is limited to employees in the classified service who meet the qualifications set forth in the announcement of the examination." Such examinations are described as being "of like kind and character to those for original appointment to the service. . . . In addition to other factors, promotional examinations shall take into consideration the quality and length of service where records are available to provide the basis for such rating." § 23-199. The code defines "promotion" as "[t]he movement of an employee from a position of one class to a position of another class having a higher maximum salary rate." § 23-1.

The record shows that Young, Kincaid, and Herndon were promoted. The plaintiffs argue that this is proof that the examination was a promotional one. However, whether the filling of a vacancy ultimately results in a promotion does not dictate what type of examination was held to fill the vacancy. The official posting for the examination stated that it was an "Open Competitive Examination."

The above-cited code sections regulate the examination process for which the personnel director is responsible. The fact that the plaintiffs are not challenging any part of the process that resulted in the selection of Larson, Critz, and Stungis is consistent with their contention that they are not arguing that the

examination process was flawed, only that the appointment process was flawed. However, in arguing that the city acted improperly with regard to the appointments of Young, Kincaid, and Herndon, the plaintiffs rely on the sections of the code which govern the examination process, not the appointment process.

Section 23-231 of the code requires that "[w]hen a vacancy in the classified service is to be filled . . . the department head shall submit a requisition to the personnel director." Section 23-232 provides, in part, that "[u]pon receipt of a personnel requisition, the personnel director shall certify in writing the names of available eligibles."

Section 23-272 specifies, in part, that "[a]ll original and all promotional appointments shall be tentative and subject to a probationary period of six (6) months of actual service." Thus, the appointments of Young, Kincaid, and Herndon were probationary appointments. Section 23-233 provides, in part, that "[p]robationary appointments shall be made only following certification from an open competitive or promotional list. In selecting eligibles from among those certified by the personnel director, the department head shall be permitted to examine the applications and examinations of the eligibles submitted for appointment."

Section 23-191 specifies that "[m]erit and fitness shall be ascertained insofar as practicable by examinations which shall be prepared by or under the direction of the personnel director . . . ." In generating the certified list, the personnel director considers each candidate's merit and fitness and ranks the candidates accordingly. § 23-231. As a result, the department heads know who is most qualified based on merit and fitness simply by viewing the certified list. However, nothing in the code requires department heads selecting candidates from a certified list to do so in the order ranked by the personnel director. The code merely limits department heads to selecting from the list of eligibles provided by the personnel director. Accordingly, the city is correct in urging that the evidence does not sustain the district court's decree.

V. JUDGMENT

Although the basis of the Court of Appeals' judgment was erroneous, its reversal of the district court's decree and dis-

missal of the action were correct. We therefore affirm the judgment of the Court of Appeals.

AFFIRMED.

IN RE ESTATE OF HAROLD CLAIR OLSEN, DECEASED.
CHERIE L. OLSEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD CLAIR OLSEN, DECEASED, APPELLANT, V. WILLIAM MARK OLSEN AND AMERICA OLSEN-SCHAAF, CLAIMANTS, APPELLEES.
579 N.W. 2d 529

Filed June 19, 1998. No. S-97-208.

1. **Property: Title: Rules of Evidence: Proof.** In cases involving questions of title, ownership, and right to possession in the proof of deeds, leases, and mortgages and other instruments of title, the best evidence rule requires that the instrument itself be produced, unless a sufficient foundation is laid for the production of secondary evidence of the contents of such instrument, such as by showing its loss or destruction or that it is in the possession or control of an adverse party who has neglected to produce it after notice to do so.
2. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
3. **Demurrer: Pleadings.** A demurrer will be sustained where the petition does not state facts sufficient to constitute a cause of action.
4. **Demurrer: Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action, as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1995), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
5. **Estates: Taxes.** As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of the estate.

Appeal from the County Court for Banner County: C.G. WALLACE, Judge. Reversed and remanded with directions to dismiss.

Robert M. Harris and Randall L. Lippstreu, of Harris & Lippstreu, P.C., for appellant.

Paul E. Hofmeister, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

This case presents two issues of first impression: first, whether a deed or other muniment of title is required as evidence where ownership to real property is directly at issue; and second, whether real property tax liability is borne by the estate of the life tenant or by the remaindermen, or is apportioned between the two, where the life tenant dies before the taxes are due and payable.

Harold Clair Olsen (Olsen) died on December 20, 1995, and was survived by his wife, Cherie L. Olsen, the personal representative of Olsen's estate; his ex-wife, Grace Olsen; and his three children, William Mark Olsen, America Olsen-Schaaf, and Susan Olsen-Urtatko. According to the evidence, prior to his death, Olsen owned a life estate in certain real property known as Leafdale Place, and the remaindermen of Leafdale Place were William and America.

The 1995 real property taxes became due and payable on December 31, 1995. See Neb. Rev. Stat. § 77-203 (Reissue 1996). America paid the 1995 real property taxes on April 30, 1996. William and America then filed a statement of claim against the estate in Banner County Court, seeking reimbursement for the taxes which had accumulated through the date of Olsen's death. Cherie disallowed the claim, and in turn, William and America filed a petition for allowance of claim. Cherie demurred, claiming that the petition failed to state sufficient facts to constitute a cause of action and that the claim was barred by Neb. Rev. Stat. § 30-2485 (Reissue 1995). On July 8, 1996, the county court overruled the demurrer, and on July 29, Cherie filed her answer and generally reasserted the same allegations as contained in her demurrer. The case proceeded to trial on October 11.

During trial, Grace and Cherie both testified that Olsen was the life tenant of Leafdale Place and that William and America were the remaindermen. Counsel for the estate objected to this testimony, stating, "Your Honor, I'm gonna object to this — is not proper evidence. I think if there is a life estate — a remain-

der interest here, it could be established by documentary evidence . . . ." The county court overruled the objection and permitted the line of questioning to continue.

Grace and Cherie then testified regarding the legal description of Leafdale Place and the identities of the remaindermen; counsel for the estate again objected. The court overruled the objection, but noted it as a continuing objection. At the close of the evidence, the county court found generally in favor of William and America in the amount of $3,022.69 (said amount representing the amount of the 1995 real property taxes having accrued up to the date of Olsen's death). The estate filed a motion for a new trial, which was overruled, and this appeal followed.

Rephrased and summarized, Cherie contends the county court erred in (1) receiving Grace's testimony into evidence; (2) overruling the demurrer; (3) failing to find that real property taxes were not due and payable until December 31, 1995, pursuant to § 77-203; (4) finding that William and America paid the 1995 real property taxes when in fact a volunteer paid them; (5) finding that William and America's claim was not barred by § 30-2485; and (6) failing to find that Olsen's right to receive income and his obligation to pay real property taxes terminated on the day of his death.

Cherie initially argues that the county court erred in admitting into evidence Grace's testimony regarding the existence of Olsen's life estate and the identities of the remaindermen because William and America did not produce documentary evidence to substantiate Grace's testimony. William and America respond by claiming that the testimony offered by Grace was sufficient, competent evidence and that if Grace's testimony was incorrect, the estate could have offered evidence to dispute her testimony, but the estate did not do so. William and America correctly note that during trial the personal representative, Cherie, admitted the existence of the life estate and the identities of the remaindermen.

The outcome of this issue is governed by generally accepted, well-settled principles of law. It has been stated that

> [i]n cases involving questions of title, ownership, and right to possession in the proof of deeds, leases, and mort-

> gages and other instruments of title, the best evidence rule requires that the instrument itself be produced, unless a sufficient foundation is laid for the production of secondary evidence of the contents of such instrument, such as by showing its loss or destruction or that it is in the possession or control of an adverse party who has neglected to produce it after notice to do so.

29A Am. Jur. 2d *Evidence* § 1077 at 537 (1994). See, also, 32A C.J.S. *Evidence* § 1077 at 438 (1996) (stating that "where the title to real property is in issue, the deeds . . . wills . . . or other muniments of title constitute the best evidence, and parol evidence is not admissible to prove title unless their absence is satisfactorily explained"); 73 C.J.S. *Property* § 35 at 233 (1983) (stating "the proper way to prove title to property is to submit into evidence original documents or certified copies from the record").

Many jurisdictions support this general principle of law. See, e.g., *Yates v. State*, 206 Tenn. 118, 332 S.W.2d 186 (1960); *Kimble v. Newark*, 91 N.J.L. 249, 102 A. 637 (1917); *Collar v. Collar*, 86 Mich. 507, 49 N.W. 551 (1891). For example, in *Bond v. Benning*, 175 Conn. 308, 398 A.2d 1158 (1978), the Connecticut Supreme Court addressed an action for an injunction and to quiet title to a certain parcel of property. The defendants disputed the plaintiffs' claim to title. The court rejected the defendants' claim and stated that "[t]he proper way to prove title is to submit into evidence original documents or . . . certified copies from the records." *Id.* at 312, 398 A.2d at 1160. The court concluded that the lower court was not in error in concluding that the plaintiffs had established ownership of the land in question by producing record title.

Similarly, in *Moe v. Chesrown*, 54 Minn. 118, 55 N.W. 832 (1893), the Minnesota Supreme Court addressed a trespass action filed for injuries to real property. At trial, the plaintiff testified that he was the owner and possessor of the property in question. The court rejected the plaintiff's testimony and reasoned that since the question of the plaintiff's title was directly in issue, title could not be proved by parol evidence. Therefore, the court ruled that the trial court improperly allowed the plaintiff to testify generally that he was the owner.

Likewise, in *Neal v. Dover*, 217 Ga. 545, 123 S.E.2d 760 (1962), the Georgia Supreme Court addressed an ejectment action wherein the defendants claimed ownership to the property in question because the plaintiffs' title was a deed to secure a debt instead of an absolute deed. The defendants claimed the trial court erred in refusing to allow a witness to testify regarding title to the property. The court initially stated that the highest and best evidence of title was the original deed, which was stipulated to in the evidence and did not have to be proven further. In turn, the court ruled that the trial court properly refused to allow the witness to testify as to his knowledge that the plaintiffs had title to the property.

In *Taylor v. Continental Southern Corp.*, 104 Cal. App. 2d 435, 233 P.2d 583 (1951), the court addressed a situation in which a defendant oil company claimed an interest in land leased to it by the plaintiff landowner. The court stated that where a lessor bases his or her testimony as to ownership upon deeds which are available and could be produced, the deeds are the best evidence as to the provisions therein. The court ultimately ruled that the trial court did not commit prejudicial error in striking such testimony. See, also, *Viccaro v. City of Ft. Wayne*, 449 N.E.2d 1161, 1164 (Ind. App. 1983) (holding that "[t]itles to property granted by deeds . . . are the best evidence of ownership of real property"); *Kingsley v. United States,* 569 S.W.2d 241, 242 (Mo. App. 1978) (holding "[i]t has long been the law of this state that evidence of title cannot be established by parol evidence"); *Olander v. City of Omaha*, 142 Neb. 340, 6 N.W.2d 62 (1942) (holding that warranty deed conveying property in joint tenancy and not as tenants in common and vesting entire title in survivor was best evidence of interest and title); *Littlefield v. Bowen*, 90 Wash. 286, 291, 155 P. 1053, 1055 (1916) (holding that "when the title to real estate is directly in issue, the best evidence of title consists in the muniments of title such as deeds, mortgages, patents, wills, etc.").

In the case at bar, the existence of the life estate and the identities of the remaindermen were directly at issue and contested by Cherie. No will, deed, or other muniment of title or ownership indicating the existence of the life estate or the identities of the remaindermen was received in evidence. As such, no basis

was shown to support the ownership claims or the identities of the remaindermen.

Cherie next argues that the county court erred in failing to sustain the demurrer, because real property taxes which become due and payable after the death of a life tenant are the duty of the remaindermen. Cherie further argues that apportioning tax liability is inappropriate. William and America respond by arguing that while the 1995 real property taxes were not due and payable until after Olsen's death, equity demands that such real property taxes be apportioned between the life tenant's estate and the remaindermen. Cherie's and William and America's arguments present the second issue of first impression: whether real property tax liability should be borne by the estate of the life tenant or by the remaindermen, or should be apportioned between the two, where the life tenant dies before the taxes are due and payable. Addressing this second issue leads this court to the question of whether the county court erred in denying Cherie's demurrer.

In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Billups v. Scott*, 253 Neb. 287, 571 N.W.2d 603 (1997); *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997). A demurrer will be sustained where the petition does not state facts sufficient to constitute a cause of action. See Neb. Rev. Stat. § 25-806(6) (Reissue 1995). A statement of "facts sufficient to constitute a cause of action," as used in § 25-806(6), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997).

This court has held that as between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes *charged* against the land during the continuance of the estate. *Spiech v. Tierney*, 56 Neb. 514, 76 N.W. 1090 (1898). In *King v. Boettcher*, 96 Neb. 319, 147 N.W. 836 (1914), we stated that a life tenant of lands is charged with the duty of paying the taxes which *accrue* upon the property of which he is enjoying the use, rents, and profits. Likewise, in *Disher v. Disher*, 45 Neb. 100,

63 N.W. 368 (1895), we said that as between the heirs and the tenant for life, it was the duty of the latter to pay all taxes *assessed* against the land during the continuance of the estate.

In Nebraska, real estate taxes are not charged, accrued, or assessed until December 31, following the prior year. Section 77-203 provides that

> [a]ll general real property taxes levied for any county, city, village or other political subdivision therein, shall be *due and payable* on December 31 next following the date of levy thereof, and commencing on that date shall be a first lien on the real estate taxed until paid or extinguished as provided by law.

(Emphasis supplied.) Real property tax liability rests with the owner or owners of the real property at the time real property taxes are charged, accrued, or assessed, i.e., "due and payable."

Our holding in *Whiteside v. Whiteside*, 159 Neb. 362, 67 N.W.2d 141 (1954), amplifies this point. *Whiteside* involved a parcel of land owned in joint tenancy with right of survivorship. On October 12, 1952, one of the joint tenants died. On March 5, 1953, the remaining joint tenant, the plaintiff, paid $129.52 for the 1952 real estate taxes. The plaintiff filed a claim for an allowance of the $129.52, and the decedent's estate objected. The plaintiff then petitioned the county court for the $129.52; the court sustained the objection and disallowed the payment. The plaintiff appealed, and we affirmed. In so doing, we determined that pursuant to § 77-203, the 1952 real estate taxes were "not due and payable and did not become a lien or encumbrance on the property until January 1, 1953, next following the levy thereof, long after plaintiff had become the sole owner of the real estate which was never any part of the estate." 159 Neb. at 366, 67 N.W.2d at 144. Thus, we determined that the county court properly refused the credit for the allowance.

Regardless of our holding in *Whiteside*, William and America claim that real property tax liability should be equitably apportioned between the estate of the life tenant and the remaindermen. However, although the *Whiteside* court was not directly presented with the issue of apportioning real property tax liability, we find it noteworthy that the court could have apportioned the taxes between the estate and the remaining joint ten-

ant, yet chose not to do so. Many other jurisdictions support the proposition that real property tax liability should be determined based on ownership status at the time the taxes become due and payable and, more importantly, that apportionment should be disallowed. See, *In re Estate of Luke*, 184 N.W.2d 42 (Iowa 1971); *Foulks, Exr., v. Talbott, Exr.*, 74 Ohio App. 281, 58 N.E.2d 790 (1943); *Ind. Trust Co., Tr. v. Elizabeth Wilson*, 58 R.I. 378, 192 A. 821 (1937); *O'Donnell et al. v. Mathews*, 221 Mo. App. 657, 284 S.W. 204 (1926); *Gates v. Wirth*, 181 Iowa 19, 163 N.W. 215 (1917); *Cummins v. Cummins*, 21 Haw. 742 (1913); *Holmes v. Taber & another*, 9 Allen 246, 91 Mass. 246 (1864).

For example, in *Holmes v. Taber & another, supra*, the Massachusetts Supreme Court held that certain real estate taxes as assessed 22 days before the death of the life tenant were properly chargeable to, and payable by, the estate of the life tenant rather than by the remainderman. In so doing, the court rejected an argument by the executor of the estate that there should be an apportionment between the estate and the remainderman so that the estate would be required to pay only that portion of the real estate taxes covering the period during which the life tenant had the benefit of the estate. The court reasoned that

> [t]he period of time fixed in reference to ownership as to taxation is the 1st of May in each year. The liability of an individual to be taxed for any specific property is decided by the relation he bears to it at that precise day; and whether he may have become the owner on the day previous, or ceased to be such owner the day succeeding, is wholly immaterial.

9 Allen at 247-48, 91 Mass. at 247-48.

Likewise, in *Gates v. Wirth, supra*, the Iowa Supreme Court addressed a dispute between a life tenant and the remainderman regarding the obligation, between themselves, for payment of real estate taxes. In *Gates*, the life tenancy terminated in August and the taxes were due and payable the first of January the following year. The trial court prorated the real estate taxes between the life tenant's estate and the remainderman. On appeal, the court determined that the remainderman, not the life tenant, was responsible for the taxes because the life estate ter-

minated before the current taxes became a lien. The court also determined that the trial court improperly prorated the real estate taxes between the estate and the remainderman. In so holding, the court stated:

> No one is under obligation to pay taxes until after the levy has been made; that is, until the amount chargeable is charged to the specific property. The duty to pay the amount thus fixed does not arise until the 1st of January following.
>
> The duty to pay, in order to discharge the land, as between title owners, rests, generally speaking, on the owner of the land at the time the annual tax to be levied is actually ascertained, fixed, and levied . . . .
>
> It follows, therefore, that, inasmuch as the estate of the life tenant in this case expired before any levy of taxes had been made for that year, before the burden of taxes for that year was imposed upon the real estate in question, he was under no obligation to discharge the taxes for that year for the benefit of the remainderman. The tax in question did not come into existence as an enforcible claim against the land until the remainderman came into possession of the land, freed from the burden of the life estate.

181 Iowa 26-27, 163 N.W. at 218. Since property tax liability is not determined until December 31 following the prior year, real property tax liability should not be apportioned between the estate of the life tenant and the remaindermen.

If this court accepts as true all the well-pled facts and the proper and reasonable inferences of law and fact which may be drawn therefrom, we must assume that William and America are the remaindermen and that Olsen was the life tenant of Leafdale Place. In so doing, however, we know that real property tax liability is not determined until December 31 following the prior year and that apportionment of real property tax liability is disallowed.

William and America were, in fact, responsible for the 1995 real property taxes on Leafdale Place. As a consequence, Cherie's demurrer should have been sustained. We reverse, and remand with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BRUCE A. IHM, APPELLANT, V. CRAWFORD & COMPANY AND ZURICH INSURANCE COMPANY, APPELLEES.

580 N.W.2d 115

Filed June 26, 1998. No. S-96-237.

1. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
2. **Jurisdiction: Judgments: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
3. **Workers' Compensation: Torts: Liability.** The Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment, and as such, payment of workers' compensation benefits relieves the employer of tort liability in connection with an accident.
4. **Workers' Compensation.** When an employee sustains an injury that arises out of and in the course of his or her employment and such injury is covered by the Nebraska Workers' Compensation Act, then the employee surrenders his or her right to any other method, form, or amount of compensation or determination thereof for that injury against his or her employer or the workers' compensation insurer.
5. **Workers' Compensation: Penalties and Forfeitures.** The penalty provisions contained in Neb. Rev. Stat. § 48-125(1) (Reissue 1993) exclude the possibility of a common-law bad faith tort claim for damages resulting from delay in either authorization for or payment of medical expenses.

Appeal from the District Court for Douglas County: JOSEPH C. TROIA, Judge. Affirmed.

Steven H. Howard, of Law Offices of Ronald J. Palagi, P.C., for appellant.

Thomas M. Locher and Paul A. Mihulka, of Hansen, Engles & Locher, P.C., for appellee Crawford & Co.

Thomas J. Culhane and Kevin R. McManaman, of Erickson & Sederstrom, P.C., for appellee Zurich Insurance Co.

CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

INTRODUCTION

The appellant, Bruce A. Ihm, was injured while working for Millar Elevator Service Company (Millar Elevator). Appellee

Zurich Insurance Company (Zurich) is Millar Elevator's workers' compensation insurance carrier, and appellee Crawford & Company is Zurich's agent for processing and administering workers' compensation claims. Ihm received treatment and underwent various surgeries as a result of his compensable injuries. During the course of his treatment, Ihm developed reflex sympathetic dystrophy. Unable to obtain adequate medical treatment in Nebraska for the condition, Ihm sought treatment in Colorado. Ihm claims that he suffered additional personal injuries and damages because his treatment for reflex sympathetic dystrophy was delayed as a result of the appellees' refusal to provide authorization for the treatment. Ihm's petition in the district court claimed that the delay violated the appellees' duty of good faith in processing and administering Ihm's workers' compensation claim. The district court sustained appellees' demurrers, finding that the Nebraska Workers' Compensation Act provided the exclusive remedy for Ihm's injuries and that therefore the court lacked subject matter jurisdiction over the cause. For the reasons that follow, we affirm.

FACTUAL BACKGROUND

Ihm filed a petition in the district court for Douglas County on August 1, 1995, alleging that the appellees had failed to act in good faith in administering his workers' compensation claim. Specifically, Ihm alleged that on February 8, 1990, he suffered severe and debilitating injuries as a result of an on-the-job accident while he was employed by Millar Elevator. The petition states that the injuries Ihm received as a result of the accident were compensable under the Nebraska Workers' Compensation Act. Ihm claims that while undergoing treatment for his compensable injuries, he developed a condition known as reflex sympathetic dystrophy.

On December 5, 1995, the appellees each filed a demurrer to Ihm's petition. Zurich's demurrer asserted that Ihm's petition failed to state facts sufficient to constitute a cause of action. Crawford & Company's demurrer asserted that the district court lacked subject matter jurisdiction over the case, that there was an action pending between the parties for the same cause in the Nebraska Workers' Compensation Court, and that the petition did not state a cause of action.

On February 5, 1996, the district court sustained the appellees' demurrers. The court determined that the Workers' Compensation Court was the sole source of remedy over the issues of the case and that Ihm had failed to state sufficient facts to constitute a cause of action for the tort alleged under Nebraska law. The court then dismissed the case for lack of subject matter jurisdiction. Ihm timely appealed.

ASSIGNMENTS OF ERROR

On appeal, Ihm asserts that the trial court erred (1) in sustaining the demurrers and finding the petition did not and could not state a cause of action, (2) in determining that the Nebraska Workers' Compensation Act provides the exclusive remedy for intentional bad faith tort claims and that the act bars any such action, and (3) in dismissing the action and not allowing Ihm an opportunity to amend his petition.

STANDARD OF REVIEW

In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Coburn v. Reiser, ante* p. 495, 577 N.W.2d 289 (1998); *Syracuse Rur. Fire Dist. v. Pletan, ante* p. 393, 577 N.W.2d 527 (1998).

When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *Big John's Billiards v. Balka, ante* p. 528, 577 N.W.2d 294 (1998); *In re Interest of Floyd B., ante* p. 443, 577 N.W.2d 535 (1998).

ANALYSIS

The Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment, and as such, payment of workers' compensation benefits relieves the employer of tort liability in connection with an accident. *Brown v. American Tel. & Tel. Co.*, 252 Neb. 95, 560 N.W.2d 482 (1997). The Nebraska Workers' Compensation Act extends a degree of immunity to

workers' compensation insurers as well. Neb. Rev. Stat. § 48-110 (Reissue 1993) provides in part:

> When employer and employee shall by agreement, express or implied, or otherwise as provided in section 48-112 accept the provisions of the Nebraska Workers' Compensation Act, compensation shall be made for personal injuries to or for the death of such employee by accident arising out of and in the course of his or her employment, without regard to the negligence of the employer, according to the schedule provided in such act, in all cases except when the injury or death is caused by willful negligence on the part of the employee.

Neb. Rev. Stat. § 48-111 (Reissue 1993) further provides:

> Such agreement or the election provided for in section 48-112 shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation or determination thereof than as provided in the Nebraska Workers' Compensation Act, and an acceptance of all the provisions of such act, and shall bind the employee . . . as well as the employer . . . . For the purpose of this section, if the employer carries a policy of workers' compensation insurance, the term employer shall also include the insurer. The exemption from liability given an employer and insurer by this section shall also extend to all employees, officers, or directors of such employer or insurer . . . .

Read together, these two statutes provide that when an employee sustains an injury that arises out of and in the course of his or her employment and such injury is covered by the Nebraska Workers' Compensation Act, then the employee surrenders his or her right to any other method, form, or amount of compensation or determination thereof for that injury against his or her employer or the workers' compensation insurer.

Ihm's action against the appellees is an action for the intentional tort of bad faith. The primary question presented by this case is whether Ihm can maintain such an action given the foregoing exclusivity provisions of the Nebraska Workers' Compensation Act. If the exclusivity provisions bar an action for bad faith against a workers' compensation insurer, then the

district court lacked subject matter jurisdiction over the action and correctly sustained the appellees' demurrers.

Ihm's petition states that the original accident arose out of and in the course of his employment and that the injuries he sustained as a result of the accident are compensable under the Nebraska Workers' Compensation Act. Ihm further pled that he has performed "all the terms, covenants and conditions to be performed on his part under the Nebraska Workers' Compensation Act." However, it is Ihm's position that the action against the appellees is not an action for compensation for his work-related injuries. Rather, Ihm claims, and we must assume for the purposes of this appeal, that the appellees breached their duty of good faith in the administration of his workers' compensation claim by refusing to authorize reasonable medical treatment for his compensable injuries. Ihm asserts that this refusal and the resultant delay in treatment caused him to suffer greater permanent impairment, extended pain and suffering, lost wages and loss of earning power because of the greater permanent impairment, future medical expenses, severe mental anguish and psychological injuries, and impaired ability "to recover medically."

The issue whether an employee may bring a bad faith tort action against a workers' compensation insurer for acts that occurred during the administration of a claim has been analyzed in other jurisdictions under various statutory schemes. Professor Arthur Larson, in his treatise on workers' compensation, notes that in a "great majority" of tort actions based on intentional delay in or termination of payments or of medical treatments, a cause of action was held not to lie. 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 68.34(c) at 13-199 (1998). However, Ihm contends that several jurisdictions allow intentional tort actions against workers' compensation insurers. See, e.g., *Hough v. Pacific Ins. Co., Ltd.*, 83 Haw. 457, 927 P.2d 858 (1996); *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985); *Southern Farm Bureau Cas. Ins. v. Holland*, 469 So. 2d 55 (Miss. 1984); *Hayes v. Aetna Fire Underwriters*, 187 Mont. 148, 609 P.2d 257 (1980).

As a first step, we point out that this court examined the meaning of § 48-111 as it applies to insurer liability in *Pettigrew v. Home Ins. Co.*, 191 Neb. 312, 214 N.W.2d 920

(1974). In *Pettigrew v. Home Ins. Co.*, the employee sustained a compensable injury and received benefits. The employee then brought a tort action, based on negligence rather than intentional conduct, and a contract action against the workers' compensation insurer. The insurer allegedly provided safety engineering for the benefit of the employees and advised the employer in safety practices. The employee claimed that the insurer failed to use reasonable care in the inspection of the premises and equipment used in construction on the jobsite. The insurer asserted that § 48-111 immunized it from third-party actions. We agreed, stating:

> The sentence "For the purpose of this section, if the employer carries a policy of workmen's compensation insurance, the term employer shall also include the insurer" came into our law in 1965, undoubtedly because in 1964 the Illinois Supreme Court held the compensation carrier did not share the employer's immunity and sustained a sizeable judgment for an employee. The principal backer of the amendment so testified before the legislative committee considering the bill, without identifying the state where the case arose. He specifically stated his bill was intended to eliminate the possibility of double collection from the carrier. . . .
>
> It is evident to us that the legislative intent in adopting the language quoted was to place the insurer in the same situation as the employer and to eliminate actions of this type.
>
> . . . .
>
> In view of the legislative history and the clear and concise wording of the last sentence of section 48-111, R. R. S. 1943, plaintiff has no cause of action against the insurer. Plaintiff has elected to take under the statute. He has done so with the insurer paying the compensation benefits. He may not now change his course and recover in either tort or contract.

Pettigrew v. Home Ins. Co., 191 Neb. at 315-17, 214 N.W.2d at 922-24.

A factor not at issue in *Pettigrew v. Home Ins. Co.*, but one that is critical to our determination of the availability of the tort

of bad faith against workers' compensation insurers is the availability of a penalty for a delay in the payment of benefits. The Nebraska Workers' Compensation Act does have a penalty provision that is relatively limited in its scope and effect. Neb. Rev. Stat. § 48-125(1) (Reissue 1993) provides in part:

> Except as hereinafter provided, all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death; *Provided*, fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability. Whenever the employer refuses payment of compensation or medical payments subject to section 48-120, or when the employer neglects to pay compensation for thirty days after injury or neglects to pay medical payments subject to such section after thirty days' notice has been given of the obligation for medical payments, and proceedings are held before the Nebraska Workers' Compensation Court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award. Attorney's fees allowed shall not be deducted from the amounts ordered to be paid for medical services nor shall attorney's fees be charged to the medical providers.

The 50-percent penalty provision for delayed payments applies to periodic disability or indemnity benefit payments only and does not apply to medical benefit payments. *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990) (because employee's claim involved only unpaid medical expenses, he was not entitled to 50-percent sum authorized by § 48-125(1)).

We acknowledge that the limited penalty (i.e., attorney fees) for unpaid medical benefits provides little deterrence to the bad faith handling of claims by workers' compensation insurers. Nevertheless, the inclusion of an administrative penalty in the Nebraska Workers' Compensation Act is evidence of legislative intent that the issues related to an insurer's handling of claims in bad faith should remain within the exclusive jurisdiction of the act. Under those circumstances, it is the province of the

Legislature, not this court, to strengthen the deterrent effect of administrative penalties within the act as public policy may dictate.

In weighing the importance of the penalty provision contained in our statute to the resolution of the issue at hand, we find the following analysis by Professor Larson to be persuasive regarding the issue of exclusivity.

> The temptation to shatter the exclusiveness principle by reaching for the tort weapon whenever there is a delay in payments or a termination of treatment is all too obvious, and awareness of this possibility has undoubtedly been one reason for the reluctance of courts to recognize this tort except in cases of egregious cruelty or venality.
>
> One final factor may be noted that has figured in many of these cases: the presence in the statute of an administrative penalty for the very conduct on which the tort suit is based. A majority of the courts have taken the view that this evidences a legislative intent that the remedy for delay in payments, even vexatious delay, shall remain within the system in the form of some kind of penalty. Several courts, however, have rejected this reasoning, without very convincing rationales. A federal district court, for example, in *Carpentino* [*v. Transport Ins. Co.*, 609 F. Supp. 556 (D. Conn. 1985)], argued that penalties might not fully compensate the plaintiff. Since when, we may ask, has it been necessary for compensation acts to compensate claimants fully? Other courts have correctly pointed out that, although the penalties may in some instances be inadequate, this does not, within the overall nature of the compensation concept, make them invalid. At most, it may be cause to apply to the legislature for a more suitable penalty level.

6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 68.34(c) at 13-230 through 13-231 (1998). We agree.

The Supreme Court of Rhode Island reached the same conclusion in *Cianci v. Nationwide Ins. Co.*, 659 A.2d 662 (R.I. 1995). In *Cianci v. Nationwide Ins. Co.*, the insurer contested its liability for the claimant's liver transplant. The Workers' Compensation Court ordered the insurer to pay for the transplant and

then Cianci brought an action alleging that the insurer's refusal to " 'promptly, properly, and fully' " pay the benefits caused him to suffer severe and permanent injuries, emotional distress, and lost wages. *Id.* at 667.

The court first held that a workers' compensation insurance carrier is entitled to the same protection under the immunity provisions of the compensation act as an employer receives. Cianci argued that his injuries did not arise out of and in the course of his job duties, and therefore, his action was not barred by the exclusivity provisions of the act. The court determined, however, that Rhode Island's compensation act contained a penalty provision for delay in the payment of benefits.

> Such a penalty is evidence of a legislative intent that the remedy for delay in payments should remain in the workers' compensation system . . . .
>
> . . . .
>
> . . . An employee covered under the act has no common-law right of action against the insurer because the act expressly addresses such claims and thus immunizes the carrier from liability under any common-law suit.

Id. at 669-70. The court then refused to find an intentional tort exception to the exclusivity provisions of the act for insurers, as an intentional tort exception for employers had previously been rejected. See *Lopes v. G.T.E. Products Corp.*, 560 A.2d 949 (R.I. 1989).

Like the Supreme Court of Rhode Island, this court has also previously held that employers are not liable to employees, outside liability imposed by the Nebraska Workers' Compensation Act, for intentional torts. See *Abbott v. Gould, Inc.*, 232 Neb. 907, 443 N.W.2d 591 (1989). We are not persuaded by Ihm's contention that his reflex sympathetic dystrophy condition did not "aris[e] out of" his work-related injury. Reply brief for appellant at 2. While the alleged tortious conduct of the appellees, in refusing to timely authorize needed medical treatment, may have come after the original injury, the conduct was not independent of the injury. Rather, the alleged tortious acts of the appellees were completely intertwined with the original injury, as their acts related directly to an alleged bad faith delay in authorization of further treatment for the original injury.

Therefore, we hold that the penalty provisions contained in § 48-125(1) exclude the possibility of a common-law bad faith tort claim for damages resulting from delay in either authorization for or payment of medical expenses. Because the Nebraska Workers' Compensation Act is solely a statutory creature, we are not free to create a separate and independent tort claim for alleged acts arising out of a bad faith delay in authorization of any medical treatment that is directly related to the original, compensable injury. Thus, Ihm may not maintain a tort action for bad faith against the appellees because the Nebraska Workers' Compensation Act provides his exclusive remedy, and the district court properly sustained the appellees' demurrers and dismissed the instant cause for lack of subject matter jurisdiction.

CONCLUSION

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, C.J., participating on briefs.

SAMANTHA HILL, APPELLANT, V. WOMEN'S MEDICAL CENTER OF NEBRASKA AND JAMES T. HOWARD, M.D., APPELLEES.
580 N.W.2d 102

Filed June 26, 1998. Nos. S-97-273, S-97-408.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Judgments: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
3. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes: Legislature: Intent.** Generally, it is the court's duty to give effect to the purpose and intent of the Legislature as ascertained from the statute itself, considering the entire language of the statute in its plain, ordinary, and popular sense.
5. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

William G. Line for appellant.

William M. Lamson, Jr., and William R. Settles, of Kennedy, Holland, DeLacy & Svoboda, and Michael T. Levy for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Samantha Hill sued the Women's Medical Center of Nebraska (Center) and James T. Howard, M.D., to recover damages resulting from the performance of an abortion and the failure of the defendants to obtain Hill's informed consent for the procedure. The defendants' demurrers were ultimately sustained, and the district court dismissed the action first as to Howard and subsequently as to the Center. We address the appeals from both dismissals in this opinion.

SCOPE OF REVIEW

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Board of Regents v. Pinzon, ante* p. 145, 575 N.W.2d 365 (1998).

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Lawry v. County of Sarpy, ante* p. 193, 575 N.W.2d 605 (1998).

FACTS

On July 5, 1995, Hill filed a petition against the Center, alleging that she had engaged the Center to perform an abortion on March 12, 1994. Hill's first cause of action alleged that the abortion was negligently performed, and her second cause of

action alleged breach of contract and sought a return of the fee paid for the abortion plus interest.

On July 5, 1996, Hill filed an amended petition that named both the Center and Howard as defendants. Hill alleged that Howard had entered into an agreement with the Center to render medical services as outlined by the medical director and that the Center and Howard had performed Hill's abortion without obtaining her voluntary and informed consent, as required by Neb. Rev. Stat. § 28-327 (Reissue 1995). Hill claimed that Neb. Rev. Stat. § 28-327.04 (Reissue 1995) provided a cause of action against the Center and Howard for their failure to obtain an informed consent for the abortion, and she also alleged joint and several liability for negligent performance of an abortion.

Howard demurred to the amended petition, alleging that it failed to state a cause of action and that the action was barred by applicable statutes of limitation. The district court sustained the demurrer, concluding that the right to file an action against a physician for an act or omission in connection with professional efforts by the physician was controlled by Neb. Rev. Stat. § 44-2828 (Reissue 1993). The district court found that the cause of action arose on March 12, 1994, and was barred by the 2-year statute of limitations set forth in § 44-2828. Hill was granted 20 days to amend.

Hill's second amended petition was identical to the first amended petition except insofar as it alleged that the negligent performance of the abortion was "an element of the negligence referred to in Section 28-327.04." Howard demurred to the second amended petition on the grounds that it was barred by applicable statutes of limitation. The Center also demurred to the second amended petition on the grounds that it failed to state a cause of action against the Center.

Before the district court ruled on the demurrers to the second amended petition, Hill filed a third amended petition, which alleged that the manner in which the abortion was performed violated the standard of care due a woman in the performance of an abortion, which standard of care was commonly recognized and practiced by abortionists in the Omaha area. In all other respects, the third amended petition was identical to the second amended petition.

Howard's demurrer to the third amended petition was sustained on the grounds that the cause of action was barred by the 2-year statute of limitations in § 44-2828, and the district court dismissed the action against Howard. Hill timely appealed the dismissal, which appeal is before this court as case No. S-97-273.

Subsequently, the district court sustained a demurrer by the Center to the third amended petition, which demurrer alleged that the petition failed to state a cause of action and was barred by the statute of limitations. The district court found that civil liability pursuant to § 28-327(3) depended upon the Department of Health's having published certain materials at the time the physician was required to inform the woman of her right to review them. The district court found that this was a condition precedent to a civil suit against a defendant under § 28-327(3) and that there was no allegation in Hill's petition that the Department of Health had published and made available these materials. Regarding Hill's claim that the abortion was negligently performed, the district court concluded that the Center's liability for an abortion performed negligently by Howard was based on the doctrine of respondeat superior and that since the statute of limitations had run against Howard, a claim made against the principal for the negligent conduct of its agent against whom the statute of limitations had run was also barred. Hill was given 10 days within which to further amend.

The Center later moved for an order dismissing the action against it for the reason that the district court had sustained the Center's demurrer to Hill's third amended petition and Hill had failed to further amend. Hill filed a "confession" to the Center's motion to dismiss, elected to stand on her third amended petition, and did not further plead. The district court sustained the Center's motion and dismissed the action against the Center. Hill's appeal from the dismissal of the Center is before this court as case No. S-97-408.

ASSIGNMENTS OF ERROR

Hill claims the district court erred in finding that the medical malpractice statute of limitations governed, rather than the statute of limitations on a statutory liability, and in sustaining the demurrers and dismissing her petition.

ANALYSIS

Hill asserts that her third amended petition stated a cause of action under § 28-327.04 and that it did not state a cause of action under the Nebraska Hospital-Medical Liability Act (NHMLA), Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 1993 & Cum. Supp. 1996), or under common-law principles of professional negligence. Both professional negligence actions under the NHMLA and professional negligence actions under common law are governed by a 2-year statute of limitations. Hill argues that her action is governed by the 4-year statute of limitations for an action upon a liability created by statute. See Neb. Rev. Stat. § 25-206 (Reissue 1995).

Section 28-327.04 sets forth consequences for violating § 28-327 and the elements necessary to obtain voluntary and informed consent to an abortion procedure. Section 28-327.04 provides:

> Any person upon whom an abortion has been performed or attempted in violation of section 28-327 or the parent or guardian of a minor upon whom an abortion has been performed or attempted in violation of such section shall have a right to maintain a civil cause of action against the person who performed the abortion or attempted to perform the abortion. A violation of such section shall be prima facie evidence of professional negligence. The written certification prescribed by subdivision (3) of section 28-327 signed by the person upon whom an abortion has been performed or attempted shall constitute and create a rebuttable presumption of full compliance with all provisions of section 28-327 in favor of the physician who performed or attempted to perform the abortion, the referring physician, or the agent of either. The written certification shall be admissible as evidence in the cause of action for professional negligence or in any criminal action. If judgment is rendered in favor of the plaintiff in any such action, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against the defendant.

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an indepen-

dent, correct conclusion irrespective of the determination made by the court below. *Board of Regents v. Pinzon, ante* p. 145, 575 N.W.2d 365 (1998). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.* Generally, it is the court's duty to give effect to the purpose and intent of the Legislature as ascertained from the statute itself, considering the entire language of the statute in its plain, ordinary, and popular sense. See *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998).

The stated purpose of Neb. Rev. Stat. §§ 28-325 to 28-345 (Reissue 1995) is to provide protection for the life of the unborn child whenever possible. See § 28-325. Section 28-327 requires that no abortion be performed except with the voluntary and informed consent of the woman upon whom the abortion is to be performed, and § 28-327.04 provides that any woman upon whom an abortion has been attempted or performed may bring a civil action against the person who performed or attempted to perform an abortion in violation of § 28-327 and that such violation is prima facie evidence of professional negligence. Section 28-327.04 specifically describes the cause of action as one for professional negligence by stating that "[t]he written certification shall be admissible as evidence in the cause of action for professional negligence or in any criminal action."

We conclude that the Legislature did not intend for § 28-327 to create a cause of action under § 25-206, which provides: "An action upon a contract, not in writing, expressed or implied, or an action upon a liability created by statute, other than a forfeiture or penalty, can only be brought within four years."

We have held that any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice and comes within the professional or malpractice statute of limitations. *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989). An action for failure to obtain informed consent is an action for professional misconduct. See *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997).

The district court correctly determined that Hill's action against Howard was one for professional negligence and that a 2-year statute of limitations applied. Hill's cause of action accrued on March 12, 1994, when the abortion was performed. See *Tiwald v. Dewey*, 221 Neb. 547, 378 N.W.2d 671 (1985) (cause of action for professional malpractice accrues and statute of limitations begins to run at time of act or omission which is alleged to be professional negligence that is basis for cause of action). Hill first named Howard as a defendant in her amended petition filed on July 5, 1996, and Hill made no allegation which would toll the 2-year statute of limitations. When it is apparent from the face of a petition that the cause of action asserted is ostensibly barred by the statute of limitations, the petition is demurrable as failing to state a cause of action unless the plaintiff alleges some excuse which tolls the operation and bar of the statute. *Giese v. Stice, supra.* After giving Hill three opportunities to amend, the district court properly dismissed the action against Howard for the reason that it was barred by the statute of limitations.

In contrast, Hill's action against the Center was commenced within 2 years from the date the abortion was performed. The Center argues that Hill's third amended petition fails to state a cause of action against it. Hill's third amended petition stated: "Defendants, and each of them, are jointly and severally liable to plaintiff because of their joint participation in the abortion procedure." We must consider whether Hill's third amended petition in fact sets forth any facts which could support liability on the part of the Center. When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Lawry v. County of Sarpy, ante* p. 193, 575 N.W.2d 605 (1998). A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. See *Coburn v. Reiser, ante* p. 495, 577 N.W.2d 289 (1998).

As to Hill's alleged cause of action for failure to obtain informed consent in accordance with § 28-327, § 28-327.04

provides that the right of action for violation of § 28-327 is "against the person who performed the abortion or attempted to perform the abortion." This limitation is consistent with § 28-327(1), which provides that the duty to obtain informed consent as set forth in § 28-327 is placed upon "the physician who is to perform the abortion . . . the referring physician, or . . . a licensed physician assistant or registered nurse who is an agent of either." The Center was not a person who performed or attempted to perform an abortion on Hill. Neither is there any allegation that the Center was an agent of the physician who was to perform the abortion or of the referring physician. Therefore, Hill's third amended petition fails to allege facts to support liability for violation of § 28-327.

Similarly, under both common law and the NHMLA, Hill has failed to allege facts to support liability on the part of the Center for the alleged failure to obtain informed consent. In both common-law professional negligence actions and actions under the NHMLA, we have held that a hospital has no independent duty to obtain a patient's informed consent to a surgical procedure to be performed by a physician who is not an employee of the hospital and that such duty lies exclusively with the treating physician. See *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997). Hill fails to allege an employment relationship between the Center and Howard.

In addition to alleging a cause of action against the Center for failure to obtain informed consent, Hill also alleged in her third amended petition that "[a]s an element of the negligence referred to in Section 28-327.04 . . . the abortion was negligently performed resulting in an incomplete abortion." Specifically, Hill alleged that fetal tissue was left in her uterus and that the leaving of fetal tissue violated the standard of care commonly recognized and practiced by abortionists in the Omaha area.

For reasons already discussed, Hill does not have a cause of action against the Center under § 28-327.04, which sets forth specific elements of informed consent to an abortion procedure. However, even considering her third amended petition as a potential action for professional negligence under common law or the NHMLA, Hill fails to set forth facts sufficient to state a

cause of action against the Center for negligently leaving fetal tissue in her uterus. The third amended petition sets forth the legal conclusion that the Center and Howard were jointly and severally liable, but alleges no facts which would indicate any negligence on the part of the Center. In particular, the third amended petition does not allege any facts as to how the Center or its agents participated in the abortion procedure or otherwise negligently contributed to her injury. Nor, as already discussed, does the third amended petition allege that there was an employment relationship between the Center and Howard such that the Center might be vicariously liable for Howard's actions.

We conclude that the district court correctly sustained the Center's demurrer, albeit for reasons different from those stated by the district court. Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm. *Swift v. Dairyland Ins. Co.*, 250 Neb. 31, 547 N.W.2d 147 (1996). Hill's third amended petition failed to state a cause of action against the Center. In addition, the record shows that the Center moved for dismissal of Hill's third amended petition and that Hill confessed to the motion. Therefore, Hill is precluded from objecting to the district court's dismissal of the third amended petition and has waived any objection to the dismissal. A plaintiff cannot consent to an order of dismissal and seek review of the order. See *Robins v. Sandoz*, 175 Neb. 5, 120 N.W.2d 360 (1963) (party is not entitled to prosecute error upon granting of order or rendition of judgment when same was made with party's consent or upon party's own application).

CONCLUSION

The judgments of the district court dismissing Hill's third amended petition against Howard and the Center are affirmed.

AFFIRMED.

MARTIN GOMEZ, ON BEHALF OF HIMSELF AND HIS MINOR CHILDREN, KASSANDRA B. AND NICHOLAS B., APPELLANT, V. KAREN M. SAVAGE AND TIMOTHY L. SAVAGE, APPELLEES, AND ANITA A. BECHTOLD, INTERVENOR-APPELLEE.

580 N.W.2d 523

Filed June 26, 1998. No. S-97-333.

1. **Habeas Corpus: Child Custody: Appeal and Error.** A decision in a habeas corpus case involving custody of a child is reviewed by an appellate court de novo on the record, and in that de novo review, where the evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Parental Rights: Adoption.** In the case of an agency adoption, the relinquishing parent surrenders all rights to the child in favor of the state or a licensed child placement agency.
4. ____: ____. Pursuant to Neb. Rev. Stat. § 43-106.01 (Reissue 1993), when a child is relinquished by written instrument to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such child.
5. **Adoption.** In an agency adoption, if the adoptive parents are unsuitable or decline to go through with the adoption, the agency retains custody over the child until such time as the child is adopted by another family.
6. ____. In the case of a private adoption, the child is relinquished directly into the hands of the prospective adoptive parents without interference by the state or a private agency.
7. **Parental Rights: Adoption.** Pursuant to Neb. Rev. Stat. § 43-111 (Reissue 1993), in an agency adoption, the relinquishing parent's rights are not totally extinguished until the child has been formally adopted by the prospective parents.
8. **Parental Rights.** A relinquishment of parental rights, given voluntarily, is not revocable.
9. **Parental Rights: Adoption.** In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.
10. **Evidence: Appeal and Error.** Under a de novo review, factual questions are tried de novo on the record and the appellate court does not consider any impermissible or improper evidence.
11. **Habeas Corpus: Child Custody: Parental Rights.** Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.

12. **Child Custody: Parental Rights.** A court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.
13. ____: ____. The right of a parent to the custody of a minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and a court may not deprive a parent of such custody unless he or she is shown to be unfit or to have forfeited his or her superior right to such custody.
14. **Child Custody: Words and Phrases.** Parental unfitness involves personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.
15. **Habeas Corpus: Child Custody: Parental Rights.** If the evidence of unfitness is insufficient to justify termination of parental rights in an action maintained under the Nebraska Juvenile Code, similarly deficient evidence of parental unfitness in a habeas corpus proceeding prevents a court from granting child custody to one who is a stranger to the parent-child relationship.
16. **Parental Rights: Proof.** An order terminating parental rights must be based upon clear and convincing evidence.
17. **Child Custody: Parental Rights.** A court cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems, or is not socially acceptable, nor because the parent's lifestyle is different or unusual.
18. ____: ____. The fact that a person outside the immediate family relationship may be able to provide greater or better financial care or assistance for a child than can a parent is an insufficient basis to deprive a parent of the right to child custody.
19. **Parental Rights.** A court can determine that a parent has failed to fulfill parental responsibilities of support and maintenance when no orders for support have been entered.
20. ____. One need not have physical possession of a child to demonstrate the existence of neglect contemplated by Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 1996).
21. ____. The State is not required to show harm to the children before parental rights can be terminated.
22. ____. A parent's moral conduct is a valid consideration in a determination of parental fitness.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed as modified.

Peter T. Hoffman, of University of Nebraska Civil Clinical Law Program, for appellant.

Herbert J. Elworth, of Casey & Elworth, and Mark R. Widell for appellees and intervenor-appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

In this appeal of a habeas corpus action seeking custody of two minor children, we are required to determine the competing interests of the appellant father, Martin Gomez; the intervenor-appellee mother, Anita Bechtold, who relinquished the children for adoption and later revoked the relinquishment; and the proposed adoptive parents, appellees Karen M. Savage and Timothy L. Savage. The district court determined that Bechtold's revocation was valid, that Gomez was unfit to have custody, and that it would be in the best interests of the children to remain in the custody of the Savages. We affirm as modified.

BACKGROUND

Gomez and Bechtold began dating when they were teenagers, and on July 23, 1982, they had a child, Jamie. Although they never married, Gomez and Bechtold began living together in 1984. The couple had two more children, Kassandra, born May 4, 1986, and Nicholas, born July 17, 1989, who are the subjects of this litigation. Gomez was not identified as the father on any of the children's birth certificates. However, the parties do not contest that he is the biological father.

Gomez did not assist with payment for the births of any of Bechtold's children. However, Gomez was present in the birthing room when Nicholas and Kassandra were born. In or about 1986, Gomez left Bechtold and the two children for about 6 months and moved to Kansas. During that time, he provided no support for his children and did not make contact with them or their mother. However, Gomez and Bechtold reunited in December 1987. During the time that Gomez and Bechtold were together, Gomez assisted with the housework, cooking, and care of the children. Gomez also attended parent-teacher conferences, attended school functions, and gave the children birthday gifts.

During the periods of time that Gomez and Bechtold lived together, Gomez partially supported Bechtold and the children with his wages, unemployment income, and a workers' compensation settlement. Bechtold received public assistance and attended cosmetology school for 14 months. Bechtold began a career in hairstyling in 1989.

According to Bechtold, Gomez used alcohol and marijuana during the periods of time they were together, and occasionally used crank, an illegal narcotic. Bechtold further testified that Gomez physically and mentally abused her and was "mean" to her and the children.

Gomez and Bechtold separated on August 10, 1990, after Gomez became involved with another woman whom he subsequently married. Gomez' wife has two children from a previous relationship and has one child fathered by Gomez. Following the separation, Gomez maintained some contact with his children but provided little financial support. The record is in conflict regarding how much time Gomez spent with his children after the separation. Gomez indicates that he spoke with the children by telephone several days each week and kept the children for overnight stays, weekends, and other visits. Bechtold indicates that Gomez called and visited the children less often than that.

According to Bechtold, between August 10, 1990, and November 1, 1991, the only support Gomez provided was approximately $50 in cash, along with the purchase of mittens and hats for the children and school supplies for Jamie. Bechtold testified that the total value of support from Gomez during this period was around $150. Gomez contends that he also provided diapers, toys, clothing, and hygienic items. Gomez preferred to provide support by buying items for the children rather than by giving cash to Bechtold because he did not trust her to buy things for the children.

Relinquishment and Placement for Adoption

During the summer of 1991, Bechtold determined that she could not take care of the children by herself and concluded that she could not rely on Gomez for financial support. Bechtold then decided to place the two younger children for adoption. Bechtold discussed adoption with Gomez, who told her he would not consent to placing the children for adoption. According to Bechtold, Gomez told her that he was saving money in order to get married and buy a house, and would not help Bechtold financially until after he and his new wife settled in. However, Gomez also offered to take the children after he

became married and offered to let the children stay with his sister. Bechtold then contacted an adoption agency in California, but was unable to place the children with that agency because Gomez again refused consent to an adoption.

In October 1991, Bechtold contacted the K.E.S.I.L. adoption agency. Knowing she needed Gomez' consent, Bechtold lied to K.E.S.I.L. and stated that she did not know the identity of the children's father(s). Bechtold placed Kassandra and Nicholas in K.E.S.I.L.'s custody on October 19, 1991. On November 2, 1991, Bechtold signed relinquishment forms for each child. The relinquishment forms stated that Bechtold granted K.E.S.I.L. full power in its discretion to take the children, care for the children, and place the children in a suitable family home for adoption. The relinquishments further authorized K.E.S.I.L. to take all necessary steps to effect the legal adoption of the children. K.E.S.I.L. accepted responsibility for the children on the same forms. Along with the relinquishment forms, Bechtold signed an affidavit stating in part that she had full knowledge and understanding as to the nature of the proceedings and that she fully realized that she would lose all legal rights in the children as soon as K.E.S.I.L. accepted her written relinquishment, at which time her consent would become irrevocable.

On the same day Bechtold signed the relinquishment forms, Kassandra and Nicholas were placed with the Savages. The Savages signed a "Child Acceptance Agreement," in which they acknowledged that K.E.S.I.L. had advised them that "until finalization in Nebraska Courts, this adoptive placement is one they term 'legal risk' [sic] because the birth fathers of the children have not been named, identified on the child's birth records or signed a relinquishment of parental rights." The agreement also stated that if for any reason the adoptive parents were not able to continue with placement, the children would return to K.E.S.I.L.'s custody.

Bechtold contends that she specifically chose the Savages as adoptive parents for Kassandra and Nicholas. The record contains a letter on behalf of K.E.S.I.L.'s predecessor, Adoption Links Worldwide, disclaiming any interest in, or responsibility for, the children. The letter also states that the agency's records reflect, and it has been represented to them, that the placement

was not made with K.E.S.I.L., but was an "identified placement" under which the children were placed with a couple specifically chosen by Bechtold. However, other than this letter and Bechtold's statements to this fact, the record has no details on how Bechtold chose the Savages or if information regarding other adoptive parents was provided to her.

Gomez learned in November 1991 that the two children had been placed for adoption when he telephoned Bechtold to discuss the children's attendance at his upcoming wedding. Bechtold told Gomez that she had placed the children for adoption but refused to give him any further information. Gomez called various adoption agencies listed in the phone book, but was unable to locate the children. In November 1991, Gomez filed two "Notice of Intent to Claim Paternity" forms with the Department of Social Services.

On October 20, 1992, the Savages filed a petition for adoption in the county court for Cass County. Gomez contested the adoption proceedings. The county court in the adoption proceedings determined that Gomez was unfit and that his parental rights should be terminated in order for the adoption to continue. The decision of the county court was appealed to the Nebraska Court of Appeals. See *In re Adoption of Kassandra B. & Nicholas B.*, 3 Neb. App. 180, 524 N.W.2d 821 (1994). This court granted further review and on December 8, 1995, concluded that due to Gomez' lack of consent, the district court lacked jurisdiction to hear the adoption proceedings. Accordingly, we remanded the cause with directions to dismiss. See *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995).

Revocation of Relinquishments

On December 15, 1995, Bechtold gave notice to the Savages that she revoked the relinquishments she gave to K.E.S.I.L. in November 1991. At this time, K.E.S.I.L. was no longer licensed in Nebraska as an adoption agency. The parties stipulated that the children could still legally be put up for adoption by an agency after the agency's license had expired. The Savages consented to Bechtold's actions in revoking the relinquishments. Next, Bechtold gave the Savages a power of attorney effective

for both Kassandra and Nicholas, and the children continued to reside with the Savages. Gomez then filed the instant action, seeking a writ of habeas corpus in order to regain custody of his children. Following the filing of Gomez' petition, the Savages filed a new adoption proceeding under the new adoption laws appearing at Neb. Rev. Stat. § 43-104.01 et seq. (Supp. 1995). Bechtold has intervened in the instant case.

TRIAL PROCEEDINGS

Trial was held on December 20, 1996, and February 4 and 7, 1997. Four days prior to the December trial date, Gomez was charged with assault and battery, disorderly conduct, and possession of a controlled substance, due to his involvement in a fight outside of a bar in Council Bluffs, Iowa. The record further lists 23 previous contacts with law enforcement. Gomez has been convicted of shoplifting, giving false information, trespassing, failure to appear, obstruction of justice, destruction of property, fraudulent obtaining of benefits, fraud by receipt of unemployment benefits, and no valid registration. Gomez has also been convicted three times for driving under the influence of intoxicating liquor (DUI). Gomez was convicted of a third-offense DUI during the period of time of the trial proceedings and was sentenced to serve a jail sentence of 30 days in February 1997. As a result of his DUI convictions, Gomez' driver's license has been revoked in Iowa for a period of 6 years. During 1996, Gomez was in jail four times.

At the commencement of trial, Gomez testified that he had just become employed with a roofing company and that by the time of the February trial date, he had received a raise, made arrangements to catch up on missed child support payments, and made arrangements to have child support payments taken directly from his wages. Also by the time of the February trial date, Gomez stated that he had arranged for housing assistance, rented furniture, and moved into a four-bedroom house with his wife and family. Gomez testified that he realized he had a problem with alcohol and that many of his problems were due to the stress of losing his children. Gomez further testified that he had stopped drinking, joined Alcoholics Anonymous, and realized that it was time he grew up and assumed a normal life.

Testimony at trial revealed that Gomez assaulted his wife in front of his stepchildren in 1994. Gomez admitted that he had been drinking and that the children became very upset as a result of the assault. Gomez' conviction for obstruction of justice and destruction of property resulted from an incident in which Gomez kicked out a door at the Omaha Police Division after he had been drinking. Bechtold testified that she had seen Gomez selling drugs in 1996. Bechtold further testified that Gomez attended a birthday party for Jamie during which he smoked marijuana and appeared to be intoxicated. Gomez admitted that he had previously kept drugs in the house while the children were there. However, Gomez stated that he did not smoke marijuana in front of the children and that he has not used marijuana since 1993.

The record indicates that Gomez has had trouble remaining employed and has a history of unemployment. Between July and December 20, 1996, Gomez earned only $500 to $1,000. He does not keep a checking or savings account. Gomez does not have any physical or mental disabilities that prevent him from being employed. He is delinquent by approximately $500 in the payment of child support for Jamie. Bechtold testified that Gomez rarely sees or calls Jamie, but Gomez testified that he speaks to Jamie often and that they have not spent much time together because she has been busy with her teenage friends. Gomez also testified that he was behind in child support payments because of his unemployment and that he has made up payment deficiencies before. Gomez further testified that jail time interfered with his ability to retain employment.

Joseph L. Rizzo, Ph.D., a clinical psychologist, testified on behalf of the Savages. Rizzo made an assessment of Gomez and testified on his behalf in the original adoption proceedings in 1993. The record shows that Rizzo had reevaluated his opinion regarding Gomez' fitness as a parent. Gomez moved that Rizzo be disqualified as a witness because work product and privileged information had been shared with the Savages' attorney, causing prejudice to Gomez. The district court overruled Gomez' motion.

Other testimony indicated that Gomez was able to visit his children in 1993 under court-ordered visitation. According to

Gomez and the children's guardian ad litem at that time, the visitation went fine, the children were comfortable with Gomez and happy to see him, and Kassandra recognized Gomez. However, Karen Savage testified that the children were upset following Gomez' visits and had to sleep with night lights afterward. Gomez last saw his children in 1993. The record shows that the children have bonded with the Savages and refer to the Savages as their parents. Gomez has conceded that if he is found to be unfit to have custody, it is in the best interests of the children that they remain in the custody of the Savages. Bechtold testified that if the Savages are unable to adopt the children, then she wants them back.

DISTRICT COURT'S DETERMINATION

Pointing to Gomez' history of unemployment, alcohol abuse, contacts with law enforcement, and lack of parental support, the district court determined that Gomez was unfit to act as a parent to Kassandra and Nicholas. The district court determined that the revocation of Bechtold's relinquishment of her parental rights was valid and that Bechtold had authority to issue a power of attorney to the Savages. The district court further questioned whether Gomez had standing to challenge the revocations. The district court then determined that under the power of attorney executed by Bechtold, the Savages had lawful custody of the children, and that the evidence supported the conclusion that it would be in the best interests of the children if they remained with the Savages.

ASSIGNMENTS OF ERROR

Gomez assigns that the district court erred in (1) determining that Bechtold could revoke her relinquishments of her parental rights, (2) allowing Rizzo to testify on behalf of the Savages, and (3) determining that Gomez was unfit to have custody of his children.

STANDARD OF REVIEW

Both parties have asserted that in an appeal from a decision in a habeas corpus action involving custody of a child, an appellate court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discre-

tion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).

However, this standard derives from *Reynolds v. Green*, 232 Neb. 60, 439 N.W.2d 486 (1989), which erroneously imported the abuse of discretion standard applicable in dissolution of marriage cases into a habeas corpus action. To the extent Reynolds erroneously set out the standard of review, it is overruled.

Under the correct standard of review, a decision in a habeas corpus case involving the custody of a child is reviewed by an appellate court de novo on the record, and in that de novo review, where the evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. See, e.g., *Hohndorf v. Watson*, 240 Neb. 368, 482 N.W.2d 241 (1992); *L.G.P. v. Nebraska Dept. of Soc. Servs.*, 239 Neb. 644, 477 N.W.2d 571 (1991); *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991); *Hensman v. Parsons*, 235 Neb. 872, 458 N.W.2d 199 (1990).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Brams Ltd. v. Elf Enters.*, 253 Neb. 932, 573 N.W.2d 139 (1998); *Mandolfo v. Chudy*, 253 Neb. 927, 573 N.W.2d 135 (1998).

ANALYSIS

Bechtold's Revocation of Relinquishments of Parental Rights

Gomez argues that Bechtold's revocations were invalid because the adoption was an agency adoption under which Bechtold's relinquishments became irrevocable when the agency accepted responsibility for the children. However, Bechtold and the Savages argue that the revocations were valid. Because the underlying adoption was not able to be carried out,

Bechtold contends that a revocation of her consent to that adoption is appropriate. Bechtold further asserts that the adoption was a private adoption because she specifically chose the Savages as adoptive parents and that in a private adoption, the relinquishing parent does not lose all parental rights until a decree of adoption has been entered. Bechtold states that if the Savages cannot adopt the children, then she wants to regain custody of them.

The Legislature, as well as this court, has long recognized a distinction between agency adoptions and private adoptions. In the case of an agency adoption, the relinquishing parent surrenders all rights to the child in favor of the state or a licensed child placement agency. *Yopp v. Batt, supra.* This court has treated an adoption as an agency adoption when a natural parent personally chose the adoptive parents with the help of an agency. See *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 305 N.W.2d 874 (1981). Neb. Rev. Stat. § 43-106.01 (Reissue 1993) states:

> When a child shall have been relinquished by written instrument . . . to the Department of Social Services or to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such child.

Under § 43-106.01, the rights of the relinquishing parent are terminated when the agency accepts responsibility for the child in writing. It is the agency that finds and investigates the prospective parents. If the adoptive parents are unsuitable or decline to go through with the adoption, the agency retains custody over the child until such time as the child is adopted by another family. *Yopp v. Batt, supra.*

In the case of a private adoption, the child is relinquished directly into the hands of the prospective adoptive parents without interference by the state or a private agency. *Id.* Neb. Rev. Stat. § 43-111 (Reissue 1993) states: "Except as provided in section 43-106.01 . . . after a decree of adoption has been entered, the natural parents of the adopted child shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such adopted child . . . ."

Under § 43-111, the relinquishing parent's rights are not totally extinguished until the child has been formally adopted by the prospective parents. *Yopp v. Batt, supra.*

This court has recognized that issues regarding the relinquishment of parental rights are particularly troublesome when the relinquishing parent wants the child returned. *Id.* Thus, this court has held that a relinquishment, given voluntarily, is not revocable. In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid. *Gaughan v. Gilliam*, 224 Neb. 836, 401 N.W.2d 687 (1987).

Bechtold asserts that the adoption was a private adoption because she specifically chose the Savages as adoptive parents. However, the relinquishments and affidavit signed by Bechtold make clear that she relinquished the children to the K.E.S.I.L. agency and not directly to the Savages. The relinquishments further show K.E.S.I.L.'s acceptance of responsibility for the children. The agreement signed by the Savages indicates that if the adoption were to fail, the children would be returned to the agency. Neither Bechtold nor the agency has provided sufficient facts to show that the instant case is distinguishable from *Kellie*, where a natural parent chose and identified the adoptive parents with the assistance of an agency. Accordingly, the instant case involves an agency, rather than a private, adoption.

Because the instant case involves an agency adoption, Bechtold's parental rights were terminated on November 2, 1991, when the agency accepted responsibility for the children. Bechtold does not contend that the original relinquishments were given due to coercion, fraud, or duress. Bechtold's relinquishments were voluntarily given and were irrevocable. Thus, Bechtold's subsequent attempts to revoke her relinquishments were not valid, and Bechtold does not have any present rights to custody of the children based on her status as their natural mother.

RIZZO'S TESTIMONY

Gomez contends that the district court erred in allowing Rizzo to testify because Rizzo had information regarding work

product of Gomez' former attorney that may have been communicated to the Savages' attorney.

Because of this court's de novo review, the trial court's consideration of improper evidence would not, by itself, require reversal. Rather, this court tries factual questions de novo on the record and does not consider any impermissible or improper evidence. See *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991).

Assuming arguendo that Gomez is correct and Rizzo's testimony was impermissible, an issue we do not have to address, we will consider the issue of Gomez' fitness as a parent without considering Rizzo's testimony.

GOMEZ' FITNESS

Gomez contends that the district court erred in determining that he was unfit and argues that as a biological parent, he has rights superior to the Savages regarding the custody of his children unless the Savages affirmatively show by clear and convincing evidence that he is not a fit parent. In particular, Gomez argues that the district court applied the wrong standard in determining that he failed to provide support for his children and improperly considered his financial status. Gomez further contends that the court failed to recognize that the children were not present or directly affected by his past encounters with law enforcement and use of alcohol. Before proceeding further, we set forth some general principles of law which are helpful to the resolution of the issue of fitness.

Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992); *Nielsen v. Nielsen*, 207 Neb. 141, 296 N.W.2d 483 (1980).

A court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. *Uhing v. Uhing, supra*; *Nielsen v. Nielsen, supra.*

The right of a parent to the custody of a minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and a court may not deprive a parent of such custody unless he or she is shown to be unfit or to have forfeited his or her superior right to such custody. *Uhing v. Uhing, supra*; *Nielsen v. Nielsen, supra.*

Parental unfitness has been defined as "'a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.'" *Uhing v. Uhing*, 241 Neb. at 375, 488 N.W.2d at 372. However, this court has also stated that

> [i]f the evidence of unfitness is insufficient to justify termination of parental rights in an action maintained under the Nebraska Juvenile Code, similarly deficient evidence of parental unfitness in a habeas corpus proceeding prevents a court from granting child custody to one who is a stranger to the parent-child relationship.

Uhing v. Uhing, 241 Neb. at 377, 488 N.W.2d at 373. See, also, *Marcus v. Huffman*, 187 Neb. 798, 194 N.W.2d 221 (1972). This rule is based on the premise that if the state would not be justified in taking custody of a child, certainly a stranger should stand in no better position. *Marcus v. Huffman, supra.*

Neb. Rev. Stat. § 43-292 (Cum. Supp. 1996) of the Nebraska Juvenile Code provides in part:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> (1) The parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition;
>
> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection;
>
> (3) The parents, being financially able, have willfully neglected to provide the juvenile with the necessary subsistence, education, or other care necessary for his or her

> health, morals, or welfare or have neglected to pay for such subsistence, education, or other care when legal custody of the juvenile is lodged with others and such payment ordered by the court;
>
> (4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile[.]

An order terminating parental rights must be based upon clear and convincing evidence. *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990); *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985).

Gomez is correct in stating that the court cannot deny him custody based on the fact that he has limited resources. A court cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems, or because the parent's lifestyle is different or unusual. *State v. Worrell*, 198 Neb. 507, 253 N.W.2d 843 (1977). The fact that a person outside the immediate family relationship may be able to provide greater or better financial care or assistance for a child than can a parent is an insufficient basis to deprive a parent of the right to child custody. *Uhing v. Uhing, supra.*

However, in the instant case, the record indicates that Gomez chose to withhold the resources he had from his children and failed to make reasonable attempts to acquire steady employment. As the district court noted, in 1996, Gomez had five different employers. Although he has provided some support for his children, the record is clear that the amounts were nominal and irregular. At one point, Gomez abandoned his children and moved to Kansas, denying his children anything in support during that time. Although he may have been behind on his child support payments for Jamie due to his lack of financial resources, the record also indicates that during his periods of unemployment, Gomez was either physically able to work and chose not to, or was unable to work because of incarceration. Gomez had control over whether he generated income and remained out of jail in order to provide child support for Jamie. Although a support order was never entered that required

Gomez to provide child support for Nicholas and Kassandra, a court can determine that a parent has failed to fulfill parental responsibilities of support and maintenance when no orders for support have been entered. See *In re Interest of Wagner and Russell*, 209 Neb. 33, 305 N.W.2d 900 (1981).

Also of concern is Gomez' criminal history, alcohol use, and drug use. Gomez has been convicted of DUI three times and has had his driver's license suspended for 6 years. He was also arrested for assaulting his wife in front of his stepchildren while under the influence of alcohol. Although Gomez stated that he has stopped drinking and joined Alcoholics Anonymous, this was apparently done at the last minute, sometime between the two trial dates, and he gave no evidence to prove his attendance at Alcoholics Anonymous meetings.

Gomez argues that under § 43-292(4), his alcohol abuse must be shown by clear and convincing evidence to be "seriously detrimental to the health, morals or well-being of the juvenile." Brief for appellant at 26. Gomez further states that in *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991), this court held that alcohol abuse must rise to the level of serious neglect of the child in question before parental rights can be terminated. However, although *In re Interest of A.H.* involved serious alcohol abuse, this court made no such statement in that case.

The fact that Nicholas and Kassandra were not present while Gomez was drinking or was involved in criminal activity makes little difference. One need not have physical possession of a child to demonstrate the existence of neglect contemplated by § 43-292(2), and the State is not required to show harm to the children before parental rights can be terminated. *In re Interest of J.N.V.*, 224 Neb. 108, 395 N.W.2d 758 (1986); *In re Interest of S.P., N.P., and L.P.*, 221 Neb. 165, 375 N.W.2d 616 (1985). Further, a parent's moral conduct is a valid consideration in a determination of parental fitness. *In re Interest of Reed*, 212 Neb. 208, 322 N.W.2d 411 (1982).

The fact that Gomez claims that he made some last minute improvements does little in light of his past behavior to show that he is now capable of fulfilling his duties as a parent. In the instant case, the record clearly shows that Gomez has an exten-

sive criminal record, has left his children in the past without providing support, has difficulty in maintaining employment or refuses to maintain employment, and has difficulties involving alcohol and drug use. The cumulative effect of Gomez' behavior provides clear and convincing evidence that he is unfit to have custody of the children.

Having determined that Gomez is unfit, we find from our de novo review that the record clearly shows it is in the best interests of the children to remain in the custody of the Savages. The Savages are fit to have custody of the children. Bechtold does not have any superior rights to custody over either Gomez or the Savages, and the adoption agency has refused responsibility for the children. Thus, there are no other parties this court need be concerned with before allowing custody to remain with the Savages. The record shows that the children have been with the Savages for over 7 years and view the Savages as their family. Furthermore, Gomez conceded that if he were found to be unfit, it was in the best interests of the children that they remain with the Savages. Thus, it is clear that it is in the best interests of the children to remain in the custody of the Savages.

AFFIRMED AS MODIFIED.

STATE EX REL. BILLY ROY TYLER, RELATOR, V. DOUGLAS COUNTY DISTRICT COURT, RESPONDENT.

580 N.W.2d 95

Filed June 26, 1998. No. S-97-772.

1. **Actions: Judicial Notice.** When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
2. **Mandamus.** Mandamus is an action at law, and a writ of mandamus is an extraordinary remedy, not a writ of right, which will be issued only when the duty to act is clear.
3. **Mandamus: Words and Phrases.** A writ of mandamus is issued to compel the performance of a purely ministerial act or duty. It is imposed by law upon an inferior tribunal, corporation, board, or person, where the relator has a clear legal right to the relief sought and when there is a corresponding clear duty existing on the part of the respondent to perform the act in question.

4. **Mandamus.** Mandamus is not available to control judicial discretion and will be issued only if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
5. ____. Mandamus is a remedy of last resort for a litigant and will be used only when all other remedies have failed.
6. ____. A writ of mandamus may not be issued where there is a plain and adequate remedy in the ordinary course of the law.
7. **Constitutional Law: Courts.** Neb. Const. art. I, § 13, does not create any new rights, but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy, but where no right of action is given or remedy exists under either the common law or some statute, this constitutional provision creates none.
8. **Courts.** It is the court's duty to prevent frivolous proceedings in the administration of justice.
9. **Constitutional Law: Courts: Actions.** While there is a generally recognized constitutional right of access to the courts, courts can place restrictions on such access in order to prevent the abuse of the judicial process, to avoid unnecessary delay in the prosecution of actions, and to guard against actions that are frivolous or malicious.
10. ____: ____: ____. The state's interest in not allowing frivolous or malicious litigation in its courts is constitutionally paramount to a plaintiff's desire to pursue such litigation.
11. **Affidavits.** In forma pauperis access to the courts is not a matter of right, but a privilege, and abuse of such privilege should not and will not be permitted.

Original action. Writ of mandamus denied. Petition dismissed.

Billy Roy Tyler, pro se.

Don Stenberg, Attorney General, and Charles E. Lowe for respondent.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Billy Roy Tyler requests a writ of mandamus directing the clerk of the district court for Douglas County to file a petition in Douglas County District Court contrary to an order of such court issued on May 11, 1990.

FACTS

On May 11, 1990, the district court issued an order limiting the number of pleadings which Tyler could file in that court to one per month as long as he was proceeding in forma pauperis

and representing himself. The district court's order noted that in an 8-year period, Tyler had filed 99 cases in Douglas County, and in most, if not all, Tyler had sought to proceed in forma pauperis. The district court's order is set forth in its entirety in the appendix following this opinion.

On May 30, 1990, Tyler appealed the order to this court. The appeal was subsequently dismissed because Tyler failed to file briefs. See *In re Administration of the Court*, 236 Neb. xxxii (case No. 90-468, Oct. 24, 1990).

Over 6 years later, Tyler, acting pro se and requesting that he be allowed to proceed in forma pauperis, submitted a petition captioned "Tyler v. Duda et al." to the district court for filing. The petition in that case states:

> Petitioner move for an order of this court voiding sale of AK SAR BEN and public land upon which it stood and in support He shows that the sale was a Result of Pork Barrel kickback graft and fraud conflict of interest in that the Douglas County Board of Commissioners which sold the public lands of Ak Sar Ben contained at least one member whom owned stock in the private corporation of defendant First Data Resources . . . .

The clerk of the district court returned the pleading to Tyler unfiled and informed him that the pleading could not be filed because he had exceeded the limits imposed on him by the order of May 11, 1990. In response, Tyler filed this original action.

ANALYSIS

Tyler seeks a writ of mandamus directing the district court to file his pleading in "Tyler v. Duda et al." Implicit in Tyler's petition is a request that this court review the district court's May 11, 1990, order which prevents the clerk of the district court from filing Tyler's pleading. We granted leave to file this original action for the purpose of considering whether under the district court's May 11, 1990, order, Tyler has a clear legal right to the relief sought and whether Tyler has an adequate remedy at law.

We note that Tyler attempted once before to test the validity of this order in *In re Administration of the Court, supra*, but that appeal was dismissed for failure to file briefs. We therefore

examine the record of this case and take judicial notice of the proceedings in the former action. When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *Baltensperger v. United States Dept. of Ag.*, 250 Neb. 216, 548 N.W.2d 733 (1996).

Mandamus is an action at law, and a writ of mandamus is an extraordinary remedy, not a writ of right, which will be issued only when the duty to act is clear. *State ex rel. Lillie v. Cosgriff Co.*, 240 Neb. 387, 482 N.W.2d 555 (1992). A writ of mandamus is issued to compel the performance of a purely ministerial act or duty. It is imposed by law upon an inferior tribunal, corporation, board, or person, where the relator has a clear legal right to the relief sought and when there is a corresponding clear duty existing on the part of the respondent to perform the act in question. See *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997). Mandamus is not available to control judicial discretion and will be issued only if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *Id.* To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, the duty must be imposed by law, the duty must still exist at the time the writ is applied for, and the duty must be clear. *Id.*

Mandamus is a remedy of last resort for a litigant and will be used only when all other remedies have failed. *State v. Laflin*, 40 Neb. 441, 58 N.W. 936 (1894). Thus, a writ of mandamus may not be issued where there is a plain and adequate remedy in the ordinary course of the law. *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994).

Tyler has not shown that the legal remedy available to him is inadequate. The order of the district court permits him to file more than one in forma pauperis pleading per month if accompanied by allegations showing immediate extraordinary and irreparable harm. Tyler made no such allegations in this case, and the record reflects no reason why he could not have simply waited until the next calendar month to file his petition.

Therefore, unless the order issued by the district court unreasonably restricted Tyler's access to the courts, he has an adequate remedy in the ordinary course of the law and is not entitled to a writ of mandamus.

Article I, § 13, of the Nebraska Constitution provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." This section does not create any new rights, but is merely a declaration of a general fundamental principle. *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959). It is a primary duty of the courts to safeguard this declaration of right and remedy, but where no right of action is given or remedy exists under either the common law or some statute, this constitutional provision creates none. *Id.*

It is the court's duty to prevent frivolous proceedings in the administration of justice. *Sargent Feed & Grain v. Anderson*, 216 Neb. 421, 344 N.W.2d 59 (1984). Tyler is no stranger to Nebraska's appellate court system. Since January 1996, he has filed no less than 59 appeals which either have been disposed of or are now pending. While there is a generally recognized constitutional right of access to the courts, courts can place restrictions on such access in order to prevent the abuse of the judicial process, to avoid unnecessary delay in the prosecution of actions, and to guard against actions that are frivolous or malicious. *Phillips v. Carey*, 638 F.2d 207 (10th Cir. 1981).

The U.S. District Court for the District of Nebraska took action to limit Tyler's access to federal court when, in *In re Tyler*, 677 F. Supp. 1410 (D. Neb. 1987), it limited Tyler's filings to one per month if he proceeded in forma pauperis. In *In re Tyler*, the U.S. District Court noted that between January 1, 1986, and August 1987, Tyler had filed 113 cases in that court. In all cases, he was granted leave to file such complaints without prepayment of costs or filing fees. Fifty-one of the cases were dismissed without service of summons upon a finding that they were frivolous or failed to state a claim upon which relief could be granted. All but two were dismissed before trial. Of those two, one was dismissed at the close of Tyler's case, and the other resulted in a judgment of $5.

The U.S. District Court noted that if Tyler were prohibited from proceeding in forma pauperis in all cases, his access to the court would be unconstitutionally denied. However, the court reasoned that Tyler's lack of funds prevented the court from controlling Tyler's filing with typical methods, such as imposing costs and attorney fees pursuant to Fed. R. Civ. P. 11. Thus, the court limited Tyler's right to proceed in forma pauperis to only one filing per month. Tyler was also prohibited from drafting complaints for other inmates, and in the event that any pleading submitted by Tyler contained abusive language, leave to proceed in forma pauperis would automatically be denied and such pleading would satisfy his quota of in forma pauperis pleadings for that month.

We note that the U.S. District Court's order differs in one respect from the Douglas County District Court's order. The U.S. District Court's order requires that any pleading filed by Tyler be accompanied by an affidavit setting forth clearly and specifically the facts giving rise to the complaint and any documentation of such facts that may exist. See *In re Tyler*, 677 F. Supp. 1410 (D. Neb. 1987).

Tyler appealed from the en banc order of the U.S. District Court. The U.S. Court of Appeals for the Eighth Circuit found no error of fact or law in the U.S. District Court's order and affirmed it pursuant to 8th Cir. R. 14. *In re Tyler*, 839 F.2d 1290 (8th Cir. 1988). See, also, *In re McDonald*, 489 U.S. 180, 109 S. Ct. 993, 103 L. Ed. 2d 158 (1989), *reconsideration denied* 490 U.S. 1003, 109 S. Ct. 1636, 104 L. Ed. 2d 151; *Peck v. Hoff*, 660 F.2d 371 (8th Cir. 1981).

We conclude that the Douglas County District Court's May 11, 1990, order does not unreasonably restrict Tyler's access to the courts, and therefore, Tyler did not have a clear legal right to have his petition filed despite the court's order. Our state courts and appellate system do not possess unlimited resources, and therefore, Tyler's petitions and appeals consume valuable time and money. Clearly, Tyler's actions restrict access to other persons who may have nonfrivolous cases and who do not seek to flood the courts with nonmeritorious actions. Thus, the district court was justified in limiting the number of pleadings which Tyler could file.

The limit imposed by the district court was well within its discretion and does not unconstitutionally limit Tyler's access to the judicial system. Tyler is not completely barred from filing lawsuits in forma pauperis; the district court simply limited the number and frequency of such suits. Additionally, no restrictions have been placed upon the number of pleadings which Tyler may file if he is represented by a licensed attorney or chooses to pay the filing fees.

The rationale of the Eighth Circuit in *Williams v. McKenzie*, 834 F.2d 152 (8th Cir. 1987), is clearly applicable. The state's interest in not allowing frivolous or malicious litigation in its courts is constitutionally paramount to the plaintiff's desire to pursue such litigation. In forma pauperis access to the courts is not a matter of right, but a privilege, and abuse of such privilege should not and will not be permitted.

CONCLUSION

Having examined Tyler's petition for writ of mandamus in the context of the district court's May 11, 1990, order, we conclude that the petition should be denied. Thus, we deny Tyler's petition for a writ of mandamus and dismiss the petition. The costs of this action are taxed to Tyler.

WRIT OF MANDAMUS DENIED.
PETITION DISMISSED.

APPENDIX

On May 11, 1990, the Douglas County District Court entered the following order:

> THIS MATTER is before the Court on its own motion, in response to the number of filings in this Court by Billy Roy Tyler, which have caused unnecessary administrative expenses in the handling of his cases, as well as delays in the handling of other cases.
>
> Since July 1, 1982, when he sought a writ of habeas corpus to prevent the allegedly illegal detention of his minor children by juvenile authorities, Mr. Tyler has filed ninety-nine (99) cases in the District Court of Douglas County in which he is a party-plaintiff, exclusive of actions for dissolution of his marriage and appeals of criminal convictions. According to records in the office of

the Clerk of the District Court, twenty-four (24) of those cases were filed during the calendar year 1988, including seventeen (17) cases filed in the last three months of that year; on two occasions during that period, Mr. Tyler filed four separate lawsuits on the same day. The Clerk's records further reflect that, since Mr. Tyler's resumption of activity in mid-November, 1989, he has filed another twenty-four (24) lawsuits with twenty (20) of those actions having been filed since February 13 of this year. Mr. Tyler himself recognizes his litigious propensities, referring, in one of his recent pleadings, to "the myriad of lawsuits that I have filed," and, in another recent pleading, describing himself as "a man of great experience in court (and about court)."

In most, if not all, of the actions initiated by Mr. Tyler, he has sought to proceed without the pre-payment of fees and costs, pursuant to Nebraska Revised Statutes 25-2301 et seq. (Reissue 1989). In addition, Mr. Tyler has filed numerous lawsuits on behalf of other individuals, with or without their consent, again proceeding in forma pauperis. As the United States Supreme Court noted in In re McDonald, 489 U.S. [180], 109 S.Ct. 993, 103 L.Ed.2d 158, reh'g denied, 490 U.S. [1003], 109 S.Ct. 1636, 104 L.Ed.2d 151 (1989), paupers filing pro se petitions are not subject to the financial considerations — filing fees and attorney fees — which deter other litigants from filing frivolous petitions.

During his incarceration following a felony conviction for possession of a controlled substance, see State v. Tyler, 223 Neb. 473, 390 N.W.2d 40 (1986), Mr. Tyler filed a number of repetitive, redundant actions seeking to challenge, on essentially the same grounds, the validity and conditions of that incarceration, including four (4) separate cases on the same day against the Superintendent of the Omaha Correctional Center. Of the twenty-five (25) cases filed by Mr. Tyler in the District Court of Douglas County between February 1, 1988, and January 3, 1989, ten (10) involved challenges to the revocation of his parole, to his custody classification as a prisoner, or to the

imposition of discipline upon him because of misconduct while incarcerated; another six (6) of such cases involved challenges to various aspects of his confinement, including mail and telephone restrictions, or confrontations with correctional personnel. It should be noted that all sixteen (16) of the cases just discussed were filed in the three-month period between October 1, 1988, and January 3, 1989.

Since becoming a homeowner in August, 1989, Mr. Tyler has sued his neighbors, a public utility (threatened shut-off of electrical service because of a delinquent bill), the Nebraska Humane Society (complaint about Mr. Tyler's un-licensed, un-vaccinated dogs running loose), three prospective employers, and a judge of the County Court of Douglas County who refused to accept Mr. Tyler's written demand (as a spectator) that certain action be taken. Others sued are those officials of the social-services and judicial systems who refuse to allow Mr. Tyler to dictate the terms of his relationship with his two oldest daughters, who were long ago removed from his custody, and those officials who have refused to accede to his repeated demands for immediate public assistance, irrespective of eligibility requirements.

Of the forty-nine (49) cases filed in this court by Mr. Tyler since January 1, 1988, twenty-three (23) are pending. Although Mr. Tyler has characterized himself as "the greatest writ writer in the world", none of the twenty-six (26) cases disposed of in the last two years has gone so far as to require a trial on the merits: five (5) of the cases have been dismissed at Mr. Tyler's request, and another was involuntarily dismissed as a result of Mr. Tyler's vulgar written response to an unfavorable ruling on a request for a temporary restraining order and a preliminary injunction; one (1) case was dismissed at the request of the person on whose behalf the action was supposedly filed by Mr. Tyler; five (5) cases were dismissed, pursuant to case-progression standards, for lack of prosecution; six (6) cases were dismissed specifically as being frivolous; and

the remaining eight (8) were dismissed as the result of pretrial motions of the defendants.

Mr. Tyler's propensity to litigation has taken him to the United States District Court for the District of Nebraska, see In re Tyler, 677 F.Supp. 1410 (D.Neb.1987), aff'd per curiam, 839 F.2d 1290 (8th Cir.1988), as well as to several other jurisdictions, see State v. Tyler, 275 N.W.2d 800 (Minn.1979) (appealability of order discharging Tyler from imprisonment under jurisdiction of Minnesota Corrections Board); Tyler v. City of Milwaukee, 740 F.2d 280 (7th Cir. 1984) (denial of in forma pauperis status because of Tyler's unruly behavior during indigency hearing, in challenge to allegedly illegal arrest); and Tyler v. Pasqua & Toloso, 748 F.2d 283 (5th Cir. 1984) (demand for expedited service on food-stamp claim). The description of Mr. Tyler's activities and behavior in In re Tyler, supra, accurately portrays his conduct before this Court as well, particularly his use of foul, disgusting and abusive language both in writing and in person.

Although an indigent person has a right of reasonable access to the court, Barnes v. Eighth Judicial District Court, 748 P.2d 483 (Nev.1987); see In re Green, 598 F.2d 1126 (8th Cir.1979); Eisemann v. Miller 101 Idaho 692, 619 P.2d 1145 (1980), that right of access is not unrestricted, Barnes, supra. A litigant[']s right of access to the courts must be balanced against and, in a proper case, must yield to, the interests of other litigants and of the public in general in protecting judicial resources from the deleterious impact of repetitious, baseless, pro se litigation. Board of County Commissioners of Morgan County v. Winslow, 706 P.2d 792 (Colo.1985) (en banc). As the United States Court of Appeals for the Eighth Circuit pointed out in Williams v. McKenzie, 834 F.2d 152 (8th Cir. 1987), the State's interest in not allowing legally frivolous or malicious litigation to proceed in its courts is constitutionally paramount to any interest of a plaintiff in pursuing such legally frivolous or malicious litigation. "Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the

institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice. The continual processing of petitioner's frivolous requests . . . does not promote that end." In re McDonald, supra at [184], 109 S.Ct. at 996, 103 L.Ed[.]2d at 164.

We expressly find, as did the judges of the United States District Court for the District of Nebraska, in In re Tyler, supra, that Mr. Tyler has flagrantly and repeatedly abused the judicial process by filing a multitude of meritless lawsuits, and that this pattern of conduct is likely to continue unabated unless preventive measures are imposed. In order to ensure the conservation of already over-worked judicial resources without altogether denying Mr. Tyler access to the courts, the following requirements will be adhered to, effective from the date of this order and to include the month of May, 1990.

1. The Clerk of the District court is directed not to accept in excess of one (1) pleading per calendar month initiating a new lawsuit, accompanied by an application to proceed in forma pauperis, in which Billy Roy Tyler is named as a plaintiff or petitioner, including cases filed in Mr. Tyler's name on behalf of other individuals, unless clear and specific allegations of fact, constituting a cause of action, are made showing immediate extraordinary and irreparable harm.

2. The Clerk shall return to Billy Roy Tyler any and all petitions or complaints submitted in excess of one per calendar month, unless such petition or complaint is accompanied by payment of the usual and customary docket fee.

3. In each new petition or complaint submitted for filing to the District Court of Douglas County, Nebraska, Billy Roy Tyler shall (a) set forth with particularity whether there has been filed in any other state or federal court an action alleging the same facts or claims for relief, or related facts or claims for relief, as those contained in the pleading submitted for filing in this court, and, if so, (b) shall submit a copy of such pleadings from such other court as may be applicable.

4. In any pleadings or documents submitted to the District Court of Douglas County, Nebraska, on behalf of other individuals, Billy Roy Tyler shall indicate under oath whether such pleading or document is submitted with the knowledge and express permission of such other individual.

5. Nothing in this order shall prohibit Billy Roy Tyler from proceeding as a plaintiff or petitioner in any civil case in this court with the representation of an attorney duly licensed to practice law in the State of Nebraska.

STATE OF NEBRASKA, APPELLEE, V. PHILLIP E. BOWEN, APPELLANT.
580 N.W.2d 535

Filed June 26, 1998. No. S-97-839.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction.** Once a motion for postconviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed.
3. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to defendant and could have been litigated on direct appeal.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Phillip E. Bowen, pro se.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

Phillip E. Bowen filed a second motion for postconviction relief, and it was dismissed by the trial court. We affirm because Bowen could have raised the lesser-included offense issue in his direct appeal and his first postconviction action.

BACKGROUND

Bowen was convicted of first degree murder and the use of a firearm to commit a felony in 1988. See *State v. Bowen*, 232 Neb. 725, 442 N.W.2d 209 (1989) (*Bowen I*). On his direct appeal in *Bowen I*, Bowen was represented by different counsel than at trial. See *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993) (*Bowen II*). This court affirmed Bowen's convictions in *Bowen I*. Bowen then filed a motion for postconviction relief pro se, which was dismissed by the trial court. See *Bowen II, supra*. We affirmed the trial court's dismissal in *Bowen II*. Finally, Bowen filed yet another pro se motion for postconviction relief, which is the subject of this appeal, and it also was dismissed by the trial court.

ASSIGNMENTS OF ERROR

Rephrased, Bowen asserts that the trial court abused its discretion in (1) denying his request for appointment of counsel to represent and advise him in presenting and arguing his motion for postconviction relief, (2) denying his request for an evidentiary hearing on his motion for postconviction relief, and (3) dismissing his motion for postconviction relief.

SCOPE OF REVIEW

A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Fletcher*, 253 Neb. 1029, 573 N.W.2d 752 (1998).

ANALYSIS

Bowen asserts that the trial court erred in dismissing his motion for postconviction relief, arguing that his right to due process was violated by his felony murder conviction because the trial court failed to give an instruction concerning any lesser-included offenses and that Bowen's trial counsel was ineffective in failing to request such instructions.

At the outset, we note that this is Bowen's second pro se motion for postconviction relief and that his direct appeal was handled by a different attorney than the attorney that represented Bowen at trial. Once a motion for postconviction relief has been judicially determined, any subsequent motion for such

relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed. *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994). Furthermore, a motion for postconviction relief cannot be used to secure review of issues which were known to defendant and could have been litigated on direct appeal. *State v. Jones*, 246 Neb. 673, 522 N.W.2d 414 (1994).

Bowen has failed to make any showing that he could not have raised any issues concerning the lack of lesser-included offense instructions in his first motion for postconviction relief. He has likewise failed to make any showing that he was not aware of the failure of his counsel on direct appeal to raise any such issues. See *State v. Jones, supra* (holding that this court was barred from considering motion for postconviction relief concerning trial court's failure to give certain lesser-included offense instructions when different attorney represented movant on direct appeal than at trial level and issue was not raised on direct appeal).

Because Bowen's counsel on direct appeal did not raise any issue concerning the trial court's failure to give lesser-included offense instructions, which could have been raised on direct appeal, and because Bowen did not raise any such remaining issues on his first motion for postconviction relief, which could have been raised at that time, we conclude that these issues are barred from consideration by this court.

CONCLUSION

This court is barred from considering Bowen's second motion for postconviction relief.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E. HUNT, APPELLANT.
580 N.W. 2d 110

Filed June 26, 1998. No. S-97-1142.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.

2. **Constitutional Law: Effectiveness of Counsel: Proof.** In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
3. **Trial: Effectiveness of Counsel: Presumptions.** There are three instances which are so inherently prejudicial to an accused that ineffective assistance of counsel is presumed. One instance is the failure of counsel to subject the prosecution's case to meaningful adversarial testing.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Harry A. Moore, Madison County Public Defender, for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

Robert E. Hunt appeals from the Madison County District Court's dismissal of his petition for postconviction relief. We removed this case to our docket pursuant to our authority to regulate the caseloads of the Nebraska Court of Appeals and this court, and we affirm. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

On August 10, 1984, appellant was convicted of first degree murder for the killing of Beverly Ramspott. On August 9, 1985, we vacated appellant's death sentence in *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985). On October 11, 1985, appellant was resentenced to life in prison. In *Hunt, supra*, we set forth the facts which led to appellant's conviction, and they shall be repeated herein only as necessary for the resolution of the issues before this court.

On April 12, 1984, four officers from the Norfolk Police Department were dispatched to appellant's home after having been advised that a woman had called to inform the police that her husband thought he had killed someone. After the officers

arrived, appellant told Officer Douglas Dekker, " 'I killed her.' " *Id.* at 709, 371 N.W.2d at 712. In addition, appellant gave the police a cassette case which contained, among other pieces of incriminating evidence, a pair of glasses belonging to the victim. Appellant also told the officer the victim's address, the location of the victim's body, and that he had sexually assaulted the victim after she was dead. The officers confirmed the address and location of the body, and appellant was then taken into custody by the Norfolk Police Department.

Once he was in police custody, appellant was interrogated on two occasions by Officer Leon Chapman. After appellant was advised of his *Miranda* rights, he informed Officer Chapman that on prior occasions, he had told his wife that he had an urge to kill a woman and have sex with her after she was dead. Appellant then confessed to the crime and gave Officer Chapman a detailed account of the events that occurred the previous evening. Officer Chapman then asked appellant to give a written or tape-recorded statement. Appellant was not willing to do this without the presence of an attorney. Due to possible constitutional problems, the State did not offer any of the evidence adduced during the second interrogation.

Prior to appellant's trial, his appointed trial counsel, Thomas DeLay, moved to suppress all statements appellant made after being placed in the custody of the Norfolk Police Department. In addition, DeLay also moved that all the evidence concerning communications between Hunt and his wife be suppressed and that the State be precluded from elucidating any evidence which in any manner referred to such communications. The trial court overruled these motions.

Once the trial progressed to closing arguments, DeLay commenced his summation with the following comments:

> May it please the Court, ladies and gentlemen of the jury: This is a tough case. This is tough. We have got a beautiful young girl who is dead. We have a defendant, Robert Hunt, who killed her. He murdered Beverly Ramspott on April 12, 1984, and he did so in Madison County. Those are some of the elements of both first and second degree murder. He is a creepy, slimy, sexual degenerate. I don't think there is anyone in the courtroom who

> could call him anything else. He took the life of a beautiful young girl who died during the administration of events for his own sexual gratification. He's a creep. If you put ooze on the door, he would ooze into the door.

DeLay then conceded appellant's guilt as to second degree murder and focused on attacking the premeditation element of the prosecution's case for first degree murder.

On August 8, 1997, appellant filed an amended petition for postconviction relief in Madison County District Court. Appellant's petition asserted that he was denied due process, a fair trial, and effective assistance of counsel due to the derogatory comments and concessions made by DeLay during closing arguments. On September 30 and October 1, the district court held a hearing on appellant's amended petition, and both appellant and DeLay were called to testify.

The examination of DeLay focused on his closing arguments and his trial strategy. DeLay, by his own account, styled the beginning of his closing argument in this manner in an attempt to gain credibility with the jury. The comments were also intended to shock the jury into understanding that the premeditation element of the prosecution's case rested on sympathy and emotion rather than actual proof.

As for his trial strategy, DeLay testified that his defense options were limited and that his only course of action was to attempt to limit the evidence against appellant because of appellant's several confessions. In addition, DeLay opined that appellant's only viable defense in order to avoid the death penalty was to argue that appellant was guilty of second degree murder. DeLay and appellant discussed this strategy on multiple occasions.

During the hearing, appellant testified that he told DeLay he wished to plead not guilty by reason of insanity. However, appellant was examined by at least two defense experts and found to be legally sane. Appellant further testified that DeLay told him that an insanity plea would not hold up in court because appellant's subjective beliefs would be trumped by experts for both appellant and the State. Therefore, if appellant chose to follow such a course of action, DeLay would file an insanity plea on appellant's behalf and then withdraw from the

case. Appellant further testified that he discussed and approved DeLay's trial strategy of focusing on avoiding the death penalty by arguing that appellant was guilty of only second degree murder.

Summarized and restated, appellant asserts in his assignments of error that the district court erred in (1) requiring appellant to demonstrate prejudice, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), rather than presuming prejudice, in accordance with *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), and (2) failing to find that appellant was denied due process, a fair trial, or effective assistance of counsel and that his rights under the 6th and 14th Amendments to the U.S. Constitution were violated with regard to DeLay's comments during closing arguments.

A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Fletcher*, 253 Neb. 1029, 573 N.W.2d 752 (1998); *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997).

In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, *supra*; *State v. Boppre*, *supra*. However, in *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993), we recognized that although counsel is presumed to be competent, there are three instances which are so inherently prejudicial to an accused that ineffective assistance of counsel is presumed. One instance is the failure of counsel to subject the prosecution's case to meaningful adversarial testing. *Id.* Accord *United States v. Cronic*, *supra*.

Appellant asserts that the district court erred by failing to presume prejudice because DeLay's derogatory comments and concessions to those elements common to both first and second degree murder constituted a failure to subject the prosecution's

case to meaningful adversarial testing. This assertion is without merit.

The U.S. Supreme Court, when considering those instances when prejudice should be presumed, noted that apart from circumstances which reach the level of being denied the right of effective cross-examination, an incurable constitutional error, there is generally no basis for finding a Sixth Amendment violation unless the accused can demonstrate specific errors which undermined the reliability of the finding of guilt. *Id.* Those courts which have considered derogatory comments made by defense counsel during closing arguments have not chosen to presume prejudice. See, *Burris v. Farley*, 51 F.3d 655, 662 (7th Cir. 1995), *cert. denied* 516 U.S. 922, 116 S. Ct. 319, 133 L. Ed. 2d 221 (applying *Strickland* test although defense counsel referred to defendant as " 'street person' " and said " '[h]e's not the best, best one I've ever had . . . . I don't even like him' "); *Douglas v. State*, 663 N.E.2d 1153, 1155 (Ind. 1996) (applying *Strickland* test although defense counsel stated during closing arguments that killing was " 'senseless,' " that defendant " 'was either the craziest person on earth or one of society's most dangerous persons,'" and that " 'all black people are not like that,' " and were " 'not savages' " or " 'animals' "). In addition, courts generally do not apply *Cronic* in ineffective assistance of counsel proceedings where defense counsel conceded elements to certain crimes in an effort to convince the jury to convict the defendant of a lesser-included offense. See, *McNeal v. Wainwright*, 722 F.2d 674 (11th Cir. 1984) (applying *Strickland* and holding argument by defense counsel suggesting guilt on charge of manslaughter rather than first degree murder was tactical decision); *Faraga v. State*, 514 So. 2d 295 (Miss. 1987), *cert. denied* 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 894 (1988) (applying *Strickland* and holding trial counsel's concession of defendant's guilt of murder, but not capital murder, during closing arguments in face of overwhelming proof was tactical decision).

The record of the postconviction relief hearing discloses that DeLay did not sacrifice the adversarial nature of the proceedings leading up to appellant's conviction. Specifically, exhibit 102 reveals that DeLay discussed with appellant (1) the exten-

sive evidence pointing to his guilt, especially appellant's numerous confessions; (2) a strategy of limiting the evidence against appellant through various motions to suppress; (3) a trial strategy of arguing that the State lacked evidence of premeditation in order to avoid the death penalty through a second degree murder conviction; and (4) an inability to bring an insanity defense because appellant had already been found legally sane by at least two defense experts. After discussing this strategy with appellant, DeLay focused on securing a second degree murder conviction to avoid the death penalty. DeLay initiated this strategy by moving to suppress incriminating statements appellant made to his wife and to the police. In addition, the record reveals that DeLay followed this strategy from opening statements to closing arguments.

The district court did not err in refusing to presume prejudice on the ground that DeLay's comments and concessions equaled a failure to subject the prosecution's case to meaningful adversarial testing as set forth in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). DeLay's comments and concessions are not severe enough to destroy the adversarial nature of the proceedings below and do not rise to the magnitude of the limited circumstances set forth by the Court in *Cronic, supra.* Consequently, we shall analyze DeLay's conduct in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997).

As stated above, appellant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced appellant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Boppre, supra.* These two prongs may be addressed in either order. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be taken. *Id.* The appellant in a postconviction proceeding has the burden of alleging and proving prejudice or, in other words, in light of all the evidence before the jury, demonstrating that the decision reached would reasonably likely have been different absent the errors. *Id.*

Assuming, arguendo, that DeLay's comments can be considered deficient, these comments, in light of all the evidence before the jury, did not prejudice appellant. Although he could have been more tactful in gaining credibility with the jury and showing that the prosecution's case relied on sympathy, DeLay's comments constituted a tactical decision made in consideration of the State's overwhelming evidence and an attempt to avoid the death penalty by conceding those elements common to both first and second degree murder. Such a course of action does not amount to ineffective assistance of counsel. See, *McNeal v. Wainwright, supra*; *Faraga v. State, supra*. Even absent these comments, it is not reasonably likely that the result of appellant's trial would have been any different, due to the wealth of incriminating evidence before the jury.

Consequently, the order of the trial court is hereby affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. STEPHEN C. SCHLEICH, RESPONDENT.

580 N.W.2d 108

Filed June 26, 1998. No. S-97-1214.

Original action. Judgment of suspension.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

On November 26, 1997, the Nebraska State Bar Association, relator, filed a formal charge against Stephen C. Schleich, respondent, alleging violation of the respondent's oath of office as an attorney and Canon 1, DR 1-102(A)(1), (3), (4), (5), and (6), of the Code of Professional Responsibility. Subsequently, this court appointed a referee pursuant to Neb. Ct. R. of Discipline 10 (rev. 1996), and the referee conducted a formal hearing.

The referee made the following findings of fact: The respondent was admitted to the practice of law in the State of Nebraska on April 13, 1989, and has resided in Lincoln, Nebraska. In

February 1994, the respondent attached a listening device to the telephone in the bedroom of his home, which he shared with his wife and infant son. The wife was unaware of this device. The respondent admitted that he illegally recorded, conspired to record, and/or conspired to use illegally obtained recordings of his wife's telephone conversations. The respondent admitted that he knew his actions were illegal at the time he installed the device.

The respondent's purpose for installing the listening device was to eavesdrop on his wife. Use of the device had been recommended by a private investigator whose assistance had been sought by the respondent. The respondent recorded three cassette tapes of telephone conversations over a period of 7 to 10 days, and the device surreptitiously recorded no more than six of his wife's conversations. Neither the respondent's wife nor anyone else had given the respondent permission to intercept and record their conversations. After listening to the tapes, the respondent disconnected the device and turned the tapes over to the investigator. The respondent then filed for divorce, but he claims that he did not use the information on the tapes to gain an advantage over his wife.

The tapes were discovered by officers of the Lincoln Police Department who were executing a search warrant on the investigator's home regarding an unrelated complaint. The respondent's wife learned of the existence of the tapes from a third party after the police had seized them.

The respondent was charged with the criminal offense of conspiracy to interfere with wire communications, in violation of Neb. Rev. Stat. § 86-702 (Reissue 1994). In exchange for his agreement to testify against the investigator, the respondent was accepted into a pretrial diversion program, which required that he complete 100 hours of volunteer community service. He was assigned to the office of the Lancaster County Clerk, and although he was given 12 months in which to complete his community service, the respondent completed it in less than 6 months. The respondent received a favorable letter of evaluation from the county clerk, and the charge against him was then dismissed. At a hearing before the Committee on Inquiry of the First Disciplinary District, the respondent expressed remorse

and recognized that his decision was a poor one. He claimed to get along well with his former wife, with whom he shares joint custody of their son.

The referee found that the relator had established by clear and convincing evidence that the respondent knowingly engaged in an illegal activity involving moral turpitude, in violation of DR 1-102(A)(3); that he engaged in conduct involving dishonesty and deceit, in violation of DR 1-102(A)(4); and that by doing so, the respondent violated DR 1-102(A)(1) and breached his oath of office as an attorney.

The referee recommended that the respondent be suspended from the practice of law for 6 months, at the completion of which he would be eligible to apply for reinstatement upon a showing that he has fully complied with the order of suspension and in the future will not engage in practices offensive to the legal profession. Neither party filed exceptions to the referee's report.

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Scott*, 252 Neb. 698, 564 N.W.2d 588 (1997). Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *State ex rel. NSBA v. Caskey*, 251 Neb. 882, 560 N.W.2d 414 (1997). The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *State ex rel. NSBA v. Zakrzewski*, 252 Neb. 40, 560 N.W.2d 150 (1997).

The criminal charge against the respondent was dismissed after he cooperated with law enforcement and successfully completed 100 hours of community service in the pretrial diversion program. His misconduct appears to be an isolated incident arising from a specific set of facts and circumstances relating to a marital problem. The respondent received no monetary benefit from his actions, and he has been forthright in taking respon-

sibility for his conduct. The respondent acknowledges that he made a very poor decision and shows remorse for the effect of his actions upon himself and his family. There is no concern regarding the protection of the public, and there is no reason to question the respondent's present or future fitness to continue in the practice of law.

Balancing the factors which mitigate in favor of the respondent against the need to deter others from similar conduct, the need to maintain the reputation of the bar as a whole, and the need to protect the public, we conclude that the respondent should be suspended from the practice of law in the State of Nebraska effective immediately. The respondent's suspension shall continue for a period of 6 months from and after the date on which he files an affidavit complying with Neb. Ct. R. of Discipline 16 (rev. 1996).

JUDGMENT OF SUSPENSION.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. VINCENT L. CARNEY, RESPONDENT.

580 N.W.2d 121

Filed June 26, 1998. No. S-97-1315.

Original action. Judgment of reprimand.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

The Committee on Inquiry of the First Disciplinary District of the Nebraska State Bar Association has charged the respondent, Vincent L. Carney, with violating his oath of office as an attorney and the following provisions of the Code of Professional Responsibility:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

. . . .

> DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair the Lawyer's Independent Professional Judgment.
>
> (A) Except with the consent of his or her client after full disclosure, a lawyer shall not accept employment if the exercise of the lawyer's professional judgment on behalf of a client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.
>
> (B) A lawyer shall not accept employment in contemplated or pending litigation if he or she knows or it is obvious that the lawyer or a lawyer in his or her firm ought to be called as a witness, except that the lawyer may undertake the employment and the lawyer or a lawyer in his or her firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his or her firm to the client.
>
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his or her firm as counsel in the particular case.
>
> . . . .
>
> DR 9-101 Avoiding Even the Appearance of Impropriety.

The respondent has filed with this court a conditional admission of guilt as to the formal charges.

The respondent was duly admitted to the practice of law in the State of Nebraska on July 24, 1972, and he has engaged in the practice of law exclusively as an intellectual property lawyer. The original complainant, Judith Zavala (formerly known as Judith Coupe), worked for the respondent in various capacities, including secretary, paralegal, and office manager. Zavala married David Coupe in April 1986, and the couple

divorced in December 1989. During the marriage, a son was born to the parties, and following the divorce, Zavala was given custody.

While employed by the respondent, Zavala encouraged him to foster a relationship with her son. The respondent tutored the child in his education, supported his involvement in youth activities, and took the child and one of his brothers on a trip to Walt Disney World.

In May 1995, a conflict occurred between Zavala and the respondent, and the respondent was informed that Zavala no longer wanted him to be in contact with the child. However, the respondent continued to spend time with the child when the child visited his father.

Zavala later filed an application to modify the divorce decree for the purpose of limiting the respondent's contact with the child. The respondent hired counsel to represent both his interests and the interests of the father in connection with the litigation. The father filed a cross-application requesting custody, and the respondent paid all of the father's legal fees in connection with the litigation.

The respondent knew that he would be a witness at trial and, in fact, was endorsed on the witness lists of both parties. The respondent admits that at this point in the proceedings, he should have realized he could no longer provide legal counsel to the father and should have ceased doing so. The respondent also admits that he assisted in doing research and investigative work and that he participated in drafting pleadings.

On August 14, 1996, Zavala filed a complaint with the Nebraska State Bar Association, alleging that the respondent used information he had learned about her while representing her in previous divorce and custody matters and that use of such information constituted a breach of her attorney-client relationship. She also alleged that the respondent had a conflict of interest by representing the father.

The respondent did not appear as the attorney of record for the father, but he did testify at the trial in connection with the applications for modification of the decree. Also, in the process of assisting the father, the respondent prepared a document entitled "Outline of Judy Coupe Deposition." This document

was given to the father's trial counsel for use in the pending litigation.

The respondent admits that he allowed his personal interests to affect his professional judgment and that because he was a witness in the pending litigation, he should have ceased to provide legal advice to the father on any matter involving the son. The respondent also admits that his participation on behalf of the father in the litigation violated Canon 1, DR 1-102(A)(1), and Canon 5, DR 5-101(A) and (B), of the Code of Professional Responsibility.

Based upon the conditional admission of the respondent and the recommendation of the Counsel for Discipline that a public reprimand is the appropriate sanction in this matter, the court finds by clear and convincing evidence that the respondent has violated DR 1-102(A)(1) and DR 5-101(A) and (B), and that the respondent should be publicly reprimanded. Thus, the respondent is hereby publicly reprimanded for conduct in violation of the Code of Professional Responsibility and his oath of office as a member of the Nebraska State Bar Association.

JUDGMENT OF REPRIMAND.

WRIGHT, J., not participating.

ALAN W. LANGVARDT, M.D., APPELLEE, V.
MARK B. HORTON ET AL., APPELLANTS.
581 N.W.2d 60

Filed July 2, 1998. No. S-95-867.

1. **Administrative Law: Appeal and Error.** Under Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1994), when a petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency.
2. **Administrative Law: Final Orders: Appeal and Error.** A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. **Administrative Law: Judgments: Appeal and Error.** On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.

4. **Administrative Law: Final Orders: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Administrative Law: Constitutional Law: Statutes: Notice.** When a statute or constitutional right requires notice and hearing, the administrative body takes on a quasi-judicial character when it makes a binding determination resolving a disputed claim between specific parties after such a hearing.
6. **Administrative Law: Constitutional Law: Courts: Case Overruled.** To the extent that *Scott v. State ex rel. Board of Nursing*, 196 Neb. 681, 244 N.W.2d 683 (1976), implies that a true de novo review by a district court of a health department determination in a contested disciplinary proceeding violates the separation of powers doctrine, it is hereby overruled.
7. **Physicians and Surgeons: Words and Phrases.** The term "gross incompetence," at least in the context of the practice of medicine, Neb. Rev. Stat. § 71-147(5)(d) (Reissue 1990), connotes such an extreme deficiency on the part of a physician in the basic knowledge and skill necessary for diagnosis and treatment that one may reasonably question his or her ability to practice medicine at the threshold level of professional competence.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Don Stenberg, Attorney General, and James D. Smith for appellants.

Arthur R. Langvardt, of Langvardt & Valle, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, and MCCORMACK, JJ.

GERRARD, J.

This appeal arises from a physician disciplinary proceeding at the Nebraska Department of Health. The department found that the actions of Alan W. Langvardt, M.D., in diagnosing and treating a young patient rose to the level of gross incompetence in violation of Neb. Rev. Stat. § 71-147(5)(d) (Reissue 1990). The district court, in its de novo review of the record, found that the evidence failed to establish that Langvardt was guilty of either gross negligence or gross incompetence, and reversed the decision of the department. The department appealed. Finding no error appearing on the record, we affirm the order of the district court.

I. FACTUAL BACKGROUND

1. Chronology of Events

On August 23, 1990, a 3-year-old male patient was admitted to the Beatrice Community Hospital for elective outpatient hernia surgery to be performed by Langvardt, a physician licensed in Nebraska and certified by the American Board of Family Practice. Once the patient had been anesthetized with a general anesthetic, the attending nurse anesthetist selected and started an intravenous line (IV). The nurse anesthetist used a 500-cc bag of 5 percent dextrose and water (D5/W), which is sugar water with no sodium. No regulating pump was used.

The hernia surgery took approximately 45 minutes to 1 hour and went routinely. Approximately 200 cc of the IV solution was used during surgery, which is an average amount of solution to use during a procedure of that length.

When the patient was taken to the recovery room at approximately 9:30 a.m., the IV that had been started in the operating room was continued. Langvardt observed the patient in the recovery room and left postsurgical orders. In particular, Langvardt ordered that the patient be left on the IV at 40 cc per hour until he was awake and eating and that Langvardt could be called for a possible dismissal order later in the afternoon if the patient was doing well and there were no problems.

Langvardt observed that the patient appeared to be awakening normally in the recovery room. The patient was in the recovery room for approximately 30 minutes, during which approximately 50 cc of IV fluid was infused. When the 3-year-old patient was sent from the recovery room to his room on the outpatient floor at approximately 10:10 a.m., he began to awake, cry, and come out of the anesthesia. At about this same time, Langvardt left the hospital to go to his office, where he saw patients for the rest of the day.

A nurse working the 6 a.m. to 6 p.m. shift took over the patient's care when he was brought to the outpatient floor. The nurse hung a second 500-cc IV bag at approximately 11:45 a.m. This means that the approximately 250 cc of IV solution that had been remaining in the bag at 10:10 a.m. had all been infused in 1 hour 30 minutes. At 6 p.m., the second bag of solu-

tion ran out, and the nurse hung a third 500-cc bag. Each of these additional bags contained the same solution that had been started during surgery.

The nurse had her first contact with Langvardt between 5:30 and 6 p.m., when she reached him at his clinic. The nurse told Langvardt that the patient had experienced a seizure and that he was drowsy, gave him the patient's vital signs, and told him that the patient's parents wanted to know if he could have his seizure medication. Two years prior to the surgery, the patient had experienced febrile seizures, i.e., seizures with fever. Langvardt thought that this history might suggest that the patient was susceptible to seizures and agreed that he could be given his medication. However, the patient's parents were unable to find the medication.

The nurse contacted Langvardt at the clinic again at approximately 6:45 p.m. The nurse told Langvardt that the patient had experienced a second seizure. She told Langvardt that she did not feel that the seizures were due to a febrile condition because his temperature was normal. The patient's clinic records indicated that he had previously been prescribed one-half milligram of Ativan for seizures, and a telephone order was written for that amount. The nurse asked Langvardt how he wanted the Ativan administered, orally or through the IV. Langvardt asked whether the IV was still going, and the nurse told him that it was, that the patient still had not eaten, and that the IV was running at a "keep open" rate.

A second nurse who was working the 3 to 11 p.m. shift took over the care of the patient at approximately 6:30 or 7 p.m. At that time, the patient was not awake and not responding verbally, but did move around in bed. Shortly after the second nurse began working with the patient, she and the patient's mother attempted to give him Ativan orally, pursuant to Langvardt's telephone order. The patient did not take the oral dose well, and it ran down his mouth.

Langvardt returned to the hospital around 7:30 or 8 p.m. because one of his other patients was beginning labor; at this time, he checked on the young patient. At 8:10 p.m., while Langvardt was present, the patient had another seizure. Langvardt ordered that one-half milligram of Ativan be given

through the IV. At 8:25 p.m., the nursing supervisor gave the patient the Ativan; she gave a second dose per Langvardt's orders at approximately 9:05 p.m. The patient seized again at approximately 9:25 p.m. Following the last dose of Ativan and the seizure at 9:25 p.m., there was no further seizure activity or vomiting; the patient remained unresponsive to verbal stimuli.

Langvardt returned to check on the patient at approximately 10:10 p.m. Langvardt reported that the patient seemed to be resting peacefully and had not had any more seizures. He was not very responsive, but Langvardt thought this was explained by the aftereffects of the seizures and of the seizure medication.

Another nurse who worked the 11 p.m. to 7 a.m. shift that night took over the care of the patient around 11 p.m. At 11:45 p.m., she notified Langvardt of the patient's status; Langvardt ordered the IV solution changed to a 5-percent dextrose solution with one-half normal saline at 30 cc per hour on a pump and ordered that they check his vital signs every 2 hours through the night.

Shortly after midnight, the patient experienced respiratory arrest, and the nurse told Langvardt that he should return to the hospital. Artificial respiration was initiated by the house supervisor and then taken over by an anesthetist who intubated the patient and continued breathing for him with a bag. Tests indicated that the patient's sodium count was too low, and it was determined from his chart that more IV solution than ordered had been infused. At 1:35 a.m., Langvardt ordered the IV changed to a normal saline solution.

At 2:43 a.m. on August 24, 1990, the patient was transferred to Saint Elizabeth Community Health Center in Lincoln, where he died on August 25. The cause of death was diffuse cerebral edema that resulted from an infusion of free water that contained no sodium, also referred to as "water intoxication."

2. Expert Testimony

(a) Dr. Robert Harry

The State offered the deposition of Dr. Robert Harry, a member of the Board of Examiners in Medicine and Surgery for the State of Nebraska. Harry testified that it was common for the anesthetist to start the IV solution and that if the proper solution

was started, it was not contrary to general practice to continue the same IV solution following surgery. However, Harry stated that it was unusual for D5/W to be used. He testified that a solution with saline would avoid the problem that occurred in this case, even if infused at similar levels, but that D5/W could have been given at 40 cc without problems. Harry testified that the standard of care did not require the use of an IV pump and that when a short stay was expected, it was not unusual not to use a pump.

Harry further testified that it was not unusual to prescribe Ativan for seizures. However, he stated that when a child comes into the hospital healthy, has seizures, and has a history of seizures with fever but does not have a fever, the physician should go through a list of possible diagnoses. It was Harry's opinion that Langvardt should have ruled out febrile seizure at the outset. Harry stated that not ordering tests earlier in the evening, e.g., at 7:30 p.m., did not violate the standard of care, but that it would have been appropriate to have done the tests at that time. Harry testified that Langvardt was ultimately responsible for monitoring the patient's progress and that Langvardt would have been aware of some complications, the seizures, as early as 5:30 p.m.

In his written report, Harry had stated that Langvardt was grossly negligent. However, at the time of his deposition, he had retracted that judgment and felt that Langvardt had not been grossly negligent but had only displayed poor judgment. Harry testified further that once Langvardt recognized that too much IV solution had been infused, he responded appropriately, and that his corrective action met the standard of care.

(b) Dr. Louis Gogela, Jr.

Dr. Louis Gogela, Jr., a physician and general surgeon, testified on behalf of Langvardt. Gogela testified that the use of D5/W had been routine at the hospital under the circumstances and that the lack of an IV pump did not violate the standard of care. He testified that it was a universal rule and a basic expectation of all surgeons that they be notified if the IV fluid is infused at a greater rate than was ordered.

Gogela testified that if the first knowledge Langvardt had of any problems was the call at around 6 p.m. when it was reported

to him that the patient had experienced seizures and that if Langvardt knew of the patient's history of seizures, prescribing Ativan would have been an appropriate response, even though the patient did not have a fever. Had no history of seizures been present, it was Gogela's opinion that further evaluation should have been done. Gogela testified that late in the evening, Langvardt would have expected the patient to be somnolent, lethargic, sleeping, and recovering from the seizures and the medication. While Gogela stated that he would have evaluated the child further, it was his opinion that Langvardt's response to the seizures was in accord with the prevailing standard of care.

Gogela further testified that Langvardt's general level of medical knowledge and skill is better than the great majority of family practitioners and primary care physicians in the area.

(c) Dr. Eric S. Thomsen

Dr. Eric S. Thomsen, a family practice physician, also testified on behalf of Langvardt. It was Thomsen's opinion that the use of the D5/W solution during surgery and postoperatively for a pediatric patient was in accord with the practices generally followed in that area at the time. Thomsen testified that given the way this order was written, he would not have expected the nurse to assume she should continue to hang bags of IV fluid without checking with the physician.

It was Thomsen's opinion that given no report from the nursing staff of the IV rate and Langvardt's knowledge of the patient's history of seizures, it was reasonable to prescribe Ativan to control the seizures when the seizures were reported to him. The patient's history of seizures would have suggested that he had a lower threshold for seizures, with or without fever. Thomsen testified that it would have been good if the tests that were eventually run after midnight had been run earlier and that running the tests would not have been a response that was contrary to the information Langvardt was getting about the patient's condition.

Thomsen testified further that when Langvardt saw the patient around 10 p.m., the drowsiness, lethargy, and lack of responsiveness would have been consistent with the patient's postictal state and having been given Ativan. He stated that

without the information regarding the IV fluid, it was reasonable for Langvardt to think that he had dealt with the problem.

Thomsen testified that he might have started to check into things earlier, at 8 p.m. or even 6 p.m., and that it would not have been unreasonable for Langvardt to have looked at the chart. Thomsen also stated that it was the physician's responsibility to evaluate the patient, to check into problems when they occur, and to consider various alternatives.

(d) Dr. Dean L. Antonson

Dr. Dean L. Antonson, a pediatric gastroenterologist, also testified for Langvardt. Antonson testified that the standard practice would be to use an IV solution containing sodium but that it was not inappropriate to use a water solution like D5/W if it was anticipated that it would only be needed for a short time. He testified that the 40-cc rate that was ordered was appropriate and that the D5/W solution could have run at that rate for an extended period of time (even 24 hours), but that he would not have recommended D5/W, even for a period of 8 hours. Antonson testified further that there had been no substantial deviation from the accepted standard of care to not use an infusion pump; however, the smaller the child, the better off one is to use something to regulate the IV flow.

Antonson testified that the rate at which the fluid was infused was a significant error and should have been reported so that the IV could have been changed or discontinued. It was Antonson's opinion that there was no reason Langvardt should have expected that the patient was receiving two to three times the IV fluid that was ordered and that there was no indication during the day that there had been any problem with regulating the IV flow.

Antonson testified that the approach Langvardt took to treat the seizure activity around 6 p.m. was well within the standard of care and that when Langvardt saw the patient around 10 p.m., he would have expected to find him sleeping or drowsy from the seizures and the medication. Once the patient stopped breathing, Langvardt ordered the proper tests and immediately recognized the problem. Antonson believed that Langvardt's response would have been the same earlier, had he been informed of the error.

3. Order from Department

A petition for disciplinary action was filed against Langvardt on February 11, 1993, alleging that Langvardt had been grossly negligent or grossly incompetent in his treatment of the 3-year-old patient in violation of § 71-147(5)(d). On August 31 and September 2 and 3, a hearing was held before a hearing officer for the department.

The order of Mark B. Horton, M.D., Director of Health (Director), dated October 11, 1994, summarized the events that occurred on August 23 and 24, 1990; the testimony of each witness; and the evidence from the medical records. Then, the Director set forth his own qualifications, including the fact that he is a physician and diplomate of the American Board of Pediatrics, his assessment of the expert testimony presented, and his own expert opinions. The Director found that each of the experts had reservations concerning Langvardt's postoperative conduct. It was the Director's opinion that the nurses' failure to properly monitor the IV and to report irregularities to Langvardt impeded his ability to timely discover the fact that the patient was receiving an excessive amount of IV solution. However, it was also the Director's opinion that Langvardt was negligent (1) in his management of the IV infusion because he failed to specify the IV solution to be used after surgery and he failed to order the preferable and correct solution; (2) because when it was clear that the patient would be in the hospital for an extended period, Langvardt failed to adequately assess the amount and type of IV fluids the child had received, he failed to order blood tests to evaluate his blood electrolyte status, and he failed to order the proper maintenance fluids; (3) because when told the IV was running at a "keep open" rate which did not match his original order, Langvardt failed to clarify his order; (4) when he failed to order a monitor; (5) because at 11:45 p.m., when Langvardt realized that the patient was still on D5/W, he changed the solution, but did not order blood tests to determine the child's electrolyte status, and he did not review the total volume and rate of the infusion; and (6) when Langvardt failed to recognize the significance of lethargy and vomiting in the afternoon and of the seizure activity late in the day. It was the Director's opinion that Langvardt demonstrated gross incompe-

tence, arising from lack of knowledge and leading to inaction on his part.

The Director concluded that Langvardt's actions and omissions rose to the level of gross incompetence in violation of § 71-147(5)(d), but that his conduct, while negligent, did not rise to the level of gross negligence.

After a dispositional hearing on November 10, 1994, the Director ordered that Langvardt's license to practice medicine be limited to the extent that Langvardt not be allowed to perform surgery on children under the age of 12 or allowed to care for hospitalized children, except normal newborns, unless a coattending physician is assigned to the case and supervises Langvardt's care. This limitation was to stay in place until Langvardt completed certain remedial coursework.

4. Appeal to District Court

Langvardt appealed the determination of the department to the district court. In conducting a de novo review, the district court considered the medical opinions of the Director, along with the evidence presented at the hearing in the department. The district court found that the evidence failed to establish that Langvardt was guilty of either gross negligence or gross incompetence. Accordingly, the district court reversed the order of the department and dismissed the proceedings. The department appealed, and we removed the case to our docket pursuant to our power to regulate the caseloads of this court and the Nebraska Court of Appeals.

II. STANDARD OF REVIEW

Under Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1994), when a petition instituting proceedings for review under the Administrative Procedure Act (APA) is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency. *Miller v. Horton*, 253 Neb. 1009, 574 N.W.2d 112 (1998).

A final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Id.* On an appeal under the APA, an appellate court reviews the judgment of the district court for errors appearing on the record and will

not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.* Finally, when reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

III. ASSIGNMENTS OF ERROR

The department asserts that the district court erred in (1) determining that the evidence failed to establish that Langvardt was guilty of gross incompetence and (2) failing to affirm the Director's decision once it found that the Director's medical opinions should be considered because the decision was supported by substantial evidence justifying the order made, the Director acted within the scope of his authority, and the order was not arbitrary, capricious, or unreasonable.

IV. ANALYSIS

1. Standard of Review

The department claims that the district court applied the incorrect standard of review in conducting a de novo review on the agency record. The department argues that under our holding in *Scott v. State ex rel. Board of Nursing*, 196 Neb. 681, 244 N.W.2d 683 (1976), the proper standard of review was whether the Director's decision was supported by substantial evidence and was not arbitrary, capricious, or unreasonable. In contrast, Langvardt contends that under § 84-917(5)(a) of the APA, the district court appropriately conducted a de novo review. Langvardt argues that *Scott v. State ex rel. Board of Nursing, supra*, was decided prior to the enactment of the present version of § 84-917(5)(a) and, thus, is no longer applicable. Therefore, the issue we must decide is whether the district court is to review a physician disciplinary determination by the department de novo on the record of the proceedings or review the matter to determine whether there is substantial evidence to support the Director's decision and whether the decision is arbitrary, capricious, or unreasonable.

Neb. Rev. Stat. § 71-159 (Reissue 1996) provides that disciplinary measures taken against a professional licensee may be

appealed, and such appeal "shall be in accordance with the Administrative Procedure Act." Section 84-917(1) provides that any person aggrieved by a final decision in a contested case is entitled to judicial review under the APA. Under § 84-917(5)(a), when a petition instituting proceedings for review under the APA is filed in the district court on or after July 1, 1989, the review shall be conducted by the district court without a jury de novo on the record of the agency. *Miller v. Horton, supra.* The record consists of the transcripts and bill of exceptions of the proceedings before the agency and facts capable of being judicially noticed pursuant to Neb. Evid. R. 201. *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995). In a true de novo review, the district court's decision is to be made independently of the agency's prior disposition, and the district court is not required to give deference to the findings of fact and the decision of the agency hearing officer. *Id.*

An aggrieved party may obtain review of any judgment or final order entered by a district court under the APA, and Neb. Rev. Stat. § 84-918 (Reissue 1994) provides the standard of review for the appellate court. Appeals involving petitions filed on or after July 1, 1989, are reviewed by an appellate court for errors appearing on the record. § 84-918(3). An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993).

Nonetheless, the department asserts that in *Scott v. State ex rel. Board of Nursing*, 196 Neb. 681, 687-88, 244 N.W.2d 683, 688 (1976), we stated that "[t]he licensing and regulation of the health profession and other matters dealing with health is a legislative function which [the legislative] branch of government ordinarily carries out through administrative agencies created by it." Relying on the conclusion that "[t]he licensing and regulation of the health profession" is a legislative function, we reasoned that a statute which purports to give a court the power to review an exercise of legislative power de novo, in the sense that the court may substitute its own judgment for that of the administrative agency to which the Legislature has delegated

the power, is unconstitutional as a violation of the separation of powers doctrine. *Id.* Thus, we determined that in health disciplinary proceedings that "the Legislature did not intend to use the term de novo in the sense that the reviewing court could substitute its own judgment for the expert judgment of the board." *Id.* at 689, 244 N.W.2d at 689. However, we have departed significantly from the reasoning in *Scott v. State ex rel. Board of Nursing* since the enactment of the 1989 amendments to §§ 84-917 and 84-918.

In *Slack Nsg. Home v. Department of Soc. Servs., supra*, we undertook an extensive analysis of the standard of review set forth in §§ 84-917 and 84-918 in light of the separation of powers doctrine. We noted that § 84-917(1) provides that any person aggrieved by a final decision in a *contested case* is entitled to judicial review under the APA. A contested case is defined in Neb. Rev. Stat. § 84-901(3) (Reissue 1994) as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." In determining whether the scope of review in §§ 84-917 and 84-918 violated the separation of powers doctrine, we focused on the actual functions performed at the hearing under review, rather than focusing on the nebulous distinction of whether an administrative agency is exercising a "legislative" function or a "judicial" function based solely on the nature of the proceeding. For purposes of the separation of powers doctrine, we concluded that an administrative agency carries out a quasi-judicial function any time it conducts a hearing to determine the rights, duties, or privileges of specific parties as required by law or constitutional right. See *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995).

In other words, when a statute or constitutional right requires notice and hearing, the administrative body takes on a quasi-judicial character when it makes a binding determination resolving a disputed claim between specific parties after such a hearing. See *Stoneman v. United Neb. Bank, ante* p. 477, 577 N.W.2d 271 (1998). It has never been a part of the legislative function to resolve contested claims of rights between specific parties based on evidentiary facts.

In the instant case, Neb. Rev. Stat. § 71-150(3) (Reissue 1996) requires the Attorney General to file a petition in order for the Director of Regulation and Licensure to discipline a licensee. Neb. Rev. Stat. § 71-153 (Reissue 1996) specifically requires that an order be issued "fixing the time and place for the hearing." Neb. Rev. Stat. § 71-155 (Supp. 1997) states that "[t]he proceeding under section 71-150 shall be summary in its nature and *triable as an equity action* and shall be *heard* by the Director of Regulation and Licensure or by a hearing officer designated by the director under rules and regulations of the department." (Emphasis supplied.) That section empowers the director or the hearing officer to receive affidavits into "evidence," administer "oaths," "subpoena witnesses and compel their attendance," "issue subpoenas duces tecum," and consider depositions. Furthermore, § 71-155 states that "[i]f the director determines that *guilt* has been established, the director may . . . consult with the board of examiners for the profession involved concerning sanctions to be imposed or terms and conditions of the sanctions." (Emphasis supplied.) Perhaps most importantly, Neb. Rev. Stat. § 71-155.01 (Supp. 1997) refers to such proceedings as "contested cases."

The above review of the statutes governing this type of disciplinary proceeding clearly indicates that notice and a hearing are required prior to disposition and that the hearing involves the adjudication of evidentiary facts. Everything about the procedure involved is in the nature of a judicial proceeding, requiring specific findings of fact concerning a particular individual and leading to a decision binding on the parties.

Therefore, because the proceeding against Langvardt was clearly a contested case under § 84-901(3) that was quasi-judicial in nature, we conclude that the district court properly conducted a de novo review of the agency record. Under the APA, the district courts have only one standard of review for contested cases filed on or after July 1, 1989. For contested cases, the review shall be conducted by the court without a jury de novo on the record of the agency. *Miller v. Horton*, 253 Neb. 1009, 574 N.W.2d 112 (1998); *Slack Nsg. Home v. Department of Soc. Servs., supra.* To the extent that *Scott v. State ex rel. Board of Nursing*, 196 Neb. 681, 244 N.W.2d 683 (1976), implies that a

true de novo review by a district court of a health department determination in a contested disciplinary proceeding violates the separation of powers doctrine, it is hereby overruled.

We now proceed to review the judgment of the district court for errors appearing on the record, keeping in mind that our inquiry is whether the district court decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Miller v. Horton, supra.*

2. Director's Expert Opinion

Before we review that portion of the record which contains the Director's own expert opinions, we must decide whether the Director properly provided his own expert opinions and whether the district court correctly took into consideration the Director's own expert opinions in its de novo review. Langvardt contends that Neb. Rev. Stat. § 84-914(5) (Reissue 1994) requires that he be notified of the Director's intent to utilize his own opinions. Langvardt asserts that because he had not been given notice of the Director's intent to use his own expertise and because the Director's opinions were not offered into evidence, he had no opportunity to cross-examine or otherwise challenge those opinions.

Section 84-914(5) provides as follows:

> An agency may take official notice of cognizable facts and in addition may take official notice of general, technical, or scientific facts within its specialized knowledge and the rules and regulations adopted and promulgated by such agency. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of material so noticed. Parties shall be afforded an opportunity to contest facts so noticed. The record shall contain a written record of everything officially noticed. An agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it[.]

The policy behind this rule is clear. Fair warning of an agency's intention to take notice of a fact or matter not in evidence must be given to the parties so as to allow them to address the matter in question at the hearing. This prevents any prejudice or sur-

prise to the parties. The parties are to be given a chance to rebut or to comment on any evidence considered by the agency when making its decision. See *In re Application of ATS Mobile Telephone*, 213 Neb. 403, 330 N.W.2d 123 (1983).

However, § 84-914(5) distinguishes situations in which the agency takes notice of facts within its specialized knowledge from those in which an agency utilizes its expertise in evaluating the evidence presented to it. In the former situation, notification to the parties is required; whereas, in the latter situation, it is not. Therefore, we must determine whether the opinions offered by the Director constituted cognizable facts that were outside the record or whether these opinions represented the Director's utilization of his expertise in evaluating the evidence in the record.

In the instant case, each of the matters on which the Director expressed his opinions was an issue which had been contested at the hearing. With regard to the type of IV solution used, the Director determined that Langvardt had failed to specify the IV solution to be used, failed to order the preferable and correct solution, and failed to order the proper maintenance fluids once it was clear that the patient would be in the hospital for an extended period. Each of the experts testified to the nature of the IV solution given to the patient, its characteristics, and its drawbacks. Langvardt had a full opportunity to examine and did examine each expert as to the propriety of utilizing D5/W.

The Director also expressed his opinion about Langvardt's failure to monitor the rate at which the IV solution was infused. He determined that Langvardt had failed to adequately assess the amount and type of IV fluids the patient had received, failed to clarify his order when told the IV was running at a "keep open" rate that did not match his orders, failed to order an IV monitor, and failed to review the total volume and rate of the infusion at 11:45 p.m., when Langvardt ordered that the IV solution be changed. Again, the rate at which the IV solution was infused, what Langvardt knew about that rate, and his responses were issues testified to by each expert at the hearing, and Langvardt examined each expert in this regard.

The Director also found that Langvardt had failed to order blood tests to evaluate the patient's electrolyte status both at the

time it was clear that the patient would be in the hospital for an extended period and at 11:45 p.m., when he changed the IV solution. Similarly, the Director found that Langvardt failed to recognize the significance of lethargy and vomiting in the afternoon and of the seizure activity late in the day as signs of water intoxication. The importance of the blood tests and whether Langvardt should have performed the tests earlier, the significance of the patient's symptoms, and the appropriateness of Langvardt's responses were all contested issues. The experts were examined by Langvardt about each of these matters.

Thus, we conclude that the Director was not substituting his expert knowledge for evidence in the record of the hearing, but, rather, used his experience and knowledge in evaluating the facts in the record. The Director did not introduce new facts or evidence but evaluated the evidence presented in light of his specialized knowledge and medical background. That the Director's ultimate judgment may have differed from those of the experts testifying at the hearing in no way diminishes the fact that it was an expert evaluation. Accordingly, we determine that the district court properly took into consideration the expert opinions of the Director in its de novo review.

3. Gross Incompetence

The Director determined that Langvardt's actions on August 23 and 24, 1990, demonstrated gross incompetence; however, the Director further determined that while Langvardt's actions were negligent, his conduct did not rise to the level of gross negligence. Section 71-147 provides, in pertinent part, that "[a] license . . . to practice a profession may be . . . limited, revoked, or suspended . . . when the . . . licensee . . . is guilty of . . . (5) practic[ing] . . . the profession . . . (d) with gross incompetence or gross negligence . . . ." Although the statute does not define gross incompetence as that term is used in § 71-147(5)(d), and we have not defined the term in the context of a professional disciplinary proceeding, other jurisdictions have had the opportunity to define "gross incompetence" in medical disciplinary proceedings.

"Incompetence" refers to a demonstrated lack of ability to perform a required duty. See *Lee v. State Bd. of Dental*

Examiners, 654 P.2d 839 (Colo. 1982). "Gross" means " '[o]ut of all measure; beyond allowance; not to be excused; flagrant, shameful; as, a *gross* dereli[c]tion of duty; a *gross* injustice; *gross* carelessness.' " *Id.* at 845 (quoting *State Board v. Savelle*, 90 Colo. 177, 8 P.2d 693 (1932), *appeal dismissed* 287 U.S. 562, 53 S. Ct. 5, 77 L. Ed. 496). Thus, the term "gross incompetence," at least in the context of the practice of medicine, § 71-147(5)(d), connotes such an extreme deficiency on the part of a physician in the basic knowledge and skill necessary for diagnosis and treatment that one may reasonably question his or her ability to practice medicine at the threshold level of professional competence. See, generally, *Yoshizawa v. Hewitt*, 52 F.2d 411 (9th Cir. 1931); *Franz v. Board of Medical Quality Assur.*, 31 Cal. 3d 124, 642 P.2d 792, 181 Cal. Rptr. 732 (1982); *Lee v. State Bd. of Dental Examiners, supra*; *Nurse Examiners v. Hohu*, 129 Colo. 195, 268 P.2d 401 (1954); *N. J. State Bd. of Optometrists v. Nemitz*, 21 N.J. Super. 18, 90 A.2d 740 (1952); *Stacey v. Board of Accountancy*, 26 Or. App. 541, 553 P.2d 1074 (1976).

The district court was correct to conclude that the record in the instant case is lacking in the quantum of evidence necessary to support a reasonable inference that Langvardt was "grossly incompetent" in his treatment of the 3-year-old patient. Each of the experts testified that while it may have been preferable to have ordered a different IV solution, to have assessed the situation more thoroughly, or to have acted earlier in the evening, none of Langvardt's responses were inexcusable given his knowledge of the patient's history and his lack of information regarding the rate of IV infusion. While the experts agreed that the patient's symptoms could be, and ultimately were, signs of water intoxication, they testified that Langvardt's actions were not contrary to the indications and the information he had received at the time.

There was no indication that Langvardt did not know the proper rate of IV fluid infusion for a child the patient's size. The experts agreed that Langvardt's order of 40 cc per hour was a proper postsurgical order. In addition, there was no evidence that Langvardt did not know how to respond to an infusion of excess fluids. The experts testified that once it became clear that

too much solution had been infused, Langvardt's response and corrective measures were appropriate. Moreover, Antonson testified that had Langvardt been informed of the error with the IV earlier in the day, he would have responded appropriately at that time.

Gogela testified that Langvardt's general level of medical knowledge and skill is better than that of the great majority of family practitioners and primary care physicians in the area. In addition, Thomsen testified that Langvardt is a very competent physician and that he has enough knowledge and skill to practice at a level above that which is generally observed in the area. These assessments of Langvardt's basic skill level were not contradicted by any evidence in the record.

Even when giving some deference to the Director's opinion that Langvardt was *negligent* in (1) his management of the IV infusion, (2) his assessment of the amount and type of IV fluids the patient had received, (3) failing to clarify his original order or order a monitor, and (4) failing to timely order blood tests or recognize the significance of lethargy and vomiting in the afternoon and of the later seizure activity, the record does not sustain a conclusion that Langvardt lacked the *basic knowledge and skill* necessary to diagnose and treat young patients such that one would reasonably question his ability to practice medicine at the threshold level of professional competence. Thus, we find no error in the district court's determination that the evidence failed to establish that Langvardt was guilty of either gross negligence or gross incompetence. The department's assignments of error are without merit.

V. CONCLUSION

Because the district court decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable, we find no error appearing on the record necessitating a reversal, vacation, or modification of the judgment. For these reasons, we affirm the judgment of the district court.

AFFIRMED.

STEPHAN, J., not participating.

TIMOTHY CAVANAUGH, APPELLANT, V. CITY OF OMAHA, APPELLEE.
580 N.W.2d 541

Filed July 2, 1998. No. S-96-491.

1. **Limitations of Actions: Time.** The point at which a statute of limitations commences to run must be determined from the facts of each case. A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit. Generally, this is true even though the plaintiff may be ignorant of the existence of the cause of action.
2. **Actions: Contracts: Time.** A cause of action in contract accrues at the time of the breach or failure to do the thing that is the subject of the agreement.
3. **Limitations of Actions: Time: Damages.** One need not know the full extent of one's damages before the limitations period begins to run, as a statute of limitations can be triggered at some time before the full extent of damages is sustained.
4. **Actions: Contracts: Time.** A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury occasioned to him or her.
5. **Breach of Contract: Words and Phrases.** A "breach" is a nonperformance of a duty.

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Douglas County, MICHAEL MCGILL, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Thomas F. Dowd, of Dowd, Dowd & Fahey, for appellant.

Kent N. Whinnery, Deputy Omaha City Attorney, and Wendy E. Hahn, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

INTRODUCTION

The City of Omaha (City) is required to conduct promotion examinations according to the terms of the collective bargaining agreement (CBA) between the City and its police union. Undisputedly, the City failed to conform to the timetable of the CBA with respect to posting notice of a lieutenant examination and administering that examination during late 1989 and early 1990. As a result of the City's actions, an otherwise ineligible

sergeant was allowed to take the lieutenant examination that was administered on April 13, 1990, and he was later promoted. Timothy Cavanaugh also took the examination; however, he was not promoted. Cavanaugh brought this breach of contract action against the City as a third-party beneficiary of the CBA. The district court determined that Cavanaugh's action was barred by the statute of limitations. The Nebraska Court of Appeals reversed, holding that the district court failed to identify a breach which brought the action within the limitations period. See *Cavanaugh v. City of Omaha*, 5 Neb. App. 827, 567 N.W.2d 592 (1997). Because we conclude that the Court of Appeals incorrectly applied the rule for determining when a cause of action for breach accrues, we reverse the decision of the Court of Appeals and remand the cause with direction to affirm the judgment of the district court.

FACTUAL BACKGROUND

The City is required by ordinance to maintain an eligibility list of candidates qualified for promotion within the Omaha Police Division. Each eligibility list, once established, has a limited duration of 2 years. Article 33, § 1, of the CBA between the City and the police union, which was adopted as an ordinance of the City of Omaha by action of the Omaha City Council, mandated that an examination to establish a new eligibility list take place 60 days prior to the expiration of the current eligibility list and that notice of the promotional examination be given 90 days before the administration of the examination.

The City's eligibility list for promotion to the rank of lieutenant was to expire on April 7, 1990. The CBA, therefore, required that the examination for the establishment of a new list be commenced on or before February 7 and that notice of the examination be posted on November 7, 1989. The City failed to comply with the terms of the CBA, however. Instead of posting notice of the upcoming examination on November 7, 1989, the City posted notice on January 8, 1990. Then, instead of administering the examination on February 7, the examination was administered on April 13.

The minimum number of years' experience required for an applicant to be eligible to take the police lieutenant examination

is 2 years in the rank of police sergeant. Cavanaugh met the 2-year eligibility requirement at the time the testing was to be performed in accordance with the CBA. Sgt. Donald Thorson did not have the requisite 2 years' experience at the time of the deadline under the CBA. Thorson did, however, have 2 years' experience under the City's delayed notice and testing timetable.

After the eligibility examination, Thorson ranked second on the eligibility list and Cavanaugh ranked eighth. There was a total of eight promotions made from the eligibility list prior to its expiration. Candidates ranking first through seventh and an affirmative action candidate who ranked ninth were promoted. Cavanaugh was not promoted before the list expired on July 22, 1992. Cavanaugh asserts that as a direct and proximate result of the City's administering the eligibility examination on April 13, 1990, in violation of the specific terms of the CBA, he was denied a promotion to the rank of lieutenant by virtue of Thorson's admittance to the eligibility testing and subsequent promotion.

Cavanaugh brought this action against the City on February 22, 1995, claiming that he is a third-party beneficiary to the CBA and that the City's delayed notice and testing constituted breaches of the CBA. The City asserted in its answer that the CBA was effectively amended by a memorandum of understanding between the parties to the CBA and also asserted that the action was barred by a 5-year statute of limitations. The district court found that the CBA was effectively amended by the memorandum of understanding. Additionally, the district court found that even if the CBA was breached, those breaches occurred (1) on November 7, 1989, when notice was supposed to be posted pursuant to the CBA; (2) on February 7, 1990, when the examination was supposed to be administered pursuant to the CBA; and (3) on January 8, 1990, when posting of notice actually occurred. The district court found that based on these dates, Cavanaugh's action was barred by the statute of limitations, and dismissed Cavanaugh's petition with prejudice.

Cavanaugh appealed the district court's decision to the Court of Appeals. The Court of Appeals held that the CBA was not effectively amended because such an amendment would require a vote by the police union members and approval by the Omaha

City Council, neither of which occurred in this case. *Cavanaugh v. City of Omaha*, 5 Neb. App. 827, 567 N.W.2d 592 (1997). The Court of Appeals then addressed the statute of limitations issue. The court found that not only had breaches of the CBA occurred at the three points in time identified by the district court, but that a breach also occurred on April 13, 1990, when the examination was actually administered and Thorson was allowed to sit for the examination. *Id.* Accordingly, the Court of Appeals reversed the district court's decision because it found that Cavanaugh brought this action within the 5-year statutory period of the April 13 breach. *Id.* The City petitioned this court for further review of the Court of Appeals' holding with respect to the statute of limitations issue only, and we granted further review.

ASSIGNMENT OF ERROR

Restated, the City asserts in its assignment of error that the Court of Appeals incorrectly applied the "occurrence rule" for determining when a breach occurs when it held that the City breached the CBA by administering the eligibility examination on April 13, 1990, and by allowing Thorson to sit for the examination, thereby bringing the action within the statute of limitations period.

STANDARD OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Veskerna v. City of West Point, ante* p. 540, 578 N.W.2d 25 (1998).

ANALYSIS

The statute of limitations issue in this case is governed by Neb. Rev. Stat. § 25-205(1) (Reissue 1995), which provides that an action upon a written agreement or contract "can only be brought within five years." The point at which a statute of limitations commences to run must be determined from the facts of each case. A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit. Generally, this is true even though the plaintiff may be ignorant of the existence of the cause of action. *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722

(1996); *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994). A cause of action in contract accrues at the time of the breach or failure to do the thing that is the subject of the agreement. See *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994).

The Court of Appeals correctly stated that one need not know the full extent of one's damages before the limitations period begins to run, as a statute of limitations can be triggered at some time before the full extent of damages is sustained. See *Gordon, supra*. See, also, *Steuben v. City of Lincoln*, 249 Neb. 270, 543 N.W.2d 161 (1996) (action accrues and statutory time within which action must be filed begins to run when injured party has right to institute and maintain lawsuit, although party may not know nature and extent of damages). In fact, a cause of action in contract accrues at the time of the breach or failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury occasioned to him or her. *Hooker and Heft v. Estate of Weinberger*, 203 Neb. 674, 279 N.W.2d 849 (1979).

The Court of Appeals also correctly noted:

> The Nebraska Supreme Court has consistently used the "occurrence rule," measuring the statute of limitations from the time of the breach in contract cases and from the time of the act or omission in tort cases. . . . Thus, the fact that Cavanaugh does not know until much later whether he will or will not be promoted is a matter of the nature and extent of damages and does not prevent the accrual of a cause of action under the occurrence rule. The breach is what begins the running of the statute of limitations under Nebraska law.

(Citations omitted.) *Cavanaugh v. City of Omaha*, 5 Neb. App. 827, 835, 567 N.W.2d 592, 598 (1997). However, the Court of Appeals' identification of certain acts and omissions as breaches was dispositive of the statute of limitations issue and requires further analysis.

The Court of Appeals identified four separate breaches in the instant case: (1) failing to post notice; (2) posting notice late; (3) failing to give the test on time; and (4) giving the test on April 13, 1990, at which time Thorson was allowed to sit. After

identifying the four breaches, the last of which brought Cavanaugh's action within the 5-year statute of limitations period, the Court of Appeals went on to state: "The analysis could be extended to say that there were breaches occurring thereafter when Thorson was promoted and Cavanaugh was not." *Id.* at 836-37, 567 N.W.2d at 599. In reaching this conclusion, the Court of Appeals likened the CBA to a contract for continuing performance over a period of time, where each successive breach begins the running of the statute of limitations anew. *Cavanaugh, supra.*

The Court of Appeals' analysis relied on the Maryland case *Singer Co. v. BG&E*, 79 Md. App. 461, 558 A.2d 419 (1989). In *Singer Co.*, the defendant was a utility company that provided electricity to the plaintiff. The Court of Special Appeals determined that the defendant had a contractual obligation to supply continuous electricity to the plaintiff and that each time there was a power outage, the defendant had breached its obligation and a new statute of limitations period began to run. *Id.* While we do not pass on the correctness of the *Singer Co.* decision, we find that the Court of Appeals misapplied the rationale in *Singer Co.* to the facts of the instant case in its application of the occurrence rule.

A "breach" is a nonperformance of a duty. Arthur L. Corbin, Corbin on Contracts § 943 (1952). Article 33, § 1, of the CBA states that "[n]otice of promotional examination shall be given ninety (90) days prior to the administration of the examination, of which examination, the initial procedure, shall take place sixty (60) days prior to termination of the current eligibility list." Section 1 imposed a duty on the City to carry out the examination process in accordance with the terms of the CBA. The parties agree that the City failed to perform this duty and that the failure first occurred on November 7, 1989, when the City did not post notice of the examination within 150 days of the expiration of the then-current eligibility list. Cavanaugh's petition was filed more than 5 years after November 7, 1989.

The actions of the City after it first failed to comply with the requirements of article 33, § 1, of the CBA were necessarily inconsistent with the testing schedule envisioned in the contract. However, it is error to characterize those subsequent acts

or omissions as separate breaches, each beginning a new statute of limitations period. This is not a case like *Singer Co., supra*, where there was an ongoing, contractual duty to supply electricity that was subject to sequential breaches each time there was a power outage. Instead, the City had one duty that is at issue in this case, the administration of the examination in conformance with the specific terms of the CBA. The City failed to perform that duty when, on November 7, 1990, it did not post notice of the examination as required. The actions that followed, including the late examination administration and the admission of Thorson, were natural consequences of the November 7 breach.

It is the nonperformance of the specific affirmative duty contained in the CBA which constituted the breach in this case, not the actions taken by the City subsequent to the breach and as a result of the breach. To hold otherwise would mean that every time the City acted with respect to the promotion examination and the list generated from that examination, there would be a new breach of the CBA. Such a holding would, in effect, obviate the occurrence rule.

We conclude, therefore, that the City's breach of the CBA with respect to its duty to administer the examination occurred on November 7, 1989, when it failed to timely post notice, and that Cavanaugh's cause of action accrued at that time. The actions the City took which were consistent with that breach, i.e., the late examination administration and the admission of Thorson, only determined whether Cavanaugh would, in fact, sustain an injury as a result of the breach. Such actions did not begin the limitations period anew. As a result, Cavanaugh's claim is time-barred by the provisions of § 25-205.

CONCLUSION

For the foregoing reasons, we determine that the Court of Appeals erred in its application of the occurrence rule. Because our ruling on the statute of limitations is dispositive of Cavanaugh's cause of action, we reverse the decision of the Court of Appeals and remand the cause with direction to affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

ALLEN E. DAUBMAN AND RENEE A. DAUBMAN, HUSBAND AND WIFE, APPELLEES, V. CBS REAL ESTATE CO., A NEBRASKA CORPORATION, AND ARLENE ENGELBERT, APPELLANTS.

580 N.W.2d 552

Filed July 2, 1998. No. S-96-734.

1. **Actions: Equity.** An action for assumpsit may be brought where a party has received money which in equity and good conscience should be repaid to another.
2. **Actions: Equity: Unjust Enrichment.** Where a party has received money which in equity and good conscience should be repaid to another, the law implies a promise on the part of the person who received the money to reimburse the payor in order to prevent unjust enrichment.
3. **Actions: Equity.** An action for assumpsit is in the nature of a bill in equity and lies wherever a party who has received money which in equity and good conscience should be repaid to another should by equity and natural principles of justice refund the money.
4. ____: ____. Although founded on equitable principles, an action in assumpsit for money had and received is an action at law.
5. **Judgments: Appeal and Error.** The judgment and factual findings of the trial court in an action at law tried to the court without a jury have the effect of a verdict and will not be set aside unless clearly wrong.
6. **Actions: Evidence: Appeal and Error.** In reviewing an action at law, an appellate court reviews the evidence in the light most favorable to the prevailing party.
7. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the lower courts.
8. **Principal and Agent.** Generally, an agent is required to act solely for the benefit of the principal in all matters connected with the agency and adhere faithfully to the instructions of the principal.
9. ____. An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal.
10. **Real Estate: Principal and Agent.** A real estate agent owes the principal a fiduciary duty to use reasonable care, skill, and diligence in performing her or his obligations and to act honestly and in good faith.
11. **Principal and Agent.** The rule requiring an agent to act with utmost good faith toward the principal places the agent under a legal obligation to make a full, fair, and prompt disclosure to the principal of all facts within the agent's knowledge which are or may be material to the matter in connection with which the agent is employed, which might affect the principal's rights and interests or influence the principal's action in relation to the subject matter of the employment, or which in any way pertain to the discharge of the agency which the agent has undertaken.
12. **Judgments.** In a bench trial, the trial court's entry of judgment in favor of a party warrants the conclusion that the trial court found in that party's favor on all issuable facts.
13. ____. The rule that in a bench trial the trial court's entry of judgment in favor of a party warrants the conclusion that the trial court found in that party's favor on all

issuable facts is not made inapplicable merely because in addition to a general finding, the trial court also mentioned certain matters specifically.

14. **Principal and Agent.** A commission for services cannot be collected by the agent if the agent has willfully disregarded, in a material respect, an obligation which the law devolves upon the agent by reason of the agency.
15. ____. A principal whose agent has violated her or his duties may properly refuse to pay compensation.
16. **Prejudgment Interest: Claims.** Absent compliance with the provisions of Neb. Rev. Stat. § 45-103.02(1) (Cum. Supp. 1996), prejudgment interest is available only when a claim is liquidated, that is, when there is no reasonable controversy either as to the plaintiff's right to recover or as to the amount of such recovery.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and INBODY, Judges, on appeal thereto from the District Court for Douglas County, MICHAEL W. AMDOR, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Mark S. Dickhute for appellants.

Richard J. Rensch, of Raynor, Rensch & Pfeiffer, for appellees.

WHITE, C.J., CAPORALE, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

Claiming that defendant-appellant CBS Real Estate Co. and its agent, defendant-appellant Arlene Engelbert, breached their fiduciary duties, plaintiffs-appellees, Allen E. Daubman and his wife, Renee A. Daubman, sought the return of the real estate sales commission they paid. Following a bench trial, the district court entered judgment in favor of the Daubmans. CBS and Engelbert appealed to the Nebraska Court of Appeals, claiming that the district court had erred in (1) finding that they breached their fiduciary duties, (2) failing to find that the Daubmans ratified and otherwise acquiesced in their actions, (3) finding that the Daubmans sustained damages, and (4) awarding prejudgment interest. Concluding that the evidence failed to support the district court's judgment, the Court of Appeals vacated the judgment and remanded the cause with directions to dismiss. See *Daubman v. CBS Real Estate Co.*, 6 Neb. App. 390, 573 N.W.2d

802 (1998). The Daubmans thereupon successfully petitioned for further review, claiming, in summary, that the Court of Appeals erroneously set aside the district court's factual findings. For the reasons hereinafter set forth, we reverse, and remand with direction.

II. SCOPE OF REVIEW

This action is one for assumpsit for money had and received, an action which may be brought where a party has received money which in equity and good conscience should be repaid to another. *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997); *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 531 N.W.2d 523 (1995). In such a circumstance, the law implies a promise on the part of the person who received the money to reimburse the payor in order to prevent unjust enrichment. *Kramer, supra*; *Wrede, supra*. The action, although falling under the common-law class of assumpsit, is really in the nature of a bill in equity and lies wherever the party should by equity and natural principles of justice refund the money. *Boman v. Olson*, 158 Neb. 636, 64 N.W.2d 310 (1954). Although founded on equitable principles, an action in assumpsit for money had and received is an action at law. *Kramer, supra*; *Wrede, supra*.

The judgment and factual findings of the trial court in an action at law tried to the court without a jury have the effect of a verdict and will not be set aside unless clearly wrong. *In re Estate of Wagner*, 253 Neb. 498, 571 N.W.2d 76 (1997). In reviewing an action at law, an appellate court reviews the evidence in the light most favorable to the prevailing party. *Id.* However, regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the lower courts. *State v. Hill, ante* p. 460, 577 N.W.2d 259 (1998).

III. FACTS

As the Daubmans were considering building a new home, they wished to explore the amount for which they could sell their current home. To that end, they contacted Engelbert, a real estate salesperson working through CBS. Engelbert met with the Daubmans, and the Daubmans asked her to prepare a competitive market analysis on the property to determine its market

value. Engelbert prepared the analysis and forwarded the results to the Daubmans.

Engelbert informed the Daubmans that she was working with Thomas and Brenda Pedersen, who were looking for a residence similar in features and price to the Daubman property. According to Allen Daubman, Engelbert also stated that the Pedersens "had been pre-approved for credit in an amount more than necessary to purchase [the] home." Engelbert also stated, according to Allen Daubman, that the Pedersens had sufficient financial ability to purchase the home and that financing would not be a problem; that the Pedersens were preapproved with a particular lender for a $180,000 loan. Engelbert contradicted Allen Daubman, testifying that she did not state that the Pedersens had been preapproved for a particular amount of credit. Rather, Engelbert claims that she told the Daubmans not that the Pedersens were preapproved but that they were "qualified buyers, that [she] had been working with them, that . . . they had a savings plan, they had been paying off their debts, and they had the cash to close." Engelbert admitted telling the Daubmans that the Pedersens were capable of buying the home.

Engelbert offered to show the property to the Pedersens if the Daubmans signed a "one-party listing agreement" with CBS granting it an exclusive right to sell the property to the Pedersens only. The next day, the Daubmans signed the one-party listing agreement. Pursuant to this agreement, the Daubmans agreed to give CBS the sole and exclusive right to sell the property for $139,950 "cash or as terms agreed" to the Pedersens only, and to pay CBS a cash commission of 7 percent of the gross sales price. At the time the agreement was signed, the Daubmans notified Engelbert that they might be interested in leasing back the property or moving into an apartment, since they were contemplating building a new home, which would not be completed before the sale of their current property closed.

Engelbert showed the property to the Pedersens that same day, and later that day the Pedersens requested that Engelbert prepare an offer. Engelbert prepared an offer, which provided that the Pedersens would purchase the property for $132,000 and rent the property back to the Daubmans for a period of time. That evening, Engelbert presented the offer to the Daubmans.

Allen Daubman testified that upon receiving the offer, he told Engelbert that he was not interested, that he was very disappointed, and that he no longer wished to pursue the matter with the Pedersens. He further explained to Engelbert that he was concerned about the Pedersens' ability to obtain financing, based on the fact that their offer provided for a 95-percent loan. According to Allen Daubman, Engelbert was insistent on working something out and stated that the Pedersens' credit was "squeaky-clean." Engelbert denies using the term "squeaky-clean."

The Daubmans' plan to build a new home would require several financial obligations, including renting an apartment. Thus, if the Pedersens could not obtain a loan, the Daubmans could face the situation of not having their house sold but having to pay rent on an apartment and payments on a construction loan. To offset their risk, the Daubmans suggested to Engelbert that the Pedersens make a $5,000 nonrefundable earnest deposit. According to Allen Daubman, Engelbert recommended very strongly against such a proposal, saying that it was unnecessary, and reiterated that the Pedersens were financially strong, asserting that "they had been saving money in anticipation of buying a house; that they had cleaned up their bills; and that financing, again, should not be any problem whatsoever."

The following day, Allen Daubman prepared and faxed a counteroffer to CBS, specifying a purchase price of $139,900; an earnest deposit of $2,000; approval of financing in 30 days; closing within 30 days; and possession to be given the Pedersens at closing, all contingent upon the Pedersens being able to obtain financing of 95 percent of the purchase price at 8.5 percent for 30 years. The counteroffer would also allow the Daubmans to continue listing and showing the property for purposes of obtaining backup offers in the event the Pedersens were unable to obtain financing.

The next day, the Pedersens requested that CBS prepare another offer. The new offer provided that they would purchase the property for $139,900 with an earnest deposit of $2,000, conditional on their obtaining a conventional loan secured by a mortgage or deed of trust on the property in the sum of $132,900. The offer further provided that the Pedersens were to

apply for financing within 5 business days of its acceptance and that if financing was not approved within 30 days of acceptance of the offer, the offer would be null and void, and the earnest deposit would be returned to the Pedersens. The offer further provided that if processing of the Pedersens' loan application was not completed within 30 days, the time limit would be automatically extended until the lending agency either approved or rejected the application. The transaction was to be closed on July 29, 1992, by an escrow agent and possession given to the Pedersens on July 30. The Daubmans accepted the offer on June 12, 1992, on the condition that the possession date be subject to the availability of a mover acceptable to them. The Pedersens accepted this condition.

The Pedersens met with Residential Mortgage Services on June 15, 1992, to apply for a loan, with Engelbert in attendance. At the appointment, Engelbert did not learn of any information that would jeopardize the Pedersens' loan application, and after the appointment, she communicated the information she learned to Allen Daubman. On June 25, the Daubmans entered into an agreement for the construction of a new home. On July 9, Residential Mortgage Services notified Engelbert that it probably would not be able to make a loan to the Pedersens and recommended that the loan application be moved to another lender.

After learning of the probable denial by Residential Mortgage Services, Engelbert contacted Capital Financial Services to determine whether it could approve a loan to the Pedersens on the terms contained in their purchase agreement. On July 10, 1992, Capital Financial Services informed Engelbert that it could probably make the loan and asked her to have the loan file transferred to it. On the same day, the loan file was moved from Residential Mortgage Services to Capital Financial Services, and the Pedersens made an appointment to meet with a Capital Financial Services representative on July 13. Engelbert testified that she personally gave the loan file to the representative.

After moving the loan file, Engelbert informed the Daubmans on July 10, 1992, of the transfer, that the chances for loan approval were good, and that she would know more on July

13. According to Allen Daubman, Engelbert told him on July 10 that she assisted the Pedersens in making a separate second loan application with a different lender on July 9. The Daubmans had not authorized CBS or Engelbert to seek alternative financing on behalf of the Pedersens in the event the first financial institution turned them down. Allen Daubman asked Engelbert why she moved the Pedersens over to a second lender without first calling him, and stated that the purchase agreement was now null and void because the Pedersens had not made the second loan application within the 5-day period. Engelbert told Allen Daubman that he was wrong and that

> as long as any loan application is pending, not just the first one, but any loan application is pending, when the 30-day time period under the purchase agreement hits, that I had no choice but to wait until whatever loan application was pending is either approved or rejected by that particular lender.

Allen Daubman was concerned that if he insisted the purchase agreement was void, he could face possible legal actions by the Pedersens and CBS. Engelbert testified that she now realized that Allen Daubman's interpretation of the purchase agreement was correct and that the rejection from Residential Mortgage Services rendered the purchase agreement null and void.

The Pedersens applied for a loan to Capital Financial Services on July 13, 1992. Also on that day, Allen Daubman requested that Engelbert ask the Pedersens if they would delay the closing and possession until the end of August. The Pedersens rejected this request. Allen Daubman then asked Engelbert to contact the Pedersens and ask them if they would agree to make the $2,000 deposit nonrefundable so that the Daubmans could sign a 6-month apartment lease at the Washington Heights apartment complex. The Pedersens rejected this request as well.

Engelbert and Allen Daubman met with a representative of Capital Financial Services on July 16, 1992, to discuss the Pedersens' loan prospects. On July 17, Allen Daubman faxed a letter to Engelbert informing her that in order to perform according to the purchase agreement and vacate the property at the end of July, the Daubmans needed to sign a 6-month apart-

ment lease. However, because the Pedersens' loan had not yet been approved, the Daubmans were unwilling to sign the apartment lease. Thus, Allen Daubman suggested that the parties enter into an amendment whereby the Pedersens would make the $2,000 deposit nonrefundable and the Pedersens would be given an additional 2 weeks to obtain loan approval. According to Allen Daubman, before even discussing the proposal with the Pedersens, Engelbert told him that the proposed amendment would not be acceptable to the Pedersens. Engelbert denies that she prematurely told Allen Daubman that the Pedersens would deny the amendment. On July 18, the Pedersens rejected the amendment.

The Daubmans had located an apartment in the Washington Heights apartment complex, and the complex operator was willing to lease to them on a 6-month basis. The operator told the Daubmans that they eventually needed to sign the lease, but was not pressing them to do so. The Daubmans were trying to delay the signing as long as possible. When the Pedersens told Engelbert that they would not agree to the Daubmans' amendment, Brenda Pedersen also informed Engelbert that she had called the complex operator to check on the availability of apartments there. After speaking with the Pedersens, Engelbert called the complex operator to find out whether any apartments were available for lease, notwithstanding that the Daubmans had not authorized her to do so. According to Engelbert, "because Mrs. Pedersen had called, [the operator] was starting to put two and two together and asked me if it was about the Daubmans. And I said yes." Engelbert then called the Daubmans on July 18, 1992, and informed them of the Pedersens' rejection of the amendment. Shortly after talking to Engelbert about the proposed amendment, the complex operator called the Daubmans and insisted that they sign the lease no later than the evening of July 27.

Shortly after the "apartment incident," Allen Daubman contacted a senior vice president of CBS, indicated that he no longer wished to work with Engelbert, and requested that another salesperson handle the matter. According to Allen Daubman, he also told the vice president during this conversation that he did not think it was appropriate that CBS receive a

commission. The vice president denied that Daubman indicated at this time that he did not want to pay a commission.

Engelbert learned on July 21, 1992, from the vice president that Allen Daubman did not want her calling him. Engelbert called Capital Financial Services on July 20, 21, 22, and 23 and visited their office on July 24 to find out the status of the Pedersens' loan. She learned that Capital Financial Services had received mortgage approval that day and would be receiving formal loan approval on July 27. Engelbert prepared and faxed a letter to Allen Daubman that afternoon explaining this. On July 27, Engelbert learned that the Pedersens received formal loan approval and called Allen Daubman the same day to communicate this news to him.

On July 27, 1992, the Daubmans entered into a 6-month apartment lease. On July 30, Allen Daubman informed CBS that he did not want the escrow agent to pay CBS a commission and sent a letter to the escrow agent demanding that no moneys be withheld by it and paid to CBS for its services. The escrow agent informed Allen Daubman that it could not close the sale unless either the Daubmans agreed to allow it to deduct the commission or CBS agreed to forfeit its commission. Neither the Daubmans nor CBS would so agree. CBS' vice president told Allen Daubman that the commission had to be paid out of the closing, despite the fact that neither the listing agreement nor the purchase agreement so provided.

An employee of the escrow agent testified that in the event of a commission dispute, either the parties have to resolve the problem or the real estate agent has to give authorization to close without withholding the commission. According to this witness, "I can't go on what a seller is telling me until I get authorization from the [real estate] company to not charge a commission or whatever."

On July 31, 1992, Allen Daubman faxed an agreement to the CBS vice president informing him that the Daubmans would allow the sale to be closed and the commission to be paid out of the proceeds of the sale of the house if CBS agreed that such payment would be without prejudice to any claim the Daubmans might have over whether the commission was payable under the circumstances. The vice president agreed,

and Allen Daubman then instructed the escrow agent to close the sale.

CBS received a commission of $9,793 on August 3, 1992, and the parties stipulated that the Daubmans had suffered no damages, special or general. Finding that Engelbert and, through her, CBS had breached the fiduciary duties they owed the Daubmans, the district court awarded the Daubmans the amount of the commission, together with prejudgment interest from and after July 31, 1992, and costs.

IV. ANALYSIS

1. Petition for Further Review

We begin our analysis by focusing on the issues raised by the Daubmans' petition for further review. In considering whether the evidence supports the district court's finding that Engelbert and CBS breached their fiduciary duties to the Daubmans and whether such breach justifies a forfeiture of their commission, we recall that generally, an agent is required to act solely for the benefit of the principal in all matters connected with the agency and adhere faithfully to the instructions of the principal. *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989); *Walker Land & Cattle Co. v. Daub*, 223 Neb. 343, 389 N.W.2d 560 (1986); *Allied Securities, Inc. v. Clocker*, 185 Neb. 524, 176 N.W.2d 914 (1970). An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal. *Fletcher, supra*; *Grone v. Lincoln Mut. Life Ins. Co.*, 230 Neb. 144, 430 N.W.2d 507 (1988).

More specifically, a real estate agent owes the principal a fiduciary duty to use reasonable care, skill, and diligence in performing her or his obligations and to act honestly and in good faith. *Barta v. Kindschuh*, 246 Neb. 208, 518 N.W.2d 98 (1994). The rule requiring an agent to act with utmost good faith toward the principal places the agent under a legal obligation to make a full, fair, and prompt disclosure to the principal of all facts within the agent's knowledge which are or may be material to the matter in connection with which the agent is employed, which might affect the principal's rights and interests or influence the principal's action in relation to the subject matter of the

employment, or which in any way pertain to the discharge of the agency which the agent has undertaken. *Brezina v. Hill*, 202 Neb. 773, 277 N.W.2d 224 (1979). In a number of instances, we have held that a real estate agent's breach of duty prevented the collection of a commission. E.g., *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990) (agent forged principal's signature); *Firmature v. Brannon*, 223 Neb. 123, 388 N.W.2d 119 (1986) (agent denigrated property); *Brezina, supra* (to protect buyer, agent signed and filed purchase agreement in violation of selling principal's wishes); *Vogt v. Town & Country Realty of Lincoln, Inc.*, 194 Neb. 308, 231 N.W.2d 496 (1975) (agent had undisclosed interest in purchase); *Allied Securities, Inc., supra* (agent had undisclosed interest in purchase); *Schepers v. Lautenschlager*, 173 Neb. 107, 112 N.W.2d 767 (1962) (agent had undisclosed interest in purchase and failed to inform principal of prospective purchaser willing to pay more than sale price); *Pearlman v. Snitzer*, 112 Neb. 135, 198 N.W. 879 (1924) (agent failed to declare he already had buyer at price above which agent was to recover commission); *Campbell v. Baxter*, 41 Neb. 729, 60 N.W. 90 (1894) (agent received commission from both buyer and seller); *Jansen v. Williams*, 36 Neb. 869, 55 N.W. 279 (1893) (agent interfered with principal's right of direct sale).

The district court based its legal conclusion that Engelbert placed her interests and those of the Pedersens above those of the Daubmans upon the following specific findings of fact:

> [E]very effort was made by . . . Engelbert to consummate sale of the premises with the Pedersens only. When the Pedersens' financial condition was shown to be precarious . . . Engelbert took several steps to keep the transaction alive for the Pedersens, and, more to the point, even when events became detrimental to the [Daubmans]. As the series of events became more convoluted and the [Daubmans] made arrangements to enter into a six-month lease of an apartment during construction of their new home . . . Engelbert on her own initiative contacted their lessor to ascertain for herself whether the Daubmans could continue to lease the property if there was a delay in the closing of the sale of [the] Daubmans' home. This "end run" is the

> most glaring example of the extent to which . . . Engelbert put her own interests and the interests of the Pedersens ahead of the [Daubmans']. More damaging was the fact that closing of the sale of the Daubman home was contingent upon payment of Engelbert's and CBS' commission.

Since the listing agreement restricted Engelbert to selling only to the Pedersens, the fact that that was her sole effort could not have constituted a breach of her duty to the Daubmans. Moreover, while Engelbert and CBS refused to voluntarily forfeit their commission, it was the escrow agent that refused to close the transaction unless either the commission was voluntarily forfeited by Engelbert and CBS or the Daubmans allowed it to be paid. Thus, neither does this occurrence support the district court's legal conclusion.

However, Engelbert's effort with regard to the Pedersens' loan applications is another matter. Because it was not until July 13, 1992, that the Pedersens met with Capital Financial Services and because Engelbert took the position that the Daubmans had no choice but to wait and see whether Capital Financial Services approved or rejected the Pedersens' loan application, the Daubmans faced a considerable time problem. The purchase agreement provided that the Pedersens would take possession on July 30. Thus, the Daubmans would need to rent an apartment in order to vacate by that date. Residential Mortgage Services took 24 days on the Pedersens' loan application, and there was no way of telling exactly how long Capital Financial Services would take to either approve or reject the Pedersens' application. Moreover, as part of her effort to complete the sale no matter what the effect on the Daubmans, Engelbert, without the Daubmans' knowledge, contacted the operator of the apartment complex to check on the availability of apartments and confirmed to the operator that her inquiry concerned the Daubmans, with the result that the Daubmans were pressured into executing a lease by July 27. Although Engelbert was authorized to sell only to the Pedersens, she should not have continued to push the sale when the situation began to look detrimental to the interests of the Daubmans.

In addition, it must be remembered that although Engelbert claimed she stated only that the Pedersens were prequalified,

Allen Daubman testified that Engelbert erroneously told them that the Pedersens had been preapproved with a particular lender for a $180,000 loan, enough to buy their home. While the district court made no specific finding with regard to this issue, the rule that in a bench trial, the trial court's entry of judgment in favor of a party warrants the conclusion that the trial court found in that party's favor on all issuable facts requires that we conclude the district court resolved this issue in favor of the Daubmans. See, *Peterson v. Kellner*, 245 Neb. 515, 513 N.W.2d 517 (1994); *Burgess v. Curly Olney's, Inc.*, 198 Neb. 153, 251 N.W.2d 888 (1977). (This rule is not made inapplicable merely because in addition to a general finding, the trial court also mentioned certain matters specifically. *Burgess, supra.*)

The district court's factual findings with regard to Engelbert's treatment of the Pedersens' loan applications, her contact with the apartment complex operator, and her representation as to the preapproval of the Pedersens for a loan support the district court's legal conclusion that Engelbert and, through her, CBS put their interests in completing the sale, and thereby collecting the commission, and the interests of the Pedersens in acquiring the property ahead of the Daubmans' interests in selling the property in a manner and under a time schedule which least inconvenienced them. All of Engelbert's actions taken together support the district court's legal conclusion that she and, through her, CBS materially breached the duties they, as agents, owed their principals, the Daubmans.

2. Claims on Appeal

Having so determined, we turn our attention to the errors on appeal claimed by CBS and Engelbert.

(a) Breach of Duties

The claim that the district court erred in concluding that CBS and Engelbert breached their fiduciary duties has been resolved in considering the Daubmans' petition for further review and requires no further analysis.

(b) Acceptance of Actions

Next, CBS and Engelbert argue that the Daubmans ratified or otherwise acquiesced in their actions. On the other hand, the

Daubmans contend that they timely disavowed CBS' and Engelbert's actions. However, ratification and acquiescence are concepts involved in determining whether an agent's actions may bind the principal or whether the agent is liable to the principal for damages resulting from an alleged breach of duty. CBS and Engelbert point out that "[t]he effect of acquiescence or ratification by the principal is that the agent is released from liability to the principal for its losses." Brief for appellants at 32. See *Barta v. Kindschuh*, 246 Neb. 208, 518 N.W.2d 98 (1994). However, this theory has no application in the instant case, and the district court did not err in failing to find that the Daubmans ratified or acquiesced in the actions of CBS and Engelbert.

(c) Damages

Next, CBS and Engelbert allege that the district court erred in finding that the Daubmans sustained damages, as the parties stipulated otherwise. However, the issue of damages is not relevant when determining whether an agent's breach of duty results in a loss of commission.

A commission for services cannot be collected by the agent if the agent has willfully disregarded, in a material respect, an obligation which the law devolves upon the agent by reason of the agency. *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990); *Walker Land & Cattle Co. v. Daub*, 223 Neb. 343, 389 N.W.2d 560 (1986); *Vogt v. Town & Country Realty of Lincoln, Inc.*, 194 Neb. 308, 231 N.W.2d 496 (1975). A principal whose agent has violated her or his duties may properly refuse to pay compensation. *Walker Land & Cattle Co., supra*; *Allied Securities, Inc. v. Clocker*, 185 Neb. 524, 176 N.W.2d 914 (1970); Restatement (Second) of Agency § 399 (1958).

(d) Prejudgment Interest

Finally, CBS and Engelbert assert that the district court erred in awarding prejudgment interest. Neb. Rev. Stat. § 45-104 (Reissue 1993) provides that "interest shall be allowed . . . on money received to the use of another and retained without the owner's consent . . . and on money . . . due and withheld by unreasonable delay of payment." However, absent compliance with the provisions of Neb. Rev. Stat. § 45-103.02(1) (Cum. Supp. 1996), prejudgment interest is available only when the

claim is liquidated, that is, when there is no reasonable controversy either as to the plaintiff's right to recover or as to the amount of such recovery. *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 529 N.W.2d 16 (1995); § 45-103.02. Although here the amount in dispute is not controverted, a reasonable controversy concerning the right of the Daubmans to recover existed. Thus, the district court erred in awarding prejudgment interest.

V. JUDGMENT

For the foregoing reasons, we reverse the judgment of the Court of Appeals and remand the cause thereto with the direction that it affirm the judgment of the district court, modified in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., not participating.

FIRSTIER BANK, N.A., TRUSTEE OF THE JOHN M. HUNT TESTAMENTARY TRUST, ET AL., APPELLANTS, V. DEPARTMENT OF REVENUE, STATE OF NEBRASKA, APPELLEE.

580 N.W. 2d 537

Filed July 2, 1998. No. S-96-1040.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, and a reviewing court is obligated to reach its conclusion independent of the determination made by the administrative agency or the district court.
2. **Actions: Taxes.** An action cannot be maintained by one taxpayer on behalf of himself or herself and others similarly situated to recover back taxes alleged to have been illegally assessed. In such case, each must bring an action on his or her own behalf.
3. **Administrative Law: Statutes.** In order to be valid, a rule or regulation which an agency creates must be consistent with the statute under which the rule or regulation was promulgated.
4. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Vard R. Johnson, of Broom, Johnson & Clarkson, for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee.

WHITE, C.J., CAPORALE, WRIGHT, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

FirsTier Bank, N.A., trustee of the John M. Hunt testamentary trust; Union Bank and Trust Company, trustee of the J. Michael McQuiston irrevocable trust; and Norwest Capital Management and Trust Company, trustee of the Steven J. Silver testamentary trust (hereinafter referred to as "the petitioners"), appeal from the district court's affirmance of a decision by the Nebraska Department of Revenue (Department) which denied income tax refunds claimed on the amended 1990 Nebraska fiduciary income tax returns filed by the petitioners. Each of the petitioners has brought an action on behalf of one named trust. The cases were consolidated by the Department on December 13, 1994, for purposes of a contested hearing, which was held on March 28, 1995. In all, there have been over 250 amended fiduciary income tax returns filed for tax year 1990, and over $78,000 in income tax refunds has been requested. By stipulation with the Department, each of these 250 parties has agreed to be bound by the final outcome of these three cases.

SCOPE OF REVIEW

Statutory interpretation is a matter of law, and a reviewing court is obligated to reach its conclusion independent of the determination made by the administrative agency or the district court. See, *Brown v. Wilson*, 252 Neb. 782, 567 N.W.2d 124 (1997); *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995).

FACTS

The following facts are taken from the stipulation of facts by the petitioners and the Department: The petitioners filed amended Nebraska fiduciary income tax returns, forms No. 1041N, for tax year 1990, within the prescribed time for claiming refunds. The following statement was attached to each amended return:

> The taxpayer is amending this Nebraska Fiduciary Income Tax Return due to an error in the calculation and payment of income tax on the original return. According to Nebraska Revenue Statute 77-2717, the income tax imposed on, and the computation of the tax for, individuals shall apply to the tax liability of all estate [sic] and trusts. The amount of tax due has been recalculated according to the statute.

In their amended returns, the petitioners calculated their tax liability using the single-taxpayer rate schedule in effect in 1990, rather than the estates and trusts rate schedule which was designated by the Department as the appropriate rate schedule for taxing estates and trusts. As a result, FirsTier Bank, N.A., trustee of the John M. Hunt testamentary trust, claimed a tax refund of $76. Union Bank and Trust Company, trustee of the J. Michael McQuiston irrevocable trust, claimed a tax refund of $383. Norwest Capital Management and Trust Company, trustee of the Steven J. Silver testamentary trust, claimed a tax refund of $474.

The Nebraska income tax system was partially uncoupled from the Internal Revenue Code by 1987 Neb. Laws, L.B. 773. After the passage of L.B. 773, Nebraska income tax was no longer calculated as a percentage of federal income tax before credits. Instead, L.B. 773, § 8(f), which was codified at Neb. Rev. Stat. § 77-2715.02(2)(f) (Supp. 1987), required that rate schedules be established by the Department for each "federal filing status." The parties have stipulated that I.R.C. § 1 (Supp. IV 1986) did not define "filing status" at the time L.B. 773 was enacted. Yet, the Internal Revenue Code required in relevant part that "[t]he taxable income of an estate or trust shall be computed in the same manner as in the case of an individual, except as otherwise provided in this part." I.R.C. § 641(b) (1994).

Following the enactment of L.B. 773, the Department published rate schedules for each of the following categories of taxpayers: individual taxpayers, married taxpayers filing joint returns and surviving spouses, heads of households, married taxpayers filing separately, and estates and trusts. The tax-rate schedule for estates and trusts was also published in the

Department's annual fiduciary income tax booklet from 1987 through 1994.

Section 77-2715.02(2)(a) was amended by 1993 Neb. Laws, L.B. 240, which replaced the federal rate schedule with Nebraska's own version of rate schedules. This 1993 amendment did not provide a separate rate schedule for estates and trusts, but in 1994, the Legislature again amended § 77-2715.02(2)(a) and created a separate rate schedule for estates and trusts.

In April 1994, the petitioners filed their amended fiduciary income tax returns for the 1990 tax year, seeking a partial refund of the taxes paid for 1990. On December 13, 1994, the Department consolidated the petitioners' claims for the purpose of hearing and deciding the common issues in any subsequent appeal that might be taken therefrom. On June 20, 1995, the State Tax Commissioner issued a final order denying the petitioners' claims for refunds. The petitioners appealed the final order to the Lancaster County District Court, which heard the appeals on May 30, 1996, and entered an order denying refunds on September 4. The petitioners each have filed a timely notice of appeal to this court.

ASSIGNMENTS OF ERROR

In summary, the petitioners make the following assignments of error: The district court erred (1) in failing to properly construe Neb. Rev. Stat. § 77-2717(1) (Reissue 1990), which stated that certain estates and trusts would be taxed as individuals; (2) in sanctioning the Department's treatment of estates and trusts as a "federal filing status" pursuant to § 77-2715.02(2)(f) (Reissue 1990); (3) in approving the Department's adoption of the federal tax rate schedule for estates and trusts, because the statutes which allowed the Department to rely upon the Internal Revenue Code must be read in conjunction with the limits placed on the Department for taxing estates and trusts as individuals; (4) in finding that the Nebraska Legislature acquiesced to the Department's creation of a separate rate schedule for estates and trusts; (5) in not recognizing that the 1994 amendment to the Nebraska tax statutes, which stated that estates and trusts could be taxed at a special rate, would have been unnecessary if the Department's prior actions were justified pursuant

to existing law; and (6) in determining that § 77-2717(1) was unconstitutionally vague if construed so that estates and trusts were taxed pursuant to one of the existing rate schedules assigned to individuals.

ANALYSIS

Initially, we point out that this is not a class action. The established rule in this state is that an action " 'cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed. In such case each must bring an action on his own behalf.' " *Boersma v. Karnes*, 227 Neb. 329, 331, 417 N.W.2d 341, 344 (1988). This court has jurisdiction over a taxpayer's refund claim only if the taxpayer followed the proper procedures for obtaining a refund; jurisdiction will not vest on the basis that others are similarly situated. We therefore proceed to the merits of the claims of the three petitioners over which we have jurisdiction.

The petitioners contend that the Department exceeded its statutory power when it created a separate rate schedule for estates and trusts, because § 77-2717 required the Department to use one of the following four rate schedules to tax estates and trusts: individual, married filing jointly and surviving spouse, head of household, or married filing separately. They assert that since estates and trusts had to be taxed as individuals, the rate schedule which most logically applied to them was the rate schedule for individual taxpayers.

In contrast, the Department claims that §§ 77-2715.02 and 77-2717 authorized it to refer to the Internal Revenue Code to create a tax-rate schedule for estates and trusts. Also, the Department argues that it was specifically directed by § 77-2715.02 to establish one rate schedule for each "federal filing status." Since the Internal Revenue Code provided for a separate tax rate for estates and trusts, the Department claims that it was also justified in creating a separate tax rate for estates and trusts. Further, the Department reasons that if the rate schedule applied to estates and trusts did not qualify as a "federal filing status," then the Department would have been required to apply one of the four existing individual tax rates without having obtained any

guidance from the Legislature, and that giving such discretion to the Department would have been an unconstitutional delegation of legislative power.

Section 77-2717 provided in part: "(1) The tax imposed on, and the computation of the tax for, individuals shall apply to the tax liability of all estates and trusts except those trusts taxed as a corporation under the Internal Revenue Code." During the 1990 tax year, § 77-2715.02 provided:

> (1) Whenever the primary rate is changed by the Legislature under section 77-2715.01, the Tax Commissioner shall update the rate schedules required in subsection (2) of this section to reflect the new primary rate and shall publish such updated schedules.
>
> (2) The following rate schedules are hereby established for the Nebraska individual income tax and shall be in the following form:
>
> (a) The income amounts for columns A, B, and E shall be the same as for the federal rate schedules in effect for tax year 1987;
>
> . . . .
>
> (f) One rate schedule shall be established for each federal filing status.

Statutory interpretation is a matter of law, and a reviewing court is obligated to reach its conclusion independent of the determination made by the administrative agency or the district court. See, *Brown v. Wilson*, 252 Neb. 782, 567 N.W.2d 124 (1997); *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995). In order to be valid, a rule or regulation which an agency creates must be consistent with the statute under which the rule or regulation was promulgated. *State ex rel. Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988). Therefore, the Department's creation of a special tax rate for estates and trusts is valid only if such actions were permitted by §§ 77-2715.02 and 77-2717 and other applicable sections of chapter 77.

First, we note that § 77-2717 provided that computation of the tax for individuals was to apply to the tax liability of all estates and trusts except those taxed as a corporation under the Internal Revenue Code. The Department properly interpreted

§ 77-2717 to mean that the estates and trusts in question should be taxed as individuals and not as corporations. Thus, the question before us is which individual tax-rate schedule should have been applied to the estates and trusts.

In 1986, before L.B. 773 was enacted, the federal government changed the taxation of estates and trusts. Prior to 1986, estates and trusts were taxed at the rate which was used to tax married taxpayers filing separately. However, in the 1986 amendment to the Internal Revenue Code, Congress created a separate and higher tax rate especially for estates and trusts. This rate schedule was published in I.R.C. § 1, which provided five rate schedules for taxing individuals.

Pursuant to § 77-2715.02(2)(a), the Department mirrored the Internal Revenue Code and adopted a separate rate schedule for estates and trusts. The basis of the petitioners' claims is that the Department did not have the authority to create this separate rate schedule for estates and trusts and, therefore, should have taxed their trusts at the tax rate used to tax single taxpayers.

In examining this argument, we consider whether the Department had authority to tax the trusts as single taxpayers. Section 77-2715.02(2)(f) provided that one rate schedule was to be established for each "federal filing status." The federal rate schedule in effect for 1987 provided a separate rate schedule for estates and trusts under I.R.C. § 1, and previously, estates and trusts had been taxed under the Internal Revenue Code with the rate schedule for married taxpayers filing separately. Thus, there was no statutory authority for the petitioners' argument for treating estates and trusts as single taxpayers, other than to make the generalization that single taxpayers are more like estates and trusts than any of the other categories.

Next, we consider whether there was statutory authority for the Department's position. From our review of the statutes in question, we conclude that the Department properly adopted a separate rate schedule for estates and trusts. We disagree with the petitioners' assertion that the Department could not adopt the federal rate schedules because § 77-2715.02 referred only to "federal filing status." This term is sufficiently broad to include the federal rate schedules.

When Congress adopted legislation providing that estates and trusts would no longer be taxed pursuant to the rate schedule for married taxpayers filing separately, it created a special tax rate for estates and trusts and continued to list tax information regarding estates and trusts in the portion of the Internal Revenue Code relating to taxation of individuals. Since § 77-2717 mandated that estates and trusts be taxed as individuals and § 77-2715.02 directed the Department to create a rate schedule in conformity with federal law, it was reasonable for the Department to tax estates and trusts pursuant to a special rate schedule.

CONCLUSION

We conclude that a reading of §§ 77-2715.02 and 77-2717 together required the Department to tax estates and trusts in conformity with the tax-rate schedules established by the Internal Revenue Code. A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998).

Therefore, we affirm the judgment of the district court.

AFFIRMED.

CONNOLLY, J., not participating.

DONNA CARPENTER, PERSONAL REPRESENTATIVE OF THE ESTATE OF TODD ALAN CARPENTER, DECEASED, APPELLEE, V. DAVID J. CULLAN, APPELLANT.

581 N.W.2d 72

Filed July 2, 1998. No. S-96-1148.

1. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
2. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.

3. **Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
4. **Appeal and Error.** In an action tried to the court, the findings of the court will not be disturbed on appeal unless clearly wrong.
5. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
6. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
7. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
8. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
9. **New Trial: Proof: Appeal and Error.** Under the law-of-the-case doctrine, all matters which expressly or by necessary implication are adjudicated by an appellate court become the law of the case on remand for a new trial and will not be considered again unless it is shown that the facts presented at the second trial are materially and substantially different from the facts presented at the first trial.
10. **Proof: Appeal and Error.** For purposes of the law-of-the-case doctrine, the burden of showing a material and substantial difference in the facts is on the party asserting the difference.
11. **Trial: Evidence: Appeal and Error.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and, in case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if a specific ground is not apparent from the context.
12. **Trial: Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), a trial judge has broad discretion in determining the admissibility of evidence.
13. **Negligence: Circumstantial Evidence: Proof.** Negligence, like any other fact, may be proved by circumstantial evidence.
14. **Attorney and Client: Negligence: Proximate Cause: Proof.** There are three elements a plaintiff alleging attorney negligence must prove: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.
15. **Judgments: Appeal and Error.** In rendering judgment as the finder of fact, the trial court resolves credibility issues and weighs the evidence in the same manner as a jury, and its factual findings have the same effect as a jury verdict.
16. **Judgments: Verdicts.** In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.

17. **Motions for New Trial: Appeal and Error.** A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

Joseph K. Meusey, Michael F. Coyle, and Travis S. Tyler, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

David A. Domina and Cletus W. Blakeman, of Domina & Copple, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

This is a legal malpractice action. Appellee, Donna Carpenter, initiated this suit in her capacity as personal representative of the estate of Todd Alan Carpenter (Carpenter), her son, against appellant, attorney David J. Cullan. This action was commenced by appellee after appellant failed to file a wrongful death suit on behalf of appellee within the applicable statute of limitations. The jury found in favor of appellee in the amount of $270,000. The parties stipulated that this was to be a bifurcated trial and that the trial court, upon a subsequent hearing, was to determine whether the entire verdict should be collected from appellant. The district court for Douglas County, Nebraska, determined that the entire $270,000 verdict was collectible from appellant. From this order, appellant filed an appeal, and we granted his petition to bypass the Nebraska Court of Appeals. We affirm.

BACKGROUND

On the evening of August 6, 1988, Carpenter, age 16; Nancy Sue Mueller, age 15; and Scott Bridge (Bridge), age 15, attended a campout on the Edgar Bridge farmstead in Antelope County, Nebraska. Edgar Bridge is the father of Scott Bridge. At 12:31 a.m., Carpenter and Mueller informed the group that Mueller had a curfew and that they had to leave the party. At that time, Carpenter, Mueller, Bridge, and Cory Lyons, age 15,

walked to a Volkswagen pickup owned by Edgar Bridge located 30 to 40 yards from the campsite.

As Mueller and Lyons stood near the front of the pickup conversing, Carpenter entered the vehicle from the driver's side and shut the door. Carpenter and Bridge then began to argue about who should drive the vehicle. Bridge argued that he should drive the pickup because it was his, while Carpenter argued that he should drive because he had a driver's license. As the discussion between Carpenter and Bridge continued about who should drive the vehicle, Lyons departed and went back to the campsite. Lyons testified that about 10 minutes after he returned to the campsite, he heard the pickup drive down the road toward the highway. No one saw who was driving the pickup as it left the Bridge farm.

The pickup proceeded away from the campsite toward the county road. At a point about 15 miles from the Bridge farm on Compactor Road, the westbound pickup ran a stop sign and collided with a southbound 1977 Pontiac at the intersection of Compactor Road and Clearwater-Elgin Road. Mueller, Bridge, and Carpenter were all ejected from the pickup during the impact. Volunteer emergency fire and rescue personnel from Clearwater were first on the scene. The crew extinguished the flames of the burning pickup. While walking around the pickup, one of the firemen came upon the body of one of the youths. The crew provided medical assistance to the three unconscious youths before transporting them by ambulance to a hospital in Neligh. This activity occurred before law enforcement personnel arrived at the scene. Therefore, no photographs or measurements were taken of where the youths' bodies were located in relation to the pickup, roadway, or ditch. No evidence was preserved as to where the youths came to rest after the accident. As a result of the accident, Carpenter and Mueller died. Bridge sustained a severe brain injury and has no memory of the accident or who was driving.

Deputy Sheriff Darrell Hamilton of the Antelope County Sheriff's Department investigated the accident. Five days later, the Nebraska State Patrol arrived to assist with the investigation. None of these investigators were able to make a determination of who was driving the pickup prior to the accident.

Approximately 10 days after the accident, six or seven members of the fire and rescue squad prepared a diagram of the accident scene and the postimpact positions of the bodies of Bridge, Mueller, and Carpenter. Steven Hankla and Carla Jacob, two members of the rescue squad, each recalled that Carpenter was located the farthest west of the three youths.

After the death of her son, appellee retained appellant to investigate and file a wrongful death action. Appellant failed to commence an action before the expiration of the statute of limitations. Appellee subsequently brought this malpractice action against both appellant, as an individual defendant, and the law firm of Cullan & Cullan, as a partnership defendant. The action was dismissed by the trial court upon the defendants' motions for summary judgment. On appeal, the Court of Appeals found that there was no evidence which would support a finding of liability against the partnership defendant, and affirmed the motion for summary judgment of dismissal as to Cullan & Cullan. See *Carpenter v. Cullan*, 95 NCA No. 6, case No. A-93-097 (not designated for permanent publication). The Court of Appeals reversed the order granting the motion for summary judgment of appellant, finding that the determination of the identity of the driver of the pickup was a jury question and that the district court abused its discretion in specifically finding that the testimony of appellee's expert witness, George Lynch, should be stricken as a matter of law. The Court of Appeals remanded the cause for further proceedings. In response to appellee's amended petition, appellant had admitted he was negligent in failing to file the wrongful death action within the applicable statute of limitations, but alleged that his failure to file a wrongful death action for Carpenter was not a proximate cause of any damage to appellee. Appellant alleged that there was insufficient evidence regarding the identity of the driver of the pickup at the time of the accident and that appellant's negligence did not prevent appellee from obtaining or collecting any judgment for Carpenter's death.

In the appeal to the Court of Appeals of the dismissal of this case on appellant's motion for summary judgment, the Court of Appeals, with respect to Lynch's affidavit, found that Lynch had been engaged for 6 years by the Omaha City Attorney's office

as an accident consultant; that prior to that he had been an Omaha Police Division officer for 17 years, 13½ years of which had been as an accident investigator; that he had investigated over 500 fatal accidents and over 5,000 personal injury accidents; and that he was qualified to testify on the subject of accident reconstruction. The Court of Appeals further found that Lynch had relied upon the reports, photographs, and charts which were introduced into evidence on the motion for summary judgment to determine that when the vehicles collided, the force of the impact caused the front of the pickup to move suddenly in a lateral direction to the left, commencing a counterclockwise rotation, and that during this rotation, the occupants of the pickup were thrown out the passenger-side door. This was based on the facts that the passenger-door lock was sheared off, the door was deformed from the inside, and the steering wheel was bent to the right. Lynch further opined that the rotation of the pickup forced the occupants' bodies against the passenger door, forcing it open; that damage to the door resulted from the force of their bodies pushing on the door; that the steering wheel was bent as a result of the driver's holding onto the wheel as he was forced toward the right-hand side; and that the occupants came out in the following order: Carpenter first, Mueller second, and Bridge third. Lynch finally opined that the seating arrangement of the youths in the pickup, from what he believed to be the order in which they were ejected through the right-hand door, was that the one on the right (Carpenter) came out first and that the one on the left (Bridge) came out last. Lynch said his opinions were made to a reasonable degree of scientific certainty. The Court of Appeals held that while ordinary laypersons might not have pieced together what happened, "once Lynch's opinion is explained, it is easy to follow his rationale. Lynch's opinion is understandable and reasonable." *Carpenter v. Cullan*, 95 NCA No. 6 at 15. The Court of Appeals concluded that on the state of the record, the determination of the driver of the pickup was a jury question. No further review was sought of the opinion of the Court of Appeals. Appellee contends that the holding by the Court of Appeals as to the admissibility of Lynch's testimony and opinions becomes the law of the case.

At trial on remand, Lynch testified as an expert witness for appellee as to his opinions regarding the identity of the driver of the pickup. Lynch testified that based upon factors of force and rotation, the violent rotation of the pickup created a left-to-right movement of the occupants within the cab. This movement forced the occupants against the right passenger door and, upon failure of the door latch, the passenger next to the door was forced out of the pickup first. Lynch opined that the first person ejected from the pickup would have been in the farthest west at-rest position in comparison with the at-rest positions of the other two occupants from the rotational pivot. Using this analysis, Lynch concluded that at the time of impact, Carpenter was positioned at the right-hand passenger door, Mueller was seated somewhere in the middle of the cab, and Bridge was the driver. Lynch also testified that his findings and opinions had not changed from those given in exhibit 87, a supplemental interrogatory answer written by appellee's attorney which disclosed appellee's endorsement of Lynch as an expert witness and briefly summarized Lynch's conclusions regarding the reconstruction of the accident. Appellee introduced this exhibit into evidence over appellant's objection on the grounds that it was cumulative.

Appellant moved for a directed verdict at the close of appellee's case in chief. The trial court denied this motion.

The trial court held, as a matter of law, that appellant was negligent in failing to timely file the wrongful death case, that the driver of the pickup had been negligent, and that Carpenter had been killed as a result of that negligence. The identity of the driver had to be determined by the jury. The jury returned a verdict in favor of appellee in the amount of $270,000. The jury found that Bridge, not Carpenter, had been driving the pickup at the time of the collision. Appellant moved for a new trial and a judgment notwithstanding the verdict. Both motions were denied.

The parties, by stipulation, agreed that the trial was to be bifurcated, with a separate hearing to be held to determine whether the negligence of appellant was the proximate cause of the entire sum of the damages found by the jury and whether the

judgment could have been collected from the original tort-feasor. At the collectibility hearing, the court found that appellee met her burden by showing that she would have been successful in obtaining and collecting a judgment in this action. The insurance coverages available to pay the verdict included a State Farm Insurance Company policy issued to the Bridge family covering the pickup, with coverage limits of $100,000 per person and $300,000 per occurrence, and an underinsured motorist policy issued to the Carpenter family by Farm Bureau Insurance Company of Nebraska, which provided coverage in the amount of $200,000 over and above the State Farm policy limit. The trial court, in this bifurcated hearing, determined that the insurance coverage would have provided a total of $300,000 for payment of the verdict and judgment and that therefore, the entire $270,000 was collectible from appellant. From this order, appellant appeals.

ASSIGNMENTS OF ERROR

Appellant asserts that the trial court erred (1) in ruling that the $270,000 jury verdict was collectible by appellee; (2) in failing to sustain appellant's motion for a directed verdict, since there was insufficient evidence as to the identity of the driver of the pickup; (3) in receiving Lynch's opinion regarding the driver of the pickup over the objection of counsel; (4) in failing to strike the opinion of Lynch regarding the identity of the driver of the pickup because Lynch was not in possession of such facts to enable him to express an opinion not based on speculation; (5) in receiving exhibit 87 over the objection of counsel, since that exhibit was based upon hearsay and was cumulative; and (6) in failing to sustain appellant's motion for judgment notwithstanding the verdict and motion for new trial.

STANDARD OF REVIEW

The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316 (1995).

When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996); *Reavis v. Slominski, supra*; *German v. Swanson*, 250 Neb. 690, 553 N.W.2d 724 (1996).

In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995).

In an action tried to the court, the findings of the court will not be disturbed on appeal unless clearly wrong. *Steuben v. City of Lincoln*, 249 Neb. 270, 543 N.W.2d 161 (1996); *RaDec Constr. v. School Dist. No. 17*, 248 Neb. 338, 535 N.W.2d 408 (1995); *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 530 N.W.2d 619 (1995).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Brams Ltd. v. Elf Enters.*, 253 Neb. 932, 573 N.W.2d 139 (1998); *Mandolfo v. Chudy*, 253 Neb. 927, 573 N.W.2d 135 (1998); *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb. 694, 573 N.W.2d 747 (1998).

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Abboud v. Papio-Missouri River NRD*, 253 Neb. 514, 571 N.W.2d 302 (1997); *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 571 N.W.2d 64 (1997); *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997).

ANALYSIS

EXPERT TESTIMONY

The evidence in the instant case establishes that the driver of the pickup ran the stop sign and would support a finding that

whoever was driving the pickup was negligent. The issue is whether enough evidence was presented to support a finding of who was driving the pickup.

When appellee appealed the original trial court decision granting appellant's motion for summary judgment, she alleged that the trial court erred in striking the expert opinion of Lynch. In making a determination of the merit of this assignment of error, the Court of Appeals considered the admissibility of Lynch's opinion. The Court of Appeals held that the evidence was sufficient to support Lynch's opinion. The Court of Appeals also held that the determination of the driver of the pickup was a jury question and that the district court abused its discretion in specifically finding that Lynch's expert testimony should be stricken as a matter of law. The Court of Appeals then remanded the cause for further proceedings on the issue of the liability of appellant. It is this new trial that gives rise to this appeal.

On appeal to this court, appellant now contends that the expert testimony of Lynch regarding the identity of the driver of the pickup was based on speculation and was erroneously admitted by the trial court over the objection of counsel. Appellant also contends that the trial court erred in failing to strike Lynch's opinion.

Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *Talle v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 823, 572 N.W.2d 790 (1998); *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996); *Pendleton v. Pendleton*, 247 Neb. 66, 525 N.W.2d 22 (1994); *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994).

The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. *Talle v. Nebraska Dept. of Soc. Servs., supra*; *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993).

Under the law-of-the-case doctrine, all matters which expressly or by necessary implication are adjudicated by an

appellate court become the law of the case on remand for a new trial and will not be considered again unless it is shown that the facts presented at the second trial are materially and substantially different from the facts presented at the first trial. *Talle v. Nebraska Dept. of Soc. Servs., supra.*

For purposes of the law-of-the-case doctrine, the burden of showing a material and substantial difference in the facts is on the party asserting the difference. *Id.* The Court of Appeals expressly ruled on the admissibility of Lynch's testimony in a previous stage of this suit. Appellant has not shown that the facts presented at the second trial were materially and substantially different from the facts presented at the first trial. We find, therefore, that the Court of Appeals' decision precludes our reconsideration of the issue of the admissibility of Lynch's expert opinion under the law-of-the-case doctrine. Accordingly, appellant's assignments of error regarding the testimony of Lynch are without merit.

ADMISSION OF EXHIBIT

Appellant asserts that it was error for the trial court to admit exhibit 87, appellee's supplemental interrogatory answer, over the objection of counsel because the exhibit was cumulative and based on hearsay.

During the cross-examination of Lynch, appellant approached Lynch and showed him exhibit 87, and confirmed that the exhibit summarized the opinions expressed by Lynch at trial and that none of those opinions had changed. Appellant proceeded to question Lynch on the location of the youths' bodies, the physical collision data, the steering wheel deformity, the vehicular rotation, the point of ejection of the youths, the at-rest positions of their bodies, and the passenger-door deformity.

On redirect, appellee attempted to rehabilitate Lynch's testimony through a comparison of the consistency of his pretrial and trial opinions. Appellee offered exhibit 87, and the trial court received it into evidence over appellant's objection that the evidence in the exhibit was cumulative.

We have held that error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and, in case the ruling is one admitting evi-

dence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if a specific ground is not apparent from the context. *Allphin v. Ward*, 253 Neb. 302, 570 N.W.2d 360 (1997).

In the instant case, appellant did not specifically object at trial to the admission of the exhibit on the grounds of hearsay. Rather, appellant objected that the evidence in the exhibit was "cumulative." Therefore, since no specific hearsay objection was made at the time the exhibit was offered, appellant is barred from asserting hearsay as a ground for error by the trial court.

Accordingly, we now consider appellant's contention that the exhibit was erroneously admitted because its evidence was cumulative. Neb. Ct. R. of Discovery 33(b) (rev. 1996) states that answers to interrogatories may be used to the extent permitted by the Nebraska Evidence Rules. Therefore, the admission into evidence of an answer to an interrogatory is governed by the Nebraska Evidence Rules. Pursuant to Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), relevant evidence may be excluded if its probative value is substantially outweighed by needless presentation of cumulative evidence. We have stated that under this rule, a trial judge has broad discretion in determining the admissibility of evidence. See *State v. Dixon*, 240 Neb. 454, 482 N.W.2d 573 (1992). Because the exhibit was used to rehabilitate the testimony of a witness whose veracity was challenged by appellant's use of the exhibit on cross-examination, the information it contained was relevant. We do not find any prejudice to appellant based on this exhibit. Therefore, the trial court did not abuse its discretion in admitting this exhibit over appellant's objection.

Directed Verdict

Appellant contends that the trial court erred in failing to sustain his motion for a directed verdict because there was insufficient evidence to identify the driver of the pickup.

Appellant argues that based on the evidence and testimony introduced, the jury was required to speculate as to whether Mueller or Bridge was the driver of the pickup and that therefore, his motion for directed verdict should have been granted.

The evidence in this case indicated that the driver of the pickup was either Mueller or Bridge. We have held that

" '[n]egligence, like any other fact, may be proved by circumstantial evidence. This is evidence of one fact, or of a set of facts, from which the existence of the fact to be determined may reasonably be inferred. . . .' " *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 462-463, 466 N.W.2d 499, 508 (1991).

The evidence indicates that the pickup in question was owned by the Bridge family and was used by Bridge. Bridge drove the pickup to the campsite and argued with Carpenter about driving home. Mueller did not have a driver's license, was never seen behind the wheel of the pickup, and expressed no interest in driving. Further, Lynch opined that Mueller was not seated behind the steering wheel or by the passenger door at the time of the impact. Based on this evidence and the benefit of every inference that is reasonably deducible therefrom, we find that reasonable minds could draw the conclusion that Bridge was the driver of the pickup. Therefore, the trial court did not err in overruling appellant's motion for directed verdict.

Proximate Cause of Loss

Appellant alleges that the trial court erred in finding the entire $270,000 jury verdict to be collectible. There are three elements a plaintiff alleging attorney negligence must prove: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996); *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991); *McVaney v. Baird, Holm, McEachen, supra*. In the present case, there is no question that appellant was employed by appellee. It is also clear that the evidence would support a finding that appellant failed to file a wrongful death cause of action before the statute of limitations had run, thereby neglecting his reasonable duty. The issue in the present case, then, is whether appellant's negligence was the proximate cause of loss to appellee.

By stipulation of the parties, after the jury returned a verdict in favor of appellee for $270,000, the trial court held a bifurcated hearing to determine what portion of the $270,000 verdict was the proximate result of appellant's negligence. It should be

noted that the method of bifurcation used in this trial is not approved, since the proximate result of appellant's negligence should have been submitted to the trier of fact in the same trial as the other issues. However, in this case, since the parties stipulated to this procedure, we are not inclined to reverse on this issue. In rendering judgment as the finder of fact, the trial court resolves credibility issues and weighs the evidence in the same manner as a jury, and its factual findings have the same effect as a jury verdict. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996).

We first note that the only reason a separate bifurcated hearing on the third prong of the malpractice action was proper was because the parties stipulated to it. The record indicates that the following discussion was had by counsel and the court:

> MR. DOMINA [Counsel for appellee]: . . . There is an area in this lawsuit in which I think there will be a reference to insurance. And that's one of the things we have to prove about the case within the case is that a judgment could have been won and collected. And so it may be that the defendant will be asked — Unless you want to agree that it's not an issue. Maybe we can agree that it's not an issue. Otherwise, I think we've got to ask the defendant if he investigated collectibility. Maybe if we can just take that issue off the table, then it doesn't come up at all.
>
> THE COURT: What do you say to that?
>
> MR. MEUSEY [Counsel for appellant]: I think that [collectibility] probably is a legal issue. It's probably one of the elements of proof in a case that they have to prove the collectibility of the judgment. I don't think that that's relevant to the issue of the measure of damages. I think it's a matter for the court afterwards. You could prove that out of the presence of the jury as to what the man's insurance was and that sort of thing.
>
> MR. DOMINA: I'll stipulate to that approach.

Later, the following discussion was had:

> MR. DOMINA: . . . If we prevail, we then have a separate hearing on the question of collectibility to you alone.
>
> THE COURT: That's what we'll do on that then.
>
> MR. MEUSEY: Agreed.

Appellant concedes that $100,000 of the $270,000 judgment is collectible because coverage would have been available for the $100,000 under the insurance policy covering the pickup issued by State Farm to the Bridges. Appellant contends, however, that the remainder of the judgment, $170,000, was not a loss arising as a proximate result of appellant's negligence. Because appellant conceded that $100,000 of the $270,000 judgment was collectible, the only thing to be decided at that hearing was an interpretation of the Farm Bureau contract, and this is decided as a question of law. Appellant recognizes that the Carpenters had an underinsured motorist policy with Farm Bureau for an additional $200,000. The Farm Bureau policy provides:

> We will pay the damages for **bodily injury** to an **insured** that an **insured** is legally entitled to collect from the owner or operator of an **underinsured motor vehicle**. The **bodily injury** must be caused by accident and arise out of the ownership, operation or use of an **underinsured motor vehicle**.

(Emphasis in original.)

Appellant argues, however, that a claim could still be made on the policy; that even if a claim could not be made, the statute of limitations barring such claim ran after he was discharged by appellee; and that therefore, he is not liable for any amount payable under that policy.

Specifically, appellant first argues that a claim for uninsured/underinsured motorist benefits sounds in contract and that therefore, a cause of action for breach of contract does not accrue, such that the statute of limitations begins to run, until breach occurs. Therefore, since no claim has been submitted and no denial has occurred, there has been no breach.

Appellant next argues that under the first of two minority views of breach of contract from other jurisdictions, the action accrues either when the insured settles with or obtains a judgment against the tort-feasor, or when the insured knows or should have known of the tort-feasor's uninsured or underinsured status. Under this view, appellant argues that in the instant case, a claim for underinsured motorist benefits did not accrue until entry of the judgment in October 1996, when the court

determined that appellee was legally entitled to underinsured motorist benefits. Therefore, appellee has 5 years from that date to bring a cause of action against Farm Bureau.

Appellant also argues that under a second minority view, a cause of action for underinsured motorist benefits accrues at the time of the accident. Under this theory, appellant argues that even if the statute of limitations was activated by the accident, appellee had until August 8, 1993, to seek underinsured motorist benefits, but failed to do so. Because appellant stopped representing appellee in December 1990, his representation did not prevent appellee from recovering benefits.

Each of these arguments is without merit. According to the terms of the policy, in order for Farm Bureau to pay damages for bodily injury, the insured must be legally entitled to collect the damages from the owner or operator of an underinsured motor vehicle. Because appellant failed to bring a wrongful death action within the statute of limitations, appellee never attained the status of one legally entitled to collect. See *Western Fire Ins. Co. v. Miller*, 98 Or. App. 79, 81, 778 P.2d 965, 966 (1989) (holding that insured whose tort action was barred by statute of limitations was not entitled to recover underinsured motorist benefits under policy because insured was not "'legally entitled to recover damages'" against tort-feasor).

We find that the trial court was not clearly wrong in finding the entire $270,000 loss to appellee was proximately caused by appellant's negligence.

Motion for Judgment Notwithstanding Verdict and Motion for New Trial

In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 556 N.W.2d 23 (1996); *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996); *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996).

Having already determined that reasonable minds could draw the conclusion that Bridge was the driver of the vehicle, we find the trial court properly denied appellant's motion for judgment notwithstanding the verdict.

A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Heye Farms, Inc. v. State*, 251 Neb. 639, 558 N.W.2d 306 (1997); *Farmers & Merchants Bank v. Grams, supra*; *Hartley v. Guthmann*, 248 Neb. 131, 532 N.W.2d 331 (1995).

Having determined that no error prejudicial to the rights of the unsuccessful party has occurred, we find that the trial court did not abuse its discretion by overruling appellant's motion for new trial.

CONCLUSION

Because we find appellant's assignments of error to be without merit, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM C. BLACKMAN, APPELLANT.
580 N.W. 2d 546

Filed July 2, 1998. No. S-97-105.

1. **Trial: Judgments: Appeal and Error.** In a bench trial of a criminal case, the trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.
2. **Trial: Convictions: Appeal and Error.** A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.
3. **Drunk Driving: Evidence: Proof.** A violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993) is one offense, but it can be proved in more than one way.
4. **Circumstantial Evidence: Words and Phrases.** Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists.
5. **Convictions: Circumstantial Evidence.** In finding a defendant guilty beyond a reasonable doubt, a finder of fact may rely upon circumstantial evidence and the inferences that may be drawn therefrom.
6. **Circumstantial Evidence: Proof.** A fact proved by circumstantial evidence is nonetheless a proven fact.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and INBODY, Judges, on appeal thereto

from the District Court for Keith County, JOHN P. MURPHY, Judge, on appeal thereto from the County Court for Keith County, KRISTINE R. CECAVA, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

J. Blake Edwards and Robert S. Harvoy, of McGinley, Lane, O'Donnell, Reynolds & Edwards, P.C., for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

The Nebraska Court of Appeals concluded that William C. Blackman's conviction for driving under the influence of alcohol (DUI), in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993), should be reversed, based upon its determination that the evidence adduced at his trial was insufficient to sustain the conviction. *State v. Blackman*, 6 Neb. App. 294, 572 N.W.2d 101 (1997). We granted the State's petition for further review and conclude that the evidence, while mostly circumstantial, was sufficient to sustain the conviction.

FACTUAL AND PROCEDURAL BACKGROUND

In a complaint filed on June 5, 1996, the State alleged that while in Keith County on May 31, 1996, Blackman did "operate or have actual physical control of a motor vehicle while under the influence of alcoholic liquor or of any drug, or when he had a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath." A bench trial was held on October 7, 1996, in the county court for Keith County. Two witnesses testified for the State.

Dion John Neumiller, a deputy sheriff with the Keith County Sheriff's Department, testified that at approximately 10 p.m. on May 31, 1996, he was notified that a motorcycle was observed in a ditch along a county road in rural Keith County. When Neumiller arrived at the scene 15 to 20 minutes later, he observed the motorcycle in the ditch north of the road and a man, later identified as Blackman, "laying [sic] on the east side

of the motorcycle with his feet in the ditch and his back up on the roadway." Neumiller described his initial encounter with Blackman as follows:

> When I arrived the male wasn't moving. I exited my patrol vehicle and asked him if everything was okay. At that point, he did move, and he advised me that he had been westbound when he met two vehicles. After the second vehicle passed him, he lost control of the motorcycle and went into the north ditch and high centered it there.

Neumiller also testified that after he asked Blackman if he was hurt, Blackman "pretty much insisted that he could still ride the motorcycle" and that Blackman stated before the accident occurred, he was going home. Additionally, Neumiller testified that Blackman advised him that "he needed help getting the motorcycle out of the ditch and back up onto the roadway." However, Neumiller did not observe Blackman on the motorcycle at any point prior to or after arriving on the scene, and on cross-examination, Neumiller could not recall whether the keys to the motorcycle were in the ignition or if the motor was warm to the touch after he arrived at the scene.

During their encounter, Neumiller detected "a strong odor of an alcoholic beverage coming from" Blackman. When questioned, Blackman told Neumiller that he had not consumed alcohol since the previous evening. Neumiller observed that Blackman was able to stand without assistance but had difficulty walking, that his speech was slurred, and that his eyes were bloodshot. Blackman was unable to perform field sobriety tests satisfactorily. Based upon these observations and his education, training, and law enforcement experience, Neumiller formed the opinion that Blackman was under the influence of alcohol and arrested him on suspicion of DUI. Neumiller then transported Blackman to the Keith County Corrections Center.

Officer David Kling of the Ogallala Police Department testified that at the time of Blackman's arrest, Kling held a valid Class B permit to operate an Intoxilyzer 5000 machine. Kling administered an Intoxilyzer test to Blackman after Neumiller transported him to the corrections center. Following the 15-minute statutory observation period, which began at 11:11 p.m., Kling conducted the test and obtained the results at 11:28 p.m.

Kling testified that he conducted the test in accordance with the rules and regulations of the state Department of Health. The parties stipulated that the Intoxilyzer was properly maintained and calibrated at the time of the test. The Intoxilyzer test results, received over Blackman's relevancy objection, established that Blackman had .134 grams of alcohol per 210 liters of breath as of 11:28 p.m., approximately 1½ hours after Neumiller received the dispatcher's notice which led to his roadside encounter with Blackman.

The State rested following Kling's testimony, and Blackman moved for a directed verdict, asserting the prosecution's failure "to show any time that [Blackman] was in actual control of a motor vehicle, so as to constitute a reasonable time prior to the testing procedure that he was in control of the vehicle." After the court overruled this motion, Blackman rested without presenting evidence and renewed his motion for directed verdict. Following closing arguments, the trial court issued the following ruling from the bench:

> The Court finds from an examination of the evidence that the State of Nebraska has met its burden of proof and finds the defendant, William C. Blackman, guilty of Driving Under the Influence of Alcoholic Liquor under . . . §60-6,196(1)(c), Class W Misdemeanor.

A journal entry filed on October 10, 1996, states that the court found Blackman guilty of " 'Driving Under the Influence of Alcoholic Liquor.' " The court subsequently imposed sentence, which included 6 months' probation, a $200 fine plus costs, revocation of Blackman's operator's license for 60 days, an order that he not consume or possess alcohol, and an order that he submit to random chemical testing at his own expense.

Blackman appealed to the district court for Keith County, alleging that the judgment of the county court was contrary to the facts and contrary to law. The district court found no error and affirmed Blackman's conviction and sentence. Blackman then perfected a timely appeal to the Court of Appeals, which, in a 2-to-1 opinion, reversed, with directions to dismiss.

In the majority opinion, the Court of Appeals found that "[t]he undisputed evidence produced by the State was that Blackman was lying by his motorcycle and that he was under

the influence of alcohol at the time Officer Neumiller arrived at the scene." *State v. Blackman*, 6 Neb. App. 294, 299, 572 N.W.2d 101, 104 (1997). However, the majority viewed the critical issue as "whether there is sufficient direct or circumstantial evidence from which a fact finder could infer that Blackman's intoxication and his operation or control of his motorcycle on a public road occurred simultaneously, not that Blackman was intoxicated when Officer Neumiller arrived." *Id.* at 298, 572 N.W.2d at 104. The majority concluded that because there was no direct or circumstantial evidence establishing when the accident occurred, the State failed to meet its burden of proving that "the breath test was administered within a reasonable time after Blackman last drove his motorcycle on a public road or highway," *id.* at 299, 572 N.W.2d at 104, and therefore, that the Intoxilyzer result should have been excluded from evidence. In addition, the majority held that Neumiller's testimony was insufficient to sustain the conviction because the State failed "to prove that Blackman's last act of driving occurred within a time period such that the intoxicated condition, in which he was found at the scene, had been continuous since his last act of driving." *Id.* at 300, 572 N.W.2d at 105. The Court of Appeals, therefore, reversed the decision of the district court and remanded the cause with directions to dismiss. The dissenting judge concluded that there was circumstantial evidence sufficient to affirm Blackman's conviction. We granted the State's petition for further review.

ASSIGNMENTS OF ERROR

Restated, Blackman contends in his assignments of error that (1) the Intoxilyzer test was not timely administered and, therefore, should not have been admitted into evidence; and (2) his conviction was contrary to the evidence.

STANDARD OF REVIEW

In a bench trial of a criminal case, the trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997); *State v. Christner*, 251 Neb. 549, 557 N.W.2d 707 (1997); *State v. Emrich*, 251 Neb. 540, 557 N.W.2d 674 (1997).

A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Hansen, supra*; *State v. Christner, supra*; *State v. Emrich, supra*. In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *State v. Hansen, supra*; *State v. Christner, supra*; *State v. Emrich, supra*.

ANALYSIS

Blackman was convicted under § 60-6,196, which provides in pertinent part:

> (1) It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
>
> (a) While under the influence of alcoholic liquor or of any drug;
>
> (b) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or
>
> (c) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.

A violation of § 60-6,196 is one offense, but it can be proved in more than one way, i.e., excessive blood alcohol content shown through a chemical test or by evidence of physical impairment plus other well-known indicia of intoxication. See, *State v. Hingst*, 251 Neb. 535, 557 N.W.2d 681 (1997); *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995).

From Neumiller's testimony regarding Blackman's statements, it is reasonable to infer that Blackman was operating the motorcycle on the county road immediately before he lost control and went into the ditch and that he remained there until Neumiller arrived. We agree with the Court of Appeals that there is undisputed evidence that Blackman was under the influence of alcohol at the time Neumiller first encountered him. It is true that there is no direct evidence establishing the amount of time which elapsed between Blackman's last act of driving and Neumiller's arrival at the scene. However, we do not regard

such evidence as essential to a reasonable inference that Blackman operated his motorcycle on the county road in violation of § 60-6,196, in light of the totality of the circumstantial evidence in the record.

Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists. *State v. Mowry*, 245 Neb. 213, 512 N.W.2d 140 (1994); *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993). In finding a defendant guilty beyond a reasonable doubt, a finder of fact may rely upon circumstantial evidence and the inferences that may be drawn therefrom. *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997). A fact proved by circumstantial evidence is nonetheless a proven fact. *State v. Johnson*, 250 Neb. 933, 554 N.W.2d 126 (1996); *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

In its opinion, the Court of Appeals cites decisions by other state courts holding that a motorist's perceived state of intoxication at the scene of a motor vehicle accident is not probative of intoxication during the operation of the vehicle immediately prior to the accident. *State v. Blackman*, 6 Neb. App. 294, 572 N.W.2d 101 (1997) (citing *Coleman v. State*, 704 S.W.2d 511 (Tex. App. 1986); *Brown v. State*, 584 P.2d 231 (Okla. Crim. App. 1978); *State v. Clark*, 130 Vt. 500, 296 A.2d 475 (1972)). However, our prior decisions establish that circumstantial evidence may be sufficient to sustain a DUI conviction, even when it cannot be determined precisely when the defendant last operated a motor vehicle prior to being discovered in the vehicle in a state of obvious intoxication. In *State v. Eckert*, 186 Neb. 134, 181 N.W.2d 264 (1970), the defendant's vehicle was found parked in the right lane of a highway in a rural area with its engine turned off and the defendant slumped over the steering wheel in a drunken stupor. No other persons were found in the vicinity, and no liquor or liquor containers were found in the vehicle. When aroused by law enforcement officers, the defendant had no recollection of the events immediately preceding his arrest. We held that while circumstantial, this evidence was sufficient "to sustain the finding that defendant operated his motor vehicle on a public highway while under the influence of intoxicating liquor." *Id.* at 139, 181 N.W.2d at 268.

Similarly, we held that circumstantial evidence was sufficient to sustain a DUI conviction in *State v. Miller*, 226 Neb. 576, 412 N.W.2d 849 (1987), despite the fact that no witness observed the defendant operating a motor vehicle on a public highway prior to a collision. The driver of the other vehicle testified that as she reached the crest of a hill on a rural road, she observed a truck stopped sideways on the road, blocking her lane of traffic, and that she was unable to stop before colliding with it. After the impact, the defendant climbed out of the truck and appeared to have a " 'glassy look' " in his eyes. *Id.* at 577, 412 N.W.2d at 850. The defendant told the responding law enforcement officers that he had been a passenger in the truck and that the driver had fled the scene immediately after the accident. No other persons were found in the area, and the defendant had no clear recollection of the events immediately preceding the collision. A blood test subsequently administered to the defendant disclosed a blood alcohol content of .236 percent, and following trial, he was convicted of DUI. On appeal, the defendant contended that the trial court erred in finding that he had been in actual physical control of the vehicle pursuant to the DUI statute then in effect. We affirmed the conviction, determining that while the evidence was largely circumstantial, it was sufficient to establish guilt beyond a reasonable doubt.

Our decision in *State v. Baker*, 224 Neb. 130, 395 N.W.2d 766 (1986), is also pertinent. A deputy sheriff observed a vehicle parked in the turning lane of a city street in the early morning hours. When she approached, the deputy observed the defendant sitting alone in the vehicle, asleep and leaning against the open window. She also detected a strong odor of alcohol inside the vehicle. When awakened, the defendant had difficulty producing his license and registration. His breath smelled of alcohol, his eyes were bloodshot, his speech was slurred, and he performed field sobriety tests unsatisfactorily. He was subsequently tried and convicted of DUI and of refusing to take a breath test for alcoholic content in violation of the implied consent statute. The defendant's trial testimony established the time sequence in which he consumed alcohol and operated his vehicle prior to his arrest, and we considered this evidence in affirming the DUI conviction. However, in rejecting

the defendant's argument that his conviction for refusing to submit to a test was not supported by the evidence because the arresting officer lacked reasonable grounds to believe that he had been operating his vehicle while under the influence at the time she requested that he submit to testing, we stated that while the deputy did not observe the defendant driving, "she observed the defendant under circumstances from which the trier of fact could find beyond a reasonable doubt that the defendant had driven while under the influence of alcoholic liquor," *id.* at 135, 395 N.W.2d at 770, and therefore, that the deputy had reasonable grounds to ask the defendant to submit to the breath test.

The evidence in this case establishes that Neumiller arrived at the scene 15 to 20 minutes after receiving a report that a motorcycle had been observed in the ditch by a passing motorist. Neumiller initially observed Blackman lying in the ditch next to his motorcycle, and Blackman admitted to Neumiller that he had been operating the motorcycle on the county road immediately before he lost control and landed in the ditch. Neumiller observed symptoms of intoxication almost immediately upon encountering Blackman. There is no evidence in the record of other persons, liquor, or liquor containers in the area where Blackman was found by the officer, nor is there any other evidence which would support an inference that Blackman had the means or opportunity of ingesting alcohol from the time he lost control of the motorcycle until the officer found him lying beside it in the ditch. Blackman argues that the State did not offer evidence to exclude this possibility, but we do not regard the State's burden of proving guilt beyond a reasonable doubt as requiring it to disprove every theoretical hypothesis other than guilt. In this case, it can reasonably be inferred that the deputy found Blackman where he had come to rest after losing control of his motorcycle and that Blackman's state of intoxication at that time existed when he last operated the motorcycle on the county road. Under these circumstances, the breath test results were properly admitted, with any question of delay between driving and testing going to the weight of the evidence rather than to its admissibility. See *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990). Thus, viewing the evidence

and all reasonable inferences therefrom in the light most favorable to the State, we determine that the evidence was sufficient to establish that Blackman was operating a motor vehicle while in violation of § 60-6,196, and that the district court did not err in affirming Blackman's conviction. We therefore reverse the decision of the Court of Appeals and remand the cause with directions to affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

ROGER JACKSON, APPELLEE, AND J.W. BREWER TIRE CO., APPELLANT, V. BRANICK INDUSTRIES, INC., A NORTH DAKOTA CORPORATION, APPELLEE.

581 N.W.2d 53

Filed July 2, 1998. No. S-97-113.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Statutes: Time.** Statutes covering substantive matters in effect at the time of the occurrence govern, not later enacted statutes.
3. **Actions: Time.** Whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place.
4. **Statutes: Time.** Where there has been an amendment to a statute which was a procedural change and not a substantive change, upon the effective date of the amendment, it is binding upon a tribunal.
5. **Words and Phrases.** A substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. A procedural right, on the other hand, is considered to simply be the method by which an already existing right is exercised.
6. **Workers' Compensation: Subrogation.** Under Neb. Rev. Stat. § 48-118 (Reissue 1993), reimbursement for the full amount of compensation paid to or on behalf of an employee is the measure of the employer's statutory subrogation interest.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded with directions.

John F. Simmons, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellant.

Patrick M. Connealy, of Crites, Shaffer, Connealy, Watson & Harford, for appellee Jackson.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

INTRODUCTION

Roger Jackson suffered an on-the-job injury while employed by J.W. Brewer Tire Co. (Brewer Tire). Travelers Insurance Company (Travelers), the workers' compensation insurer for Brewer Tire, paid benefits to Jackson in the amount of $133,152.91. Jackson brought a product liability action in the district court for Scotts Bluff County against Branick Industries, Inc. (Branick), which manufactured the piece of equipment Jackson was using at the time of his injury, and Brewer Tire was joined as a plaintiff in the action to protect its subrogation interest. Branick eventually agreed to settle the product liability action for $175,000, and all parties stipulated that Jackson's attorney fees and litigation expenses would be paid out of the settlement. Jackson moved the district court for an equitable division of the remaining settlement proceeds, and Brewer Tire and Travelers objected, claiming that they were entitled to the entire remaining settlement by virtue of their subrogation interest. At the time of Jackson's injury, Neb. Rev. Stat. § 48-118 (Reissue 1993) gave the employer and its insurer a subrogation interest against third-party tort-feasors in the amount of any compensation paid to or on behalf of the employee. However, at the time of the settlement, § 48-118 had been amended to allow the court to make an equitable distribution of the settlement between the employee and the employer or its insurer. The district court found that the change in the statute was procedural in nature and entered an order equitably dividing the settlement proceeds. Because we determine that the statutory amendment was substantive, rather than procedural, we reverse, and remand with directions to the district court.

FACTS

On February 19, 1993, Jackson was injured while working for Brewer Tire in Scottsbluff, Nebraska. Jackson was operating

a tire dolly allegedly manufactured and sold by Branick at the time of the accident. Jackson was using the tire dolly to unload a tire from a tire balancer when the tire slipped off the dolly, and the cylinder of the dolly shot up and struck Jackson in the throat and lower jaw area. The force of the impact threw Jackson backward into a stack of truck tires, where he struck his head. Jackson suffered a closed head injury, a neck injury that required a cervical fusion, and injuries to his throat and vocal cords. As a result of the accident and the injuries he sustained, Jackson also suffered from chronic depression. At the time of the accident, Travelers was the workers' compensation insurance carrier for Brewer Tire.

Effective July 16, 1994, 1994 Neb. Laws, L.B. 594, made significant changes in § 48-118, which is the statute governing subrogation of workers' compensation benefits paid by the employer or the employer's insurer when a third party is liable for the injury to the employee. Prior to July 16, 1994, § 48-118, in pertinent part, stated:

> A settlement of any lawsuit commenced under this section shall be void unless (1) such settlement and the distribution of the proceeds of the settlement thereof are agreed upon in writing by the employee or his or her personal representative and the insurer of the employer if there be one, and if there be no insurer, then by the employer, or (2) in the absence of such agreement, such settlement is approved by the court before which the action is pending.

L.B. 594 changed the pertinent portion of § 48-118 to read:

> A settlement of any lawsuit commenced under this section shall be void unless (1) such settlement is agreed upon in writing by the employee or his or her personal representative and the insurer of the employer if there is one, and if there is no insurer, then by the employer, or (2) in the absence of such agreement, the court before which the action is pending determines that the settlement offer is fair and reasonable considering liability, damages, and the ability of the third person and his or her liability insurance carrier to satisfy any judgment.
>
> If the employee or his or her personal representative and the insurer of the employer if there is one, and if there

> is no insurer, then the employer, do not agree in writing upon distribution of the proceeds of any judgment or settlement, the court upon application shall order a fair and equitable distribution of the proceeds of any judgment or settlement.

Neb. Rev. Stat. § 48-118 (Cum. Supp. 1996). As of July 16, 1994, Travelers had paid workers' compensation benefits in the amount of $78,375.52 to Jackson.

On June 9, 1995, Jackson filed a product liability lawsuit against Branick in the district court for negligence and strict liability in tort based on the design and manufacture of the dolly and Branick's failure to adequately warn foreseeable users of dangers inherent in the design and use of the dolly. In an amended petition filed July 17, 1995, Brewer Tire was joined as an additional plaintiff to protect its subrogation interest. On July 22, 1996, more than a year after Jackson filed suit, Travelers filed a notice of subrogation interest in the case pursuant to "Section 48-118 R.R.S. 1943." At that time, Travelers had paid workers' compensation benefits to and on behalf of Jackson in the amount of $130,444.78. Just over a month later, on August 28, Branick filed an offer of settlement and motion for approval with the district court. The offer stated:

> Defendant Branick Industries, Inc. moves the Court for an Order pursuant to Neb. Rev. Stat. § 48-118 (1994 Cum. Supp.), and hereby offers to settle the claim of Plaintiffs Roger Jackson and J.W. Brewer Tire Co. and any lien under the Nebraska Workers' Compensation Act for the total sum of $175,000.00.

Two stipulations were filed on August 30, 1996, in response to the offer of settlement. The first was a stipulation by Jackson, Brewer Tire, and Travelers agreeing that the product liability case against Branick would be settled for $175,000 and that Jackson's attorney would be paid attorney fees and expenses in the amount of $74,480.90. The second stipulation was entered into by Jackson, Brewer Tire, Travelers, and Branick and stated that the parties agreed to the settlement and that $175,000 would be paid by Branick to the clerk of the district court.

On the same day, August 30, 1996, the district court entered an order granting the offer of settlement and motion for

approval. The district court determined that the settlement was fair and reasonable considering the liability and damage issues of the case. Additionally, the district court ordered that the $175,000 paid to the clerk of the district court would be held for distribution to the plaintiffs and their attorney by order of the court after an appropriate hearing. On September 10, Jackson filed a motion for a hearing to "equitably divide the remaining settlement proceeds between the Plaintiffs" pursuant to "*R.S.Supp.*, 1994, § 48-118."

In response to Jackson's motion for a hearing on the distribution of the settlement proceeds, Brewer Tire and Travelers filed an "Answer of Interveners" on October 7, 1996. It should be noted that although Brewer Tire had been joined in the action as a plaintiff by Jackson, Travelers had not filed a petition in intervention, nor had the district court allowed any intervention in the case. The "Answer of Interveners" asserted that the changes made by L.B. 594 which amended § 48-118 were not applicable to the settlement because the effective date of the statute was subsequent to the date of Jackson's injury and after the date that Travelers began paying compensation benefits. Brewer Tire and Travelers also alleged that the changes made by L.B. 594 caused § 48-118 to be unconstitutional. Notice to the Attorney General of the claim of unconstitutionality had been filed on September 24, 1996, in the district court. The Attorney General declined to participate in the litigation in defense of § 48-118 as amended.

The district court held a hearing on October 21, 1996, on the motion for distribution of funds and the "answer" thereto. The district court issued a memorandum order on December 16. First, the district court determined that the changes made by L.B. 594 were procedural in nature and therefore should be applied to this case because the lawsuit and the settlement came into being after the effective date of the legislation. Next, the district court concluded that the legislative direction in § 48-118, as amended by L.B. 594, to the judiciary to " 'order a fair and equitable distribution of the proceeds of any judgment or settlement' " is not an unconstitutional delegation of legislative powers to the judiciary. Finally, the district court apportioned the settlement proceeds, awarding 85 percent to Jackson and 15

percent to Brewer Tire and Travelers. In making the apportionment, the district court also determined that Travelers should not receive any credits or future credits in the workers' compensation case for the amount Jackson received in the settlement. The district court overruled Travelers' motion for a new trial on January 9, 1997; thereafter, Brewer Tire and Travelers timely appealed.

ASSIGNMENTS OF ERROR

Brewer Tire and Travelers contend that the district court erred (1) in finding that the version of § 48-118 as amended by L.B. 594 is applicable to this case; (2) in finding that § 48-118 as amended by L.B. 594 is constitutional; (3) in finding that it had jurisdiction to determine whether Brewer Tire and Travelers received credit against their future workers' compensation obligation for that portion of the settlement paid to Jackson; (4) in determining that Brewer Tire and Travelers should not receive credit against any future workers' compensation obligation for that portion of the settlement paid to Jackson; and (5) in apportioning the settlement by giving 85 percent to Jackson and 15 percent to Brewer Tire and Travelers.

STANDARD OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Veskerna v. City of West Point, ante* p. 540, 578 N.W.2d 25 (1998).

ANALYSIS

With respect to the first assignment of error, we must initially determine whether the changes made by L.B. 594 to § 48-118 are procedural or substantive in nature. It is a well-established principle that statutes covering substantive matters in effect at the time of the occurrence govern, not later enacted statutes. See, *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994); *Norwest Bank Neb. v. Bowers*, 246 Neb. 83, 516 N.W.2d 623 (1994). However, whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. *Pflasterer v. Omaha Nat. Bank*, 201 Neb. 427, 268 N.W.2d 104 (1978).

Where there has been an amendment to a statute which was a procedural change and not a substantive change, upon the effective date of the amendment, it is binding upon a tribunal. *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988).

> "It is generally considered in the law that a *substantive right* is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. . . . A *procedural right*, on the other hand, is considered to simply be the method by which *an already existing right is exercised*."

(Emphasis in original.) *Id.* at 25, 421 N.W.2d at 17 (quoting *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984)). See, also, *County of Hamilton v. Thomsen*, 158 Neb. 254, 260, 63 N.W.2d 168, 172 (1954) ("[n]o rule of constitutional interpretation is violated by a legislative provision declaring retroactively a procedural method of recovery upon an existing substantive right. Such a provision may be retroactive in its application").

Both prior to and after the amendments made by L.B. 594, § 48-118 grants employers a subrogation interest in actions against third parties:

> When a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his or her dependents should have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation . . . .

Both the preamendment and postamendment versions of § 48-118 provide that when the employee, rather than the employer, brings a third-party action, "an employer having paid

or paying compensation to such employee or his or her dependents shall be made a party to the suit for the purpose of reimbursement, under the above provided right of subrogation, of any compensation paid." Likewise, both versions of the statute provide that the employee and the employer or its insurer "[e]ach shall have an equal voice in the claim and the prosecution of such suit and any dispute arising shall be passed upon by the court before which the case is pending . . . ."

Brewer Tire and Travelers assert that the changes made by L.B. 594 are substantive in nature because prior to the 1994 amendment, Brewer Tire and Travelers would have been entitled to dollar-for-dollar recovery of workers' compensation benefits paid to Jackson from any third-party settlement received by Jackson. However, if the 1994 amendment is applicable in this case, Brewer Tire and Travelers would not necessarily be entitled to a full recovery of the benefits they have paid or the entire amount of the settlement if the benefits paid exceed the settlement amount; rather, they would be entitled to receive what a court deems to be a fair and equitable division of the settlement, which in the instant case is a fraction of the total subrogation interest. The district court properly acknowledged that prior to the 1994 amendment of § 48-118, Brewer Tire and Travelers would have been entitled to dollar-for-dollar recovery of their subrogation interest; however, the court found that the amendment was not substantive in nature.

We determine that the district court correctly concluded that prior to the 1994 amendment to § 48-118, Brewer Tire and Travelers would have been entitled to dollar-for-dollar recovery of their subrogation interest. Section 48-118 states that when the employer or its insurer brings the third party action, "[a]ny recovery by the employer [or insurer] against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents . . . ." The language of the statute specifically envisions that the employer or the insurer who has paid compensation has a first claim on moneys received from a liable third party. There is no language in the statute that would alter the result if it is the employee that brings the action rather than the employer or insurer.

Thus, in *Bronder v. Otis Elevator Co.*, 121 Neb. 581, 586, 237 N.W. 671, 673 (1931), we stated:

> Under the workmen's compensation law, reimbursement for the full amount of compensation properly paid by employer to employee's dependent, with the employer's expenses for making recovery of damages to that extent from a third person whose negligence caused the death of the employee, is the measure of the employer's statutory right to subrogation. . . . Innocent employers who are required to compensate employees for injuries are intentionally granted a measure of relief equivalent to the compensation paid and the expenses incurred, where a third person negligently causes the loss and responds in damages to that extent.

Dollar-for-dollar recovery for the employer or insurer is also consistent with a great majority of workers' compensation statutes nationwide. "Under most subrogation statutes the payor of compensation gets reimbursement for the amount of his expenditure as a first claim upon the proceeds of the third party recovery, and the employee gets the excess." 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 74.31(a) at 14-481 and 14-484 (1998). Accordingly, the district court's finding regarding the nature and scope of Brewer Tire and Travelers' subrogation interest under the pre-L.B. 594 version of § 48-118 was correct.

However, Brewer Tire and Travelers contend that the district court wrongly concluded that the change in their right to recover is a mere procedural change, rather than a substantive change in the law. Brewer Tire and Travelers, citing, inter alia, *Cosse v. Allen-Bradley Co.*, 625 So. 2d 486 (La. 1993), claim that the change made by L.B. 594 is substantive in nature. In *Cosse v. Allen-Bradley Co.*, the lower court found that a change in the method and rate of reimbursement of workers' compensation benefits was substantive in nature and therefore could be applied prospectively only. At the time of the accident in *Cosse v. Allen-Bradley Co.*, the Louisiana workers' compensation subrogation statute entitled the workers' compensation carrier to full reimbursement for all benefits paid. However, by the time proceeds from the subrogation action were to be distributed

between the employee and the employer/insurer, the statute had been amended to provide for a deduction in the employer/insurer's recovery by the percentage of negligence attributable to the injured employee. The Louisiana Supreme Court, addressing a split in the lower courts, held that the application of comparative negligence to workers' compensation subrogation to reduce the recovery of the employer/insurer was a substantive change in the law.

We are presented with a similar situation in the instant case. Prior to L.B. 594, § 48-118 simply stated that when the employee brings a third-party action, the employer is to be made a party to the suit for the purposes of reimbursement "of any compensation paid." Our prior decision in *Bronder v. Otis Elevator Co., supra*, also made it clear that reimbursement for the full amount of compensation paid to or on behalf of an employee is the measure of the employer's statutory subrogation interest. Application of the pre-L.B. 594 version of § 48-118 to this case would result in Brewer Tire and Travelers' recovering the full amount of the settlement because the settlement proceeds were less than Brewer Tire and Travelers' total subrogation interest. On the other hand, application of the post-L.B. 594 version of § 48-118 entitles Brewer Tire and Travelers to whatever the trial court deems is a fair and equitable division of the settlement proceeds, and in this case, that turned out to be a small percentage of their total statutory subrogation interest. The changes made by L.B. 594 essentially call for the application of the law of equity to the statutory right of subrogation, much as the change in the Louisiana law called for the application of the law of comparative negligence to the statutory right of subrogation.

Jackson points to our decisions in *Rehn v. Bingaman*, 151 Neb. 196, 36 N.W.2d 856 (1949), and *Burks v. Packer*, 143 Neb. 373, 9 N.W.2d 471 (1943), for the proposition that the law of equity has always been applied to the statutory right of subrogation contained in § 48-118. A closer reading of those cases, however, reveals that *Rehn v. Bingaman, supra*, and *Burks v. Packer, supra*, do not go that far.

In *Burks v. Packer*, we were addressing a workers' compensation insurer's right of subrogation against a doctor who

allegedly committed malpractice. The doctor settled the malpractice action brought by the employee's representative, making payment directly to the plaintiff, even though he knew the insurer had a subrogation interest in the first $2,000 of any settlement or judgment. While we recognized that the insurer had a statutory right of subrogation under § 48-118, we applied the principles of equitable subrogation to the case to find that the doctor was still directly liable to the insurer for the amount of $2,000 and costs. *Burks v. Packer* was not a case where the insurer's statutory right of subrogation was modified or diminished by equitable subrogation. Rather, the case was decided solely on the principles of equitable subrogation. Moreover, the insurer was awarded the full amount of its subrogation interest in the case.

In *Rehn v. Bingaman, supra*, this court interpreted the holding of *Burks v. Packer, supra*, and stated that

> the employee's right of action against third persons for negligence proximately causing his injuries was a common-law right already existent outside of and notwithstanding the Workmen's Compensation Act. In other words, section 48-118, R. S. 1943, not only preserved the employee's common-law right to recover from third persons as it was before the act, but also, in the final analysis, simply gave the right of legal subrogation to his employer without depriving the employer of his right to equitable subrogation under circumstances requiring its application.

Rehn v. Bingaman, 151 Neb. at 201, 36 N.W.2d at 859. This language clarified that equitable subrogation is an *alternative* to statutory subrogation. We have not held that when statutory subrogation is employed, the law of equity may also be employed to modify the statutory right. Statutory and equitable subrogation coexist, but we have never employed a hybrid of statutory and equitable subrogation without direction from the Legislature to do so. In the instant case, the parties and the district court clearly relied on the right to subrogation granted by § 48-118, not equitable subrogation.

L.B. 594 did not merely change the way in which the employer's right to subrogation would be exercised, it actually changed the nature of the subrogation interest itself. The 1994

amendment to § 48-118 injected an element of equity into statutory subrogation where one was not present before and is, therefore, a substantive change in the law. Because L.B. 594 worked a substantive change, rather than a procedural change, we determine that it should be applied prospectively only.

Brewer Tire and Travelers' substantive right to full recovery of their subrogation interest became vested at the time the accident occurred, prior to the effective date of L.B. 594.

> When the accident happened the employer became liable to the employee for compensation to be paid according to the provisions of the statute. The employer also was subrogated to the right to recover from the negligent third party the full amount of damages suffered by the injured workman.

Murphy Construction Co. v. Serck, 104 Neb. 398, 400-01, 177 N.W. 747, 748 (1920). Because the workers' compensation statutes affix liability on the employer for injuries occurring in the course and scope of employment, the employer is subrogated at the time of the injury to any claims against third-party tort-feasors who may have caused the injury. Brewer Tire and Travelers' subrogation interest in the case became vested as soon as the injury occurred, because that is when the employer became liable to the employee for compensation to be paid according to the provisions of the workers' compensation statutes. Because we conclude that the changes made to § 48-118 by L.B. 594 are substantive and, thus, apply prospectively, it is unnecessary for us to address Brewer Tire and Travelers' remaining assignments of error.

CONCLUSION

For the foregoing reasons, the judgment of the district court is reversed, and the cause is remanded with directions to the district court to effect a distribution of the settlement proceeds consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. EDWIN KULA, ALSO KNOWN AS ED KULA, APPELLANT.

579 N.W.2d 541

Filed July 2, 1998. No. S-97-1059.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. **Final Orders: Speedy Trial: Appeal and Error.** Denial of a motion for absolute discharge based upon a violation of the accused's speedy trial rights is a final, appealable order.
3. **Convictions: New Trial: Time: Appeal and Error.** Under Neb. Rev. Stat. § 29-1207(1) and (3) (Reissue 1995), when a conviction is reversed on appeal and remanded for a new trial, the new trial must commence within 6 months from the mandate or remand, absent any excludable periods.
4. **Constitutional Law: Statutes: Speedy Trial.** An accused's right to a speedy trial as guaranteed by the Sixth Amendment to the U.S. Constitution and the statutory implementation of that right under Neb. Rev. Stat. § 29-1207 (Reissue 1995) exist independently of each other.
5. **Constitutional Law: Speedy Trial: Presumptions.** Determining whether an accused's constitutional right to a speedy trial has been violated requires consideration of four factors: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his speedy trial rights, and (4) whether the defendant suffered possible prejudice. The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.
6. **Constitutional Law: Trial: Convictions: New Trial: Time: Speedy Trial: Appeal and Error.** When a criminal conviction is reversed because of trial error and remanded for new trial, the period between the defendant's arrest and first conviction should not be counted against the State in examining the delay incident to the second trial for purposes of speedy trial analysis under the Sixth Amendment to the U.S. Constitution, unless the trial error that necessitated the second trial occurred for the purpose of delay.
7. **Double Jeopardy: Pleadings: Final Orders: Appeal and Error.** A ruling denying a plea in bar on double jeopardy grounds is a final, appealable order because it is a special proceeding that affects a substantial right.
8. **Constitutional Law: Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
9. **Constitutional Law: Double Jeopardy: Trial: Evidence: Convictions: New Trial.** The Double Jeopardy Clause bars retrial when a conviction is reversed because the evidence was insufficient to sustain a verdict of guilty, but not when reversal is due to trial error.
10. **Constitutional Law: Double Jeopardy.** The double jeopardy clause of the Nebraska Constitution provides no greater protection than that of the U.S. Constitution.

11. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
12. **Bail Bond: Habeas Corpus.** The appropriate form of relief from denial of a motion to reduce bail claimed to be excessive is by habeas corpus.

Appeal from the District Court for Merrick County: WILLIAM H. NORTON, District Judge, Retired. Affirmed and remanded for further proceedings.

Mark M. Sipple, of Sipple, Hansen, Emerson & Schumacher, and Adam J. Sipple for appellant.

Charles W. Campbell and Vincent Valentino, Special Prosecutors, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

Following a jury trial in the district court for Platte County, Edwin Kula was convicted of first degree murder and use of a weapon to commit a felony in connection with the death of Jerry Carlson. On direct appeal, we reversed, and remanded for a new trial. *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997). Following remand, Kula moved for dismissal of the charges based upon his contention that retrial would violate his right to a speedy trial. In addition, he filed a motion for leave to withdraw his not guilty plea and a plea in bar asserting that retrial would subject him to double jeopardy. Kula also moved for an order reducing the amount of his bond. He now appeals from orders of the district court denying each of these motions. We conclude that we lack jurisdiction to review the order of the district court with respect to Kula's bond. In all other respects, we affirm the judgment of the district court.

BACKGROUND

The facts and procedural history pertaining to Kula's first trial are summarized in detail in *Kula, supra*, and will not be

repeated here except to the extent necessary to address the issues raised in this appeal.

On June 6, 1995, Kula was indicted on one count of first degree murder and one count of use of a firearm in the commission of a felony related to the shooting death of Carlson. Kula was convicted and, on direct appeal, we reversed, and remanded for a new trial based upon our determination that, because of repeated prejudicial discovery violations by the prosecution, the district court erred in not granting Kula's motion for a continuance during trial and his subsequent motion for a new trial. Our mandate in *Kula, supra*, was issued on May 21, 1997. On July 9, Kula filed (1) a motion to withdraw his plea of not guilty for purposes of entering a plea in bar; (2) a plea in bar, alleging that retrial would violate his constitutional guarantee against double jeopardy; and (3) a motion to dismiss, alleging that retrial would violate his statutory and constitutional rights to a speedy trial. On August 21, an evidentiary hearing was held. At the hearing, Lois Kula, Kula's sister-in-law, testified that prior to his incarceration, Kula was employed, lived with his wife and children, and owned certain personal possessions, but that while Kula was incarcerated, his wife filed for divorce, his son was removed from the home as a result of juvenile court proceedings, he lost his job and belongings, and he was worried and anxious about his children.

During a hearing on September 18, 1997, the district court advised the parties that it was overruling Kula's motion to dismiss and his motion to withdraw his not guilty plea. In separate written orders, the district court found that Kula's constitutional and statutory rights to a speedy trial had not been denied and that Kula "failed to present a fair and just reason to support his request to withdraw his plea of not guilty previously entered . . . and that a retrial . . . as ordered by the Nebraska Supreme Court will not subject him to double jeopardy." During the September 18 hearing, the district court also denied a motion filed by Kula on September 10 seeking a reduction of his bond. Kula perfected this timely appeal from all three orders, and we granted his petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Restated, Kula contends in his assignments of error that the district court erred in (1) overruling his motion to dismiss on the grounds that his constitutional and statutory rights to a speedy trial had been violated, (2) denying his motion to withdraw his not guilty plea and thereby denying him the right to challenge his retrial on double jeopardy grounds, and (3) denying his motion for reduction of bond.

STANDARD OF REVIEW

On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998); *State v. Stubblefield*, 249 Neb. 436, 543 N.W.2d 743 (1996); *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996).

ANALYSIS

SPEEDY TRIAL

Kula contends that the charges against him should be dismissed because he has been denied his constitutional and statutory rights to a speedy trial. The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ." In addition to the federal constitutional protections in this area, Nebraska has created a statutory speedy trial right, which generally provides that a person who has been indicted for a criminal offense must be brought to trial within 6 months of his indictment. Neb. Rev. Stat. § 29-1201 et seq. (Reissue 1995). Kula contends that because of prosecutorial misconduct, the time from the date of his arrest in June 1995 to the date of his motion to dismiss on July 9, 1997, should be considered in determining whether his speedy trial rights have been violated.

Initially, we address the State's contention that we lack jurisdiction to consider this issue because the denial of Kula's motion to dismiss was not a final, appealable order. In *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997), we held that the denial of a motion for absolute discharge based upon a violation of the accused's speedy trial rights was a final, appealable order. See, also, *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331

(1997). We are not persuaded by the State's argument that *Gibbs* was incorrectly decided and thus conclude that we have jurisdiction to determine whether the district court erred in denying Kula's motion to dismiss based upon an alleged denial of his right to a speedy trial.

Kula's statutory right to a speedy trial is defined by § 29-1207, which provides in part:

> (1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
>
> . . . .
>
> (3) If such defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, or the mandate on remand.

In *Gibbs, supra*, we held that under § 29-1207(3), the State was required to try a defendant within 6 months from the date of an order in a postconviction proceeding that vacated his conviction because of a defective information, absent any excludable periods.

Kula's retrial was scheduled to commence on October 21, 1997, which was well within 6 months following the issuance of the mandate in *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997). Thus, the 6-month period prescribed by § 29-1207(3) had not expired when Kula filed his motion to dismiss on July 9. The district court correctly held that Kula was not deprived of his statutory speedy trial right.

We have recognized that an accused's right to a speedy trial as guaranteed by the Sixth Amendment to the U.S. Constitution and the statutory implementation of that right under § 29-1207 exist independently of each other. *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989). In *Trammell* and *Andersen*, we applied the balancing test adopted by the U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), to determine whether an accused's constitutional right to a speedy trial had been violated. That test involves consideration of four factors: (1) the length of the delay, (2) the reason for the

delay, (3) whether the defendant asserted his speedy trial rights, and (4) whether the defendant suffered possible prejudice. *Id.* With respect to the first of these factors, the Supreme Court stated: "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." 407 U.S. at 530.

Therefore, we must first determine the length of delay to be considered in the analysis of Kula's constitutional speedy trial claim. In *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), we rejected a contention that the defendant's third trial after the reversal of two prior convictions violated his Sixth Amendment right to a speedy trial. The defendant was arrested on March 27, 1979, and his third trial commenced on March 5, 1984. *Id.*; *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981). We computed the length of delay under the first prong of the *Barker* test by applying Neb. Rev. Stat. § 29-1207(3), finding that the third trial began approximately 17 weeks after the return of the mandate following the reversal of the second conviction. We held that this period was constitutionally reasonable and that the defendant's right to a speedy trial was not violated.

Similarly, other courts have specifically declined to consider the entire period of time beginning with the original charge or arrest in computing the length of delay. For example, in *Icgoren v. State*, 103 Md. App. 407, 653 A.2d 972 (1995), the Maryland Court of Special Appeals rejected a contention that the cumulative period between a defendant's arrest, conviction, reversal, retrial, hung jury, mistrial, and second retrial could be combined for purposes of analyzing the defendant's claim that his Sixth Amendment rights had been violated. The court concluded that as a general rule and in the absence of "extraordinary circumstances," the constitutional speedy trial analysis should focus only upon the period between receipt of an appellate mandate reversing a conviction and the subsequent retrial. *Id.* at 420, 653 A.2d at 978. See, also, *Arnold v. McCarthy*, 566 F.2d 1377, 1382 (9th Cir. 1978) (rejecting defendant's contention that court should "lump together the delay incurred by him during his two trials and test the whole period under the stricter speedy trial standards").

Kula argues that the method of computation employed in *Palmer* is inapplicable to this case because Palmer's first and second convictions were not reversed on grounds of prosecutorial misconduct. He contends that the length of delay in the present case should be computed from the date of his initial incarceration on about June 5, 1995, until the filing of his motion to dismiss on July 9, 1997, because prosecutorial misconduct formed the basis for our reversal of his conviction in *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997). In support of his argument, Kula relies on *State v. Del Gaudio*, 445 So. 2d 605 (Fla. App. 1984), and *Miketa v. Cardonne*, 549 So. 2d 1158 (Fla. App. 1989), which involved speedy trial determinations under Florida's rules of criminal procedure. In *Del Gaudio*, the court refused to impose dismissal of criminal charges as a sanction for the State's failure to comply with discovery orders where the requested information was ultimately furnished to the defendants and they were not prejudiced in the preparation of their defense. However, the court noted that where a prosecutor fails to respond to discovery requests in a timely fashion and thus forces the defendant to request a continuance, the additional time may be charged to the State for speedy trial purposes. Without mentioning *Del Gaudio*, the same court in *Miketa* held that a continuance necessitated by the State's failure to make timely discovery should not have been charged to the defendants for speedy trial purposes because they did not request it and the State "was clearly responsible for all trial delays in the case." *Miketa*, 549 So. 2d at 1159. As a result, the defendants were entitled to discharge because they had not been tried within the period specified under Florida's rules of criminal procedure. We note that in *State v. Brown*, 527 So. 2d 209 (Fla. App. 1988), the same court characterized the statement in *Del Gaudio* as dicta and indicated "grave doubt as to the very existence of a continuance 'charged' to the opposite party under the present speedy trial rule . . . ." *Id.* at 210.

Neither *Del Gaudio* nor *Miketa* examined the right to a speedy trial in a procedural context similar to that of the present case, where the issue is raised with respect to retrial after a conviction has been reversed on appeal because of prosecutorial misconduct. This was the procedural posture in *Pelletier v.*

Warden, 32 Conn. App. 38, 627 A.2d 1363 (1993), where the defendant's first conviction was reversed because of an improper summation by the prosecutor and he was convicted again following a second trial. In a petition for writ of habeas corpus, Pelletier alleged that his attorney during the second trial was ineffective because he did not take steps to protect Pelletier's constitutional right to a speedy trial. In addressing this claim, the court noted that because the second trial occurred more than 7 years after Pelletier's arrest, it was necessary to determine "whether the time between his arrest and the reversal of his first conviction should also be factored into our speedy trial analysis regarding his second trial." *Id.* at 53, 627 A.2d at 1371. The court concluded:

> Because the constitutional right to a speedy trial is intended to prevent delay that is "purposeful or oppressive" [citation omitted] the reason for the additional delay due to the necessity of a retrial is critical to our resolution of this inquiry. Because we have already concluded that there is nothing in the record to suggest that the petitioner's first trial did not proceed with anything but orderly expedition, it necessarily follows, in our view, that the period between the petitioner's arrest and his first conviction should not be counted against the state in examining the delay incident to the petitioner's second trial, unless the trial error that necessitated the second trial occurred for the purpose of delay.

(Emphasis omitted.) *Id.* Finding "nothing in the record to suggest that the prosecutorial misconduct that deprived the petitioner of a fair trial in that first prosecution was in any way motivated by a desire to cause additional delay or otherwise impair the petitioner's speedy trial rights," *id.* at 54, 627 A.2d at 1371-72, the court therefore limited its speedy trial analysis to the 18-month period between reversal of the first conviction and retrial and determined that there had been no violation of Pelletier's constitutional right to a speedy trial which his counsel should have asserted. See, also, *State v. McCormack*, 28 Wash. App. 65, 622 P.2d 1276 (1980) (holding that following mistrial, defendant's speedy trial rights were not violated by

retrial absent deliberate prosecutorial misconduct designed to circumvent right to speedy trial).

We find the reasoning in *Pelletier* persuasive as to the Sixth Amendment issue presented in this case. Kula's first trial began 5 months and 3 weeks after his indictment and arrest. While prosecutorial misconduct deprived Kula of a fair trial for the reasons stated in *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997), we cannot conclude from the record that such misconduct was intended to delay the proceedings or deprive Kula of his constitutional right to a speedy trial. In considering Kula's Sixth Amendment claim, we therefore consider only the period from the entry of our mandate in *Kula, supra*, until the filing of Kula's motion to dismiss, a period of 49 days. Kula did not allege nor does the record reflect any improper delay tactics by prosecutors during this period. While it is true that Kula has undergone personal hardship as a result of his incarceration, the same could be said for any incarcerated defendant whose conviction is reversed because of trial error that necessitates retrial. We hold that a 49-day delay is insufficient to trigger the necessity to consider the other factors listed in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Thus, we conclude that the district court did not err in finding that Kula's Sixth Amendment right to a speedy trial was not violated.

DOUBLE JEOPARDY

Kula's plea in bar is based upon his contention that because of "prosecutorial misconduct, bad faith conduct and overreaching" by prosecutors during his first trial, retrial would subject him to double jeopardy in violation of his state and federal constitutional rights. We initially address the State's contention that we lack jurisdiction to address this issue.

It is clear that a ruling denying a plea in bar on double jeopardy grounds is a final, appealable order because it is a special proceeding that affects a substantial right. *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996); *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990). However, it is also well-settled law that a defendant who has entered a plea of not guilty must obtain leave of the court to withdraw that plea before asserting a plea in bar on double jeopardy grounds. *Schrum v.*

State, 108 Neb. 186, 187 N.W. 801 (1922); *George v. State*, 59 Neb. 163, 80 N.W. 486 (1899). In this case, the district court denied Kula's motion for leave to withdraw his not guilty plea based upon its determination that he "failed to present a fair and just reason to support his request to withdraw his plea of not guilty previously entered to such charges, and that a retrial . . . will not subject him to double jeopardy." The State contends that because a motion to withdraw a prior plea is not included within the provisions of Neb. Rev. Stat. § 29-1817 (Reissue 1995), which authorizes a plea in bar, its denial is not an order in a special proceeding affecting a substantial right over which we have appellate jurisdiction.

It is significant that in denying Kula's motion for leave to withdraw his prior plea, the district court ruled on the merits of his contemporaneously filed plea in bar by making a specific finding that retrial would not constitute double jeopardy. In *George v. State, supra*, we held that while a trial court is free to disregard a plea in bar presented while a plea of not guilty remains on the record, the trial court's act of ruling on the merits of the plea in bar was appealable, notwithstanding the fact that the prior plea had not been withdrawn. Because the district court addressed the merits of Kula's plea in bar in denying him leave to withdraw his plea, we conclude that the order was appealable.

The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997); *State v. Wolf*, 250 Neb. 352, 549 N.W.2d 183 (1996); *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). In *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), the U.S. Supreme Court held that double jeopardy bars retrial when a conviction is reversed because the evidence was insufficient to sustain a verdict of guilty, but not when reversal is due to trial error. The Court explained:

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such,

> it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.,* incorrect receipt or rejection of evidence, incorrect instructions, *or prosecutorial misconduct.* When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

(Emphasis supplied.) 437 U.S. at 15. Relying on *Burks*, we have held that reversal based upon trial error does not bar a retrial of a criminal defendant. *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995).

In *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997), we rejected the contention that the district court erred in overruling Kula's motions to dismiss based on insufficiency of the evidence and found that under the applicable standard of review, the evidence was sufficient to sustain the conviction, despite the fact that it was entirely circumstantial. However, we concluded that because of the State's repeated prejudicial discovery violations, the district court erred in failing to grant Kula's motion for continuance prior to opening statements and his motion for new trial following verdict. Because of this trial error, we reversed Kula's conviction and remanded the cause for a new trial.

Kula's plea in bar is based upon a contention that the prosecutorial misconduct, which formed the basis of our reversal and remand in *Kula, supra*, was so egregious as to deprive him of his right to a fair determination of his guilt or innocence in his first trial and, therefore, that a new trial would violate his double jeopardy rights. He relies in part on *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982), in which the Supreme Court held that where a defendant's motion for mistrial based upon prosecutorial misconduct is granted, double jeopardy bars retrial when "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." 456 U.S. at 679. In formulating this rule, the Court specifically stated that notwithstanding its language in *United States v. Jorn*, 400 U.S. 470, 91

S. Ct. 547, 27 L. Ed. 2d 543 (1971), and *United States v. Dinitz*, 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976), suggesting a broader rule, "[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." 456 U.S. at 675-76. We adopted this rule in *State v. Munn*, 212 Neb. 265, 322 N.W.2d 429 (1982). See, also, *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995); *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

Some courts have held that *Kennedy* applies only to cases where a mistrial is in fact declared and that it imposes no double jeopardy restriction upon retrial following appellate reversal of a conviction because of prosecutorial misconduct. *U.S. v. McAleer*, 138 F.3d 852 (10th Cir. 1998); *United States v. Singleterry*, 683 F.2d 122 (5th Cir. 1982). Other courts have recognized that while there are valid arguments supporting the extension of the *Kennedy* rule to reversal of convictions on grounds of prosecutorial misconduct, retrial is not barred where the element of specific intent to "goad" the defendant into moving for a mistrial is absent. *Greyson v. Kellam*, 937 F.2d 1409, 1415 (9th Cir. 1991). See, *United States v. Singer*, 785 F.2d 228 (8th Cir. 1986); *United States v. Curtis*, 683 F.2d 769 (3d Cir. 1982). Consistent with the latter cases, we need not decide whether *Kennedy* should be extended to appellate reversals due to prosecutorial misconduct because the *Kennedy* test would not be met in the present case even if it were applicable. Kula did not move for a mistrial during his first trial, and he has not specifically alleged nor does the record establish that the prosecutorial misconduct which formed the basis for reversal of his conviction was motivated by a specific intent to goad him into moving for a mistrial. Thus, Kula's retrial is not barred under the Supreme Court's interpretation of the Double Jeopardy Clause of the U.S. Constitution.

Kula urges that we adopt the reasoning of the Pennsylvania courts, which have broadened the *Kennedy* rule on state constitutional grounds. In *Com. v. Smith*, 532 Pa. 177, 615 A.2d 321 (1992), the Pennsylvania Supreme Court considered the ques-

tion of whether double jeopardy barred retrial of a defendant whose conviction was reversed on appeal because of the prosecution's deliberate failure to disclose exculpatory evidence. Some of the misconduct was not discovered until after the defendant's direct appeal. Recognizing that "some courts would not view the prosecutorial misconduct in this case as rising to the level of subversion of constitutional rights," 615 A.2d at 325, under *Kennedy*, the court held that regardless of the federal standard, the double jeopardy clause of the Pennsylvania Constitution "prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." *Id.* However, we have consistently held that the double jeopardy clause of the Nebraska Constitution provides no greater protection than that of the U.S. Constitution. *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998); *State v. Stubblefield*, 249 Neb. 436, 543 N.W.2d 743 (1996); *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996). Therefore, the rationale of the Pennsylvania case is inapplicable. We conclude that the district court correctly held that retrial pursuant to our mandate in *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997), would not subject Kula to double jeopardy.

BOND

Kula's final assignment of error asserts that the district court abused its discretion by denying his motion for a reduction of his bond. The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997). Kula offers no authority establishing that a denial of a request to reduce bond prior to retrial falls into any of these

categories. Furthermore, we have held that the appropriate form of relief from denial of a motion to reduce bail claimed to be excessive is by habeas corpus. *State v. Harig*, 192 Neb. 49, 218 N.W.2d 884 (1974). See, also, *Kennedy v. Corrigan*, 169 Neb. 586, 100 N.W.2d 550 (1960); *In re Scott*, 38 Neb. 502, 56 N.W. 1009 (1893). Therefore, we conclude that we lack jurisdiction to consider this assignment of error.

CONCLUSION

For the reasons stated, the district court did not err in determining that retrial pursuant to our mandate in *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997), would not violate Kula's statutory or constitutional rights to a speedy trial or subject him to double jeopardy. We therefore affirm the judgment of the district court and remand the cause for further proceedings consistent with this opinion and our mandate in *Kula, supra.*

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

GLENN SINDELAR, TRUSTEE OF SILVER CREEK FARMS, ET AL., APPELLANTS, V. HANEL OIL, INC., A NEBRASKA CORPORATION, APPELLEE.

581 N.W.2d 405

Filed July 10, 1998. No. S-95-1296.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Records.** Once a praecipe for bill of exceptions has been filed, preparation of the bill of exceptions becomes an internal court matter, and it is the duty of the court reporter to prepare the original bill of exceptions.
3. **Summary Judgment: Records: Appeal and Error.** The only issue which will be considered on appeal of a summary judgment in the absence of a bill of exceptions is the sufficiency of the pleadings to support the judgment.
4. ____: ____: ____. Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the trial court before such evidence can be considered during appellate review of the motion.
5. **Summary Judgment: Pleadings: Appeal and Error.** In its consideration of the sufficiency of the pleadings to support a summary judgment, an appellate court considers only the facts alleged and not the conclusions of the pleader.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges, on appeal thereto from the District Court for Colfax County, JOHN C. WHITEHEAD, Judge. Judgment of Court of Appeals affirmed.

Charles L. Caskey for appellants.

L.J. Karel, of Karel & Seckman, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Hanel Oil, Inc. (Hanel), moved for summary judgment on the basis that the action filed by Glenn Sindelar, as trustee of Silver Creek Farms; Glenn Sindelar; Melvin Sindelar; and Lois Sindelar (the appellants) was time barred. Following a hearing, the district court granted Hanel's motion for summary judgment. However, no record was made of the hearing on this motion. On appeal, relying on Neb. Ct. R. of Prac. 5A(1) (rev. 1996), the Nebraska Court of Appeals found that the failure to make a verbatim record prevented the Court of Appeals from reviewing the district court's ruling on Hanel's motion and that the court's inability to review the appeal was due to an error by a court official and was, therefore, not chargeable to the parties. See *Sindelar v. Hanel Oil, Inc.*, 6 Neb. App. 349, 573 N.W.2d 782 (1998). The Court of Appeals reversed the order granting summary judgment and remanded the cause with directions that a new hearing on Hanel's motion for summary judgment be conducted and recorded verbatim by a court reporter. We granted Hanel's petition for further review.

SCOPE OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997).

FACTS

On July 28, 1994, the appellants filed a petition, alleging that Hanel sold them contaminated diesel fuel which caused filter

plugging and pump and injection problems in their diesel engines, resulting in total damages of $9,235.20 and loss of use in the amount of $3,200. The appellants also asked for an adjustment or refund for the cost of the fuel in the amount of $1,000.

Hanel filed a demurrer, which was overruled. Hanel then filed an answer which claimed that all or part of the appellants' cause of action was barred by the statute of limitations. A bifurcated trial was held July 13, 1995, on the statute of limitations issue, and the district court entered a partial summary judgment. Hanel timely filed a motion for new trial, which the district court granted.

Subsequently, the district court granted summary judgment in favor of Hanel on the basis that the statute of limitations barred the appellants' claim. The appellants have appealed and timely filed a praecipe for bill of exceptions. An affidavit filed by the district court reporter on January 8, 1996, states that no record was made of the hearing on Hanel's motion for summary judgment. In response to the praecipe for bill of exceptions, the Clerk of the Supreme Court and Court of Appeals received and filed two items: "Exhibit No. 7," a 29-page bill of exceptions of the hearing conducted on July 13, 1995, and "Exhibit No. 8," the bill of exceptions of a May 3, 1991, Colfax County Court proceeding.

On May 29, 1996, the Court of Appeals issued an order to show cause, requesting the parties to procure a bill of exceptions of the hearing on the motion for summary judgment or otherwise show cause why the case should not be treated as one where no bill of exceptions has been filed. No response was filed to the order to show cause.

The case was then argued to the Court of Appeals. In its opinion, the Court of Appeals stated that "[u]nder the rules issued by the Nebraska Supreme Court in accordance with its authority to supervise the courts, the official court reporter is charged with the duty of making a verbatim record of an evidentiary proceeding, and the making of this record may not be waived." *Sindelar*, 6 Neb. App. at 353-54, 573 N.W.2d at 785. The Court of Appeals concluded that the official charged with this responsibility failed to perform the duty imposed by the Supreme Court rules and that the failure to make a verbatim record pre-

vented it from reviewing the district court's ruling on Hanel's motion for summary judgment.

The Court of Appeals held that the appellants were entitled to review of a properly sought appeal and that the court's inability to review this appeal was due to an error by a court official and was, therefore, not chargeable to the parties. Accordingly, it reversed the district court's order granting summary judgment and remanded the cause with directions that a new hearing on Hanel's motion for summary judgment be conducted and that the hearing be recorded by a court reporter.

ASSIGNMENTS OF ERROR

In summary, Hanel claims that the Court of Appeals failed to recognize existing case law providing that in the absence of a bill of exceptions in a summary judgment proceeding, it is presumed that the evidence sustained the trial court's holding that there was no issue of fact presented at the proceeding and that it was correctly decided, and that the only issue to be heard on appeal is the sufficiency of the pleadings to support the judgment. Hanel also claims that the Court of Appeals' decision failed to take into consideration rule 5B(3)c.

ANALYSIS

The unique factual circumstances of this case present us with the question of who has the burden to preserve the record for purposes of appeal. The failure of the district court to make a verbatim record prevented the Court of Appeals from reviewing the district court's ruling on the motion for summary judgment. This case emphasizes the problem that occurs when a trial court fails to make a verbatim record at trial or at evidentiary proceedings. See, *Allphin v. Ward*, 253 Neb. 302, 570 N.W.2d 360 (1997); *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995). As will be pointed out, the parties are not left without a remedy in the event that the trial court fails to make a proper record.

Rule 5A(1) provides: "The official court reporter shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon; oral motions; and stipulations by the parties. This record may not be waived."

In addition, Neb. Ct. R. of Official Ct. Rptrs. 3 (rev. 1996) provides in part: "The official reporter shall be charged with making a verbatim record of all proceedings in such court in accordance with Rule 5, Neb. Ct. R. of Prac."

Once a praecipe for bill of exceptions has been filed, preparation of the bill of exceptions becomes an internal court matter, and it is the duty of the court reporter to prepare the original bill of exceptions. *State v. Slezak*, 230 Neb. 197, 430 N.W.2d 533 (1988). See, also, *State v. Blue*, 223 Neb. 379, 391 N.W.2d 102 (1986). Rule 5B(3)c provides:

> If the reporter is unable to prepare and certify a bill of exceptions, or if a bill of exceptions cannot be prepared and certified under provisions contained elsewhere in these rules, the bill of exceptions shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the clerk of the district court.

The Court of Appeals, on its own motion, issued an order to show cause asking the parties to procure a bill of exceptions or otherwise show cause why the case should not be treated as one where no bill of exceptions had been filed. There was no response to this order, and the parties proceeded to oral argument before the Court of Appeals. Upon the issuing of the order to show cause, it became the responsibility of the appellants to request that the district court prepare such a bill of exceptions. It is incumbent upon the party appealing to present a record which supports the errors assigned. *Allphin v. Ward, supra*; *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997). Rule 5B(3)c provided an avenue for the appellants to require the judge to prepare and certify a bill of exceptions, and thus, the appellants had an opportunity to have a bill of exceptions prepared pursuant to the Court of Appeals' order to show cause and declined to do so.

Given the contents of rule 5B(3)c and the fact that the Court of Appeals issued an order to show cause which was ignored, we consider this case as one where no bill of exceptions had been filed. The absence of a bill of exceptions, being the only vehicle for bringing evidence to an appellate court, results in the presumption that the evidence sustains the trial court's findings

that there was no genuine issue as to any material fact and that the case was correctly decided. The only issue which will be considered on appeal of a summary judgment in the absence of a bill of exceptions is the sufficiency of the pleadings to support the judgment. *Stromsburg Bank v. Nuttelman*, 218 Neb. 687, 358 N.W.2d 746 (1984).

Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the trial court before such evidence can be considered during appellate review of the motion. See *Vilas v. Steavenson*, 242 Neb. 801, 496 N.W.2d 543 (1993). The record in this case contains two exhibits. However, without a bill of exceptions to verify whether these exhibits were received into evidence at the hearing on the motion for summary judgment, we cannot consider them. Thus, we review only the pleadings to determine whether they support the judgment.

Although the appellant bears the burden of creating the record on appeal, the appellee also runs the risk that in the absence of a bill of exceptions, the pleadings may not be sufficient to support the judgment. Here, the appellants alleged that Hanel sold them contaminated diesel fuel and that they were damaged as a result. Hanel denied the allegations and alleged that all or part of the purported cause of action was barred by the statute of limitations. Neither the petition nor the answer contained any dates as to when the alleged activities occurred, and as a result, we cannot tell from the pleadings whether the cause of action was actually barred by the statute of limitations. The allegation in Hanel's answer that the statute of limitations had run constitutes a conclusion of law. In our consideration of the sufficiency of the pleadings to support the judgment, we consider only the facts alleged and not the conclusions of the pleader. Therefore, we find that the pleadings are not sufficient to support the summary judgment.

CONCLUSION

Although the Court of Appeals should have treated this case as one where no bill of exceptions was filed, it reached the correct result. Thus, the decision of the Court of Appeals is affirmed.

AFFIRMED.

CAPORALE, J., concurring.

I write separately because the Nebraska Court of Appeals not only correctly reversed the judgment of the trial court, it properly remanded the cause for a new evidential hearing.

I respectfully suggest that our rule placing the burden upon an appellant to present a record which supports the errors assigned presupposes that the trial court fulfilled its duties to the appellant by, at a minimum, making available the record required by our rules. Here, the trial court failed in its duties not once, but twice.

Not only did the trial court not see to it that its reporter made the nonwaivable record required by Neb. Ct. R. of Prac. 5A(1) (rev. 1996), but after the reporter revealed on June 5, 1996, her dereliction in that regard, the trial court itself failed to supervise the preparation of and certify the bill of exceptions as required by rule 5B(3)c. It must be remembered, after all, that although under the provisions of rule 5B(1)a a copy of the request for the preparation of a bill of exceptions is to be delivered to the court reporter, the request is filed with the clerk of the trial court. An appellant ought not be required to request a bill of exceptions from a trial court more than once.

I understand that, here, the Court of Appeals entered a show cause order, which the appellants ignored. But by the time of its January 13, 1998, opinion, the trial court judge presiding over the summary judgment proceeding was no longer available to fulfill the requirements of rule 5B(3)c. (Nebraska Supreme Court order of November 5, 1997, regarding suspension of John C. Whitehead, a district court judge.)

The only valid response the appellants could have made to the order to show cause was that they had filed a request for a bill of exceptions as required by rule 5B(1)a. I respectfully submit that under that circumstance, the Court of Appeals was free to conclude that the orderly administration of justice would be best served by, in effect, rescinding its order and remanding the cause for a new evidential hearing.

STATE OF NEBRASKA EX REL. RANDOLPH WOOD, DIRECTOR, DEPARTMENT OF ENVIRONMENTAL QUALITY, APPELLANT, V. FISHER FOODS, LTD., A NEBRASKA CORPORATION, APPELLEE.

581 N.W.2d 409

Filed July 10, 1998. No. S-96-222.

1. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion, irrespective of the determination made by the court below.
3. **Statutes: Words and Phrases.** Generally, the word "may," when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
4. **Statutes.** Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
5. ____. It is the duty of a court, as far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it so that they are consistent, harmonious, and sensible.
6. **Statutes: Legislature: Intent: Appeal and Error.** In determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection of statutes which pertain to a certain subject matter to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
7. **Administrative Law: Statutes: Public Officers and Employees: Complaints.** Under Neb. Rev. Stat. § 81-1507(1) (Reissue 1994), the director of the Department of Environmental Quality is not required to issue a complaint for each and every possible violation of Nebraska's Environmental Protection Act; however, if the director decides to pursue enforcement of a violation, then the director is required to issue a complaint meeting the necessary requirements of the statute.
8. **Statutes: Legislature: Intent.** When interpreting a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
9. **Administrative Law: Public Officers and Employees: Complaints: Penalties and Forfeitures.** When the director of the Department of Environmental Quality pursues enforcement of alleged violations of Nebraska's Environmental Protection Act by seeking the imposition of a civil penalty pursuant to Neb. Rev. Stat. § 81-1508.02 (Reissue 1994), the director must first issue a complaint by which a final decision of the director can be reached and from which an appeal can be taken to the district court pursuant to Neb. Rev. Stat. § 81-1509 (Reissue 1994).
10. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded for further proceedings.

Don Stenberg, Attorney General, and William L. Howland for appellant.

James E. Gordon, of DeMars, Gordon, Olson, Recknor & Shively, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, and STEPHAN, JJ.

GERRARD, J.

The State of Nebraska filed a petition in district court, seeking the recovery of a civil penalty from Fisher Foods, Ltd., for violations of Nebraska's Environmental Protection Act (EPA). Fisher Foods demurred to the petition on the basis that the district court lacked subject matter jurisdiction. Agreeing with Fisher Foods, the district court found that subject matter jurisdiction had not been conferred upon it because the State failed to issue a complaint to Fisher Foods by which a final decision of the director of the Department of Environmental Quality (DEQ) could be reached and from which an appeal could be taken to the district court. After sustaining the demurrer, the district court dismissed the action because the 1-year statute of limitations had expired since the time of the filing of the petition. The State appeals. We determine that the district court did not have subject matter jurisdiction; however, since the State should have been afforded a reasonable opportunity to amend its petition to cure the jurisdictional defect, we reverse, and remand the cause to the district court for further proceedings.

BACKGROUND

On September 22, 1995, the State filed a petition in district court, alleging that on September 24, 1994, Fisher Foods discharged liquid waste containing sludge from its cooking apparatus into the State's waters, specifically, Antelope Creek. Under a National Pollutant Discharge Elimination System permit issued by the DEQ, Fisher Foods was authorized to discharge liquid waste from its facility into Antelope Creek. However, Fisher Foods' permit dictated that "[s]ludge shall be

disposed of or utilized in a manner approved by the [DEQ]." The State alleged that because Fisher Foods' permit did not authorize the discharge of sludge collected in cooking devices and because Fisher Foods failed to report its noncompliance in discharging such sludge, Fisher Foods violated the EPA. Based on these violations, the State sought the recovery of a civil penalty.

Fisher Foods demurred to the petition, contending that the district court lacked subject matter jurisdiction. The district court found that it did lack subject matter jurisdiction for the reason that the State failed to issue a complaint to Fisher Foods regarding the alleged EPA violations by which a final decision of the director of the DEQ could be reached and from which an appeal could be taken to the district court. After sustaining the demurrer, the district court dismissed the action because the 1-year statute of limitations had expired since the time of the filing of the petition. The State appeals.

STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Syracuse Rur. Fire Dist. v. Pletan, ante* p. 393, 577 N.W.2d 527 (1998).

Statutory interpretation presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Cox Cable of Omaha v. Nebraska Dept. of Revenue, ante* p. 598, 578 N.W.2d 423 (1998); *PLPSO v. Papillion/LaVista School Dist.*, 252 Neb. 308, 562 N.W.2d 335 (1997).

ASSIGNMENTS OF ERROR

The State contends that the district court erred in (1) finding that it lacked subject matter jurisdiction because the State failed to issue a complaint to Fisher Foods regarding the alleged violations by which a final decision of the director of the DEQ could be reached and from which an appeal could be taken to the district court and (2) dismissing the action without affording

the State a reasonable opportunity to amend its petition to cure the jurisdictional defect.

ANALYSIS

The statutes at issue in the instant case are Neb. Rev. Stat. §§ 81-1507, 81-1508.02, and 81-1509 (Reissue 1994). Section 81-1507(1) provides in relevant part that

> [w]henever the director [of the DEQ] has reason to believe that a violation of any provision of the Environmental Protection Act . . . has occurred, he or she may cause a written complaint to be served upon the alleged violator . . . . The complaint shall specify the provision of the act . . . alleged to be violated and the facts alleged to constitute a violation thereof and shall order that necessary corrective action be taken within a reasonable time to be prescribed in such order. Any such order shall become final unless each person named therein requests in writing a hearing before the director no later than thirty days after the date such order is served. In lieu of such order, the director may require that the alleged violator appear before the director at a time and place specified in the notice and answer the charges complained of.

Further, § 81-1508.02 provides in relevant part that

> (1) [i]t shall be unlawful for any person:
>
> . . . .
>
> (b) [t]o violate any . . . water . . . quality standards . . . or limitations, any permit or license condition or limitation . . . or any monitoring, reporting, or record-keeping requirements contained in or issued or entered into pursuant to the Environmental Protection Act . . . .
>
> . . . .
>
> (2) Each violation of this section . . . shall subject a person to a civil penalty of no more than ten thousand dollars per day. . . . The amount of the penalty shall be based on the degree and extent of the violation, the size of the operation, and any economic benefit derived from noncompliance.

Finally, § 81-1509 provides that "[a]n appeal may be taken from any final decision of the director, and the appeal shall be in accordance with the Administrative Procedure Act."

The State asserts that the mandates of § 81-1507(1), specifically, the requirement to issue a complaint, apply only when the director of the DEQ decides to enforce alleged EPA violations by administrative action. The State argues that in the instant case, the director of the DEQ chose to enforce the alleged EPA violations by instituting a judicial action, seeking the recovery of a civil penalty pursuant to § 81-1508.02. Because § 81-1508.02 contains no facial requirement that the State issue a complaint to the alleged violator, the State claims that the district court did have subject matter jurisdiction.

Conversely, Fisher Foods contends that when the director seeks the imposition of a civil penalty, the director must first issue a complaint, giving notice of the violations and either ordering that corrective action be taken or requiring the violator to appear before the DEQ to answer the charges. Fisher Foods claims that it is only from a complaint or a complaint and a subsequent hearing that the director can render a final decision, thereby providing a basis for appealing and, thus, for conferring subject matter jurisdiction upon the district court. Therefore, since a complaint was not issued, Fisher Foods argues that the district court lacked subject matter jurisdiction.

Accordingly, the issue we must decide is whether a complaint must be issued to the alleged violator when the director seeks the imposition of a civil penalty in order to confer subject matter jurisdiction upon the district court.

COMPLAINT

Before determining whether the issuance of a complaint is a prerequisite to the imposition of a civil penalty, we must first decide whether the director is required under any circumstances to ever issue a complaint when pursuing enforcement of EPA violations. As previously stated, § 81-1507(1) states that "[w]henever the director [of the DEQ] has reason to believe that a violation of any provision of the Environmental Protection Act . . . has occurred, he or she *may* cause a written complaint to be served upon the alleged violator . . . ." (Emphasis supplied.) The State asserts that because the Legislature used the term "may" in the statute, the Legislature intended to give the director discretion in deciding whether or not to issue a com-

plaint when pursuing enforcement of EPA violations. Conversely, Fisher Foods contends that the term "may" in the statute gives the director only initial discretion in deciding whether to pursue enforcement of an EPA violation. However, Fisher Foods argues that if the director decides to pursue enforcement of an EPA violation, then the statute requires the director to issue a complaint to the alleged violator.

Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995); *Malzahn v. Transit Authority*, 244 Neb. 425, 507 N.W.2d 289 (1993). In addition, effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995); *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995). It is the duty of the court, as far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it so that they are consistent, harmonious, and sensible. *Hoiengs v. County of Adams, ante* p. 64, 574 N.W.2d 498 (1998).

In the instant case, if the word "may" were given its ordinary, discretionary meaning and the director chose not to issue a complaint when pursuing enforcement of EPA violations, all portions of § 81-1507 would not be given effect, and thus, the statute's objective would be defeated. For instance, under § 81-1507(1), an alleged violator must receive a complaint giving notice of the alleged violations and an order of corrective action before that portion of § 81-1507(1) which guarantees the violator the right to request a hearing on the violations and allows the director to render a final order can be effectuated. In addition, a complaint must be issued to effectuate that portion of the statute which states that "[t]he director shall afford [the alleged violator] an opportunity for a fair hearing [on the alleged violations] . . . at the time and place specified in the [complaint]." § 81-1507(2). Thus, if a complaint was never issued in the enforcement of EPA violations, the alleged violator would never be afforded the opportunity to exercise his or

her guaranteed right under the statute to request a fair hearing on the alleged violations.

Moreover, in the absence of a complaint containing the director's final decision or a complaint and a hearing wherein the director renders a final decision pursuant to § 81-1507(1), there can exist no final decision to serve as the basis for appealing, thereby rendering moot § 81-1509, which states that "[a]n appeal may be taken from any final decision of the director . . . ." We bear in mind that in determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection of statutes which pertain to a certain subject matter to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Abboud v. Papio-Missouri River NRD*, 253 Neb. 514, 571 N.W.2d 302 (1997); *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997). Based on the foregoing, we determine that the Legislature intended § 81-1507(1) to be interpreted to mean that the director of the DEQ is not required to issue a complaint for each and every possible EPA violation; however, if the director decides to pursue enforcement of an EPA violation, then the director is required to issue a complaint meeting the necessary requirements of the statute. Nonetheless, the question remains as to whether the director is required to issue a complaint when enforcing EPA violations by seeking the imposition of a civil penalty.

Civil Penalty

Essentially, the State asserts that the director is not required to issue a complaint to an alleged violator of the EPA when seeking the imposition of a civil penalty, since the mandates of § 81-1507(1), specifically, the requirement to issue a complaint, apply only when the director is pursuing enforcement of the alleged EPA violations by administrative action.

When interpreting a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Abboud v. Papio-Missouri River NRD, supra*; *Brown v. Wilson*, 252 Neb. 782, 567 N.W.2d 124 (1997).

Moreover, in determining the meaning of a statute, we would again conjunctively consider and construe a collection of statutes which pertain to a certain subject matter to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Abboud v. Papio-Missouri River NRD, supra*; *Snipes v. Sperry Vickers, supra.* Keeping the foregoing rules of construction in mind, we now proceed to an analysis of the relevant statutes to determine whether the director must issue a complaint to the alleged violator of the EPA when seeking the imposition of a civil penalty, in order to confer subject matter jurisdiction upon the district court.

Section 81-1507(1) authorizes the director of the DEQ to issue a complaint to the alleged violator of the EPA, giving notice of the alleged violations and either ordering that corrective action be taken or requiring the violator to appear before the DEQ regarding the EPA violations. It is only from the complaint or a complaint and a hearing that a final order can be rendered by the director, serving as a basis for an appeal in accordance with § 81-1509. Thus, under the EPA statutory scheme, in the absence of a complaint or a complaint and a hearing, there is no final order of the director from which to appeal and to confer subject matter jurisdiction upon the district court.

The State, however, asserts that § 81-1508.02 provides an alternative remedy, in the form of a civil penalty, for enforcing EPA violations and that under the plain language of this statute, the director is not required to issue a complaint. Thus, even though a complaint was not issued, the State claims that the district court does have subject matter jurisdiction. We do not agree, as it is apparent from the plain statutory language that the Legislature did not intend § 81-1508.02 to provide an alternative remedy whereby the director could circumvent the notice and hearing requirements of § 81-1507. If the Legislature had intended such a result, it could have so provided. The Legislature, however, did not do so. Thus, we determine that the director must satisfy the requirements of § 81-1507(1), specifically, that the director must issue a complaint, whenever he or she decides to pursue enforcement of EPA violations by seeking the imposition of a civil penalty pursuant to § 81-1508.02.

As further support for our interpretation of §§ 81-1507 and 81-1508.02, we look to the federal Clean Water Act, 33 U.S.C. §§ 1251 through 1387 (1994), the source of many of the provisions found in Nebraska's EPA. See, Natural Resources Committee Hearing, L.B. 570, 93d Leg., 2d Sess. 18-19 (Mar. 5, 1993); Agriculture Committee Hearing, L.B. 342, 86th Leg., 1st Sess. 21-22 (Feb. 2, 1979). Unlike the EPA, the Clean Water Act explicitly grants the administrator of the U.S. Environmental Protection Agency the discretion that the director of the DEQ claims to now have in the case at bar. The Clean Water Act provides that "the Administrator . . . shall issue an [administrative] order requiring such person to comply with [the Clean Water Act], *or* [he or she] shall bring a civil action . . . ." (Emphasis supplied.) 33 U.S.C. § 1319(a)(1) and (3). The failure of the Legislature to enact a provision explicitly providing for such discretion or authority to commence civil actions, as is found in the Clean Water Act, further evidences legislative intent that the director of the EPA not have this same power to commence a civil action, rather than an administrative action, for the imposition of a civil penalty.

Finally, we note that the Legislature, in enacting the EPA, did explicitly grant the director authority under certain circumstances to proceed directly to district court without first complying with the notice and hearing requirements of § 81-1507. For example, Neb. Rev. Stat. § 81-1508(1) (Reissue 1994) states that if a person "causes the death of fish or other wildlife," damages shall be recoverable, "in addition to the penalties provided in sections 81-1508.01 and 81-1508.02 . . . in a *civil action brought in the district court* of the county in which such violation . . . occurred." (Emphasis supplied.) Furthermore, § 81-1508(2) provides that the director, "in addition to the penalties provided by . . . sections 81-1508.01 and 81-1508.02 . . . may *petition the district court* for an injunction" for violations or threatened violations of the EPA. (Emphasis supplied.) In addition, § 81-1508(3) expressly provides that "[u]pon receipt of evidence that the handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste is presenting an imminent and substantial endangerment to the health of humans or animals or to the environment, the director may *petition the district court* for

an injunction . . . ." (Emphasis supplied.) However, this same grant of authority to proceed directly to district court is conspicuously absent from §§ 81-1507 and 81-1508.02, and thus, we construe such absence as further evidence that the director does not have the power to initiate a judicial action for the imposition of a civil penalty without complying with the notice and hearing requirements of § 81-1507.

In the case at bar, the petition filed by the State did not contain allegations of death or harm to fish and wildlife, nor did it contain a plea for an injunction; thus, no subject matter jurisdiction was conferred upon the district court in accordance with § 81-1508. Therefore, the district court could have obtained jurisdiction over the matter only if an appeal had been taken from a final order of the director rendered pursuant to a complaint or a complaint and a hearing. Accordingly, because the State did not allege in its petition that a complaint was issued to Fisher Foods whereby the director reached a final order, we determine that the district court did lack subject matter jurisdiction; thus, the district court did properly sustain Fisher Foods' demurrer.

Nevertheless, the State asserts that the district court erred in dismissing its cause of action without affording it an opportunity to amend its petition to remedy the jurisdictional defect. It is well settled that when a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997); *Larson v. Demuth*, 252 Neb. 668, 564 N.W.2d 606 (1997).

In the instant case, a reasonable possibility exists that the State could remedy the jurisdictional defect in its petition, and thus, leave to amend should have been granted by the district court. The defect could be remedied, for example, by the State's amending its petition to request an injunction for violations of the EPA. Accordingly, we determine that the dismissal of the State's cause of action was premature.

CONCLUSION

Therefore, although the district court correctly determined that it lacked subject matter jurisdiction and properly sustained

Fisher Foods' demurrer, we conclude that the district court erred in dismissing the State's cause of action without affording the State an opportunity to amend its petition to remedy the jurisdictional defect. For this reason, we reverse the judgment and remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., participating on briefs.

JOHN M. STEWART, APPELLANT, V.
ELLIOTT S. HECHTMAN, APPELLEE.
581 N.W.2d 416

Filed July 10, 1998. No. S-97-087.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
3. **Collateral Estoppel: Words and Phrases.** For the purposes of applying the doctrine of collateral estoppel, an issue is considered to be the "identical issue" in the absence of a significant factual change.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded for further proceedings.

Lee R. Terry, of Terry & Kratville, for appellant.

Michael J. Mooney, Jr., and Jay H. Greathouse, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and McCORMACK, JJ.

McCORMACK, J.

This is an appeal from the order of the district court for Douglas County, Nebraska, dismissing John M. Stewart's neg-

ligence action for lack of personal jurisdiction. Following a one-vehicle motorcycle accident occurring in North Carolina, Stewart sued Elliott S. Hechtman in the district court for Douglas County, serving him by certified mail at his home in Sarasota, Florida. Hechtman filed a special appearance, challenging the court's jurisdiction over him. The special appearance was sustained. Stewart then filed a second action against Hechtman in the district court for Douglas County and personally served him at his townhouse in Omaha, Nebraska. Hechtman filed another special appearance, which was sustained on the basis of collateral estoppel. Stewart now appeals. Pursuant to our authority to regulate the dockets of the Nebraska Court of Appeals and this court, we removed the case to our docket on our own motion. We reverse, and remand for further proceedings.

BACKGROUND

Stewart was a passenger on a 1994 Harley Davidson motorcycle owned and operated by Hechtman. In September 1995, Stewart and Hechtman were involved in a one-vehicle motorcycle accident which occurred on Highway 23 in Macon County, North Carolina. Hechtman entered into a curve, leaned the motorcycle to make the turn, and lost control of the motorcycle. Stewart was ejected from the motorcycle, which then rolled on top of him, causing severe injuries.

On April 12, 1996, Stewart filed in the district court for Douglas County his initial negligence petition (the first action), alleging that Hechtman was a property owner and resided in Omaha, Douglas County, Nebraska. In the first action, Hechtman was served on April 19 by certified mail at his home in Sarasota, Florida. Hechtman filed a special appearance pursuant to Neb. Rev. Stat. § 25-516.01(2) (Reissue 1995), challenging the court's exercise of personal jurisdiction over him. A hearing was held before the district court. At the hearing, Hechtman produced evidence that he is registered to vote in Florida, identifies his state of residence on his income tax returns as Florida, and maintains his driver's license in Florida. Further, the motorcycle he was driving in the accident was registered and licensed to Hechtman in Florida. The district court ruled that Hechtman was a resident of the State of Florida, not

the State of Nebraska. The order stated that the fact that Hechtman has an ownership in real property in Nebraska does not subject him to the personal jurisdiction of this state, because Hechtman's interest in the property has nothing to do with the cause of action which arose in North Carolina. The district court therefore sustained Hechtman's special appearance and dismissed the petition without prejudice.

On September 19, 1996, Stewart again filed in the district court for Douglas County his petition alleging negligence against Hechtman (the second action). This case was assigned to a different judge than in the first action. On September 28, Hechtman was personally served the petition at the townhouse of which he was a joint owner, located at 2506 South 92d Plaza, in Omaha. Hechtman filed another special appearance, objecting to the court's jurisdiction over him. A hearing was again held before the district court. During the hearing, Stewart produced evidence that Hechtman was personally served at his Omaha home, which he owns and lists in the Omaha phone book. Hechtman offered Stewart's petition in the first action, Hechtman's special appearance objecting to jurisdiction in the first action, and the district court's order dismissing the action for lack of jurisdiction.

The district court held that the issue presented at the hearing was previously argued and ruled on by the judge in the first action, and that Stewart was collaterally estopped from raising the issue again. The district court agreed with and accepted the judge's findings and order in the first action and thereby sustained Hechtman's special appearance filed in the second action, dismissing the petition at Stewart's costs. From this order, Stewart appeals.

ASSIGNMENTS OF ERROR

Stewart asserts that the trial court erred in (1) sustaining Hechtman's special appearance when Hechtman was personally served with the petition and summons in Omaha and (2) granting Hechtman's special appearance on the basis of res judicata.

STANDARD OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Brams*

Ltd. v. Elf Enters., 253 Neb. 932, 573 N.W.2d 139 (1998); *Mandolfo v. Chudy*, 253 Neb. 927, 573 N.W.2d 135 (1998); *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb. 694, 573 N.W.2d 747 (1998).

ANALYSIS

COLLATERAL ESTOPPEL

The first issue to be addressed in this appeal is whether the court's prior order of dismissal for lack of personal jurisdiction over Hechtman after the special appearance precludes relitigation of that issue in subsequent proceedings on the same cause of action. Hechtman asserts that the ultimate issue decided by the court in the first action was personal jurisdiction and that the court's decision on this issue precludes relitigation of that issue based on the doctrine of collateral estoppel.

There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *Cunningham v. Prime Mover, Inc.*, 252 Neb. 899, 567 N.W.2d 178 (1997); *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996); *Farm Credit Bank v. Stute*, 248 Neb. 573, 537 N.W.2d 496 (1995).

The first step in determining whether collateral estoppel applies is to decide whether there is an identity of issues in the successive proceedings. For the purposes of applying the doctrine of collateral estoppel, an issue is considered to be the "identical issue" in the absence of a significant factual change. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994). In the first action, the court determined that Hechtman was not a resident and determined that the court did not have personal jurisdiction over Hechtman under Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995). The issue determined by that court, therefore, was that Hechtman did not have sufficient minimum contacts with Nebraska to subject him to personal jurisdiction. In the second action, Hechtman was personally served within the State of Nebraska. The first prong

for determination of whether collateral estoppel applies is whether there were identical issues. The issue in the first action was residence, and the issue in the second action was service. These issues are not identical.

While there are no Nebraska cases discussing the issue of collateral estoppel and personal jurisdiction, we find the case *Swan v. Sargent Industries*, 620 P.2d 473 (Okla. App. 1980), to be instructive. In *Swan*, the plaintiff filed an action against the defendant which was dismissed for lack of personal jurisdiction over the defendant, who had filed a special appearance. The plaintiff filed a second action, wherein the defendant specially appeared pleading the earlier order as res judicata and again asserting that the Oklahoma court lacked jurisdiction. The district court ruled that its earlier decision barred review of the personal jurisdiction issue. The Oklahoma Court of Appeals affirmed the district court's decision, but stated:

> [W]hile a dismissal for want of personal jurisdiction over the defendant does not preclude *litigation* of the merits before a court of proper jurisdiction . . . it does preclude *relitigation* of the question of the court's jurisdiction at that time. It does not prevent a court acquiring jurisdiction by virtue of subsequent facts, e.g. later personal service on the defendant while he is present in the state.

(Emphasis in original.) *Id.* at 477. See, also, *Kendall v. Overseas Development Corp.*, 700 F.2d 536 (9th Cir. 1983) (after plaintiff's state court suit was dismissed against one defendant for lack of personal jurisdiction, plaintiff had right to file another complaint on same cause of action curing jurisdictional defect, and thus, after plaintiff filed suit in federal district court on same claim, dispositive question was whether he pleaded any new facts in federal litigation that supported different result on jurisdiction issue).

We find this rationale to be persuasive. While the doctrine of collateral estoppel would prohibit relitigation of the identical issue ruled upon in the first action, that issue dealt with whether Hechtman had sufficient minimum contacts with the state for the state to acquire personal jurisdiction. In the second action, Stewart introduced evidence of transient jurisdiction created by in-state personal service of Hechtman. This is not the identical

issue. The evidence of personal service introduced by Stewart is a significant factual change in the second action which supports a different result on the jurisdictional issue. Therefore, we find the district court erred in sustaining Hechtman's special appearance and dismissing Stewart's petition.

PERSONAL JURISDICTION

Having determined that Stewart was not collaterally estopped from raising the issue of personal jurisdiction in the second action, we turn now to an analysis of whether the district court has personal jurisdiction over Hechtman. This appeal raises the question of whether the mere presence of the person in the state is a sufficient basis upon which to exercise personal jurisdiction over the person. Stewart argues that the district court erred in determining that it did not have personal jurisdiction over Hechtman. We agree.

We discussed the issue of personal service as providing the court with personal jurisdiction in *Dale Electronics, Inc. v. Copymation, Inc.*, 178 Neb. 239, 132 N.W.2d 788 (1965). In that case, we stated:

> Historically, the jurisdiction of courts to render judgments in personam was grounded on their de facto power over the defendant's person. Presence within the territorial jurisdiction of a court was prerequisite to the rendition of a judgment personally binding the defendant. Now, however, as capias ad respondendum has given way to personal service of summons or other forms of notice, due process requires only that to subject a defendant to a judgment in personam if he be not present within the territory of the forum, he have certain minimum contacts with it . . . .

Id. at 241-42, 132 N.W.2d at 790. See, also, *Burnham v. Superior Court of Cal., Marin County*, 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990) (holding that service of process confers state court jurisdiction over physically present nonresident, regardless of whether he was only briefly in state or whether cause of action is related to his activities there). We therefore find that the district court has personal jurisdiction over Hechtman.

CONCLUSION

Because we conclude the district court had personal jurisdiction by reason of personal service upon Hechtman, we reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

PAYLESS BUILDING CENTER, INC., DOING BUSINESS AS BUILDERS HOW-TO WAREHOUSE, APPELLANT, V. L. DEAN WILMOTH AND SHIRLEY WILMOTH, COTRUSTEES OF THE L. DEAN WILMOTH AND SHIRLEY WILMOTH REVOCABLE LIVING TRUST DATED APRIL 26, 1994, AND JOHN DOE AND ___ DOE, HIS WIFE, REAL AND TRUE NAMES UNKNOWN, APPELLEES.

581 N.W.2d 420

Filed July 10, 1998. No. S-97-416.

1. **Statutes: Appeal and Error.** Questions of statutory interpretation present questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes.** A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.
3. **Statutes: Appeal and Error.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Mechanics' Liens: Words and Phrases.** As used in Neb. Rev. Stat. § 52-139(5) (Reissue 1993), the plain and ordinary meaning of individual is a single human being as contrasted with a social group or institution.
5. **Prejudgment Interest: Claims.** Absent compliance with the provisions of Neb. Rev. Stat. § 45-103.02(1) (Cum. Supp. 1996), prejudgment interest is available only when a claim is liquidated, that is, when there is no reasonable controversy either as to the plaintiff's right to recover or as to the amount of such recovery.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded with direction.

Patrick J. Nelson, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellant.

Larry W. Beucke, of Parker, Grossart, Bahensky & Beucke, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CAPORALE, J.

The plaintiff-appellant, Payless Building Center, Inc., doing business as Builders HOW-TO Warehouse, seeks the foreclosure of a construction lien against realty titled in the defendants-appellees, L. Dean Wilmoth and Shirley Wilmoth, cotrustees of the L. Dean Wilmoth and Shirley Wilmoth revocable living trust dated April 26, 1994. The district court dismissed the action, concluding that being titled in the names of protected parties under the Nebraska Construction Lien Act, Neb. Rev. Stat. § 52-125 et seq. (Reissue 1993), the property was exempt from foreclosure. Payless thereupon appealed and successfully petitioned this court to bypass the Nebraska Court of Appeals, asserting that the district court erred in, among other things, concluding the cotrustees were protected parties under the lien act and not entering judgment in its favor, including prejudgment interest. We reverse, and remand with direction.

The dispositive issues present questions of statutory interpretation, matters which present questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State ex rel. Wood v. Fisher Foods, ante* p. 982, 581 N.W.2d 409 (1998); *Cox Cable of Omaha v. Nebraska Dept. of Revenue, ante* p. 598, 578 N.W.2d 423 (1998).

On April 16, 1994, the Wilmoths, who are husband and wife, as both grantors and trustees, entered into a joint revocable living trust agreement for estate planning purposes. The trust provides that as trustees, the Wilmoths have the power to control and direct all trust payments, add or remove trust property, and amend or revoke the trust.

In November 1995, the Wilmoths, as individuals, signed an agreement to purchase a house from Robert D. Edson and Beverly J. Edson, which Robert Edson was in the process of constructing. While the Wilmoths signed the purchase agreement as individuals, the agreement provided that the property was to be titled in the trust. On the same day the purchase agreement was signed, the Wilmoths paid a deposit via a check drawn

from the Wilmoths' personal account in a Wichita, Kansas, credit union. They later, as individuals, signed two addenda to the purchase agreement, and on February 14, 1996, paid the balance of the purchase price by a cashier's check drawn on a Wichita bank, which listed the Wilmoths as the remitters. The Wilmoths as individuals also signed the real estate closing statement as the buyers. On February 15, a warranty deed titled in the cotrustees, as set forth earlier, was recorded with the register of deeds. The Wilmoths at all times intended to and did occupy the subject property as a residence.

In building the house, Robert Edson purchased building materials from Payless, but failed to pay $24,981.36 of the principal sums owing for the materials used in the house. On April 30, 1996, Payless recorded a construction lien against the property, naming Robert Edson as the contractor and the Wilmoths as cotrustees of the trust.

If certain specified procedures are followed, the lien act provides for the creation, attachment, and enforcement of liens against real estate in favor of a person furnishing services or materials under a real estate improvement contract. §§ 52-126, 52-131, 52-133, 52-134, and 52-135. However, "a buyer who is a protected party takes free of all construction liens that are not of record at the time his or her title document is recorded." § 52-139(5). To the extent relevant here, a "protected party" is an "individual who contracts to . . . buy . . . residential real estate all or a part of which he or she occupies or intends to occupy as a residence." § 52-129(1)(a).

In determining whether the protection afforded a buyer by § 52-139(5) applies, we are bound by the rule that a statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. *In re Estate of Peterson, ante* p. 334, 576 N.W.2d 767 (1998); *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995); *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993). See, also, *State ex rel. Wood v. Fisher Foods, supra.* In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of

statutory words which are plain, direct, and unambiguous. *In re Estate of Peterson, supra*; *Metropolitan Utilities Dist. v. Balka*, 252 Neb. 172, 560 N.W.2d 795 (1997); *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997).

The Wilmoths entered into the purchase agreement as individuals and paid the purchase price from their individual funds. Thus, there can be no question that they bought the property as individuals. It is also clear that they as individuals not only intended to but occupied the property as a residence. Therefore, they individually became protected parties as defined by § 52-129(1)(a). However, the exemption from foreclosure afforded by § 52-139(5) does not apply to them, for they did not record a title document in their individual names prior to the recording of Payless' lien. The language of § 52-139(5) makes clear that only where a buyer records the title document prior to the recording of the lien is the property exempted from foreclosure.

Neither does the exemption apply to the cotrustees. They are not the buyers, did not sign the purchase agreement, did not provide the purchase money, and did not as cotrustees occupy or intend to occupy the property as a residence. Nor are the cotrustees, as such, individuals as required by § 52-139(5). The plain and ordinary meaning of individual is a single human being as contrasted with a social group or institution. Webster's Third New International Dictionary, Unabridged 1152 (1993). That our Legislature used the word in its plain and ordinary sense is illustrated by its specifying that a protected party buyer takes free of liens "not of record at the time his or her title document is recorded." § 52-139(5). Individuals possess gender, cotrustees as such do not. Grantors of trusts create a legal entity separate and apart from themselves. Except as the law may otherwise provide, such grantors are not free to alternately embrace or disown their creation as their individual interests may dictate at a particular moment. As long as the trust exists, its separate nature must be respected.

Thus, Payless' assertion that the district court erred in holding the cotrustees to be protected parties is correct. However, Payless' claim that it is entitled to prejudgment interest is not.

Absent compliance with the provisions of Neb. Rev. Stat. § 45-103.02(1) (Cum. Supp. 1996), prejudgment interest is available only when the claim is liquidated, that is, when there is no reasonable controversy either as to the plaintiff's right to recover or as to the amount of such recovery. *Daubman v. CBS Real Estate Co., ante* p. 904, 580 N.W.2d 552 (1998); *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 529 N.W.2d 16 (1995). Here, there was a reasonable controversy concerning the right of Payless to recover. Thus, it is not entitled to prejudgment interest.

Accordingly, as noted in the first paragraph hereof, the district court's dismissal of the action is reversed and the cause remanded with the direction that it enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

MICHAEL N. SCHIRBER, APPELLANT, V. STATE OF NEBRASKA, IN THE INTEREST OF PROCEEDINGS REGARDING PATRICK J. THOMAS, ET AL., APPELLEE.

581 N.W.2d 873

Filed July 10, 1998. No. S-97-417.

1. **Attorney Fees.** Neb. Rev. Stat. § 23-1204.01 (Reissue 1997) provides for the compensation of acting county attorneys, stating that such assistant or assistants shall be allowed such compensation for their services as the court shall determine.
2. **Attorney Fees: Proof.** While attorney fees and expenses in compensation for the services of an acting county attorney are ordinarily left to the trial court's discretion, an application for attorney fees and expenses must be granted where the record demonstrates that the amount requested was reasonable and there is no evidence or indication otherwise that the amount is unreasonable.

Appeal from the District Court for Sarpy County: WILLIAM CASSEL, Judge. Reversed and remanded with directions.

Jerome J. Ortman for appellant.

Michael L. Munch, Sarpy County Attorney, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

WHITE, C.J.

The question presented is whether the attorney fees, costs, and expenses granted by the Sarpy County District Court to appellant, Michael N. Schirber, as acting county attorney pursuant to Neb. Rev. Stat. § 23-1205 et seq. (Reissue 1991 & Supp. 1995) were reasonable in amount.

Schirber was appointed acting county attorney in the investigation and prosecution of Patrick J. Thomas, Sarpy County Sheriff; Timothy Dunning, Douglas County Sheriff; and William Brueggemann, Cass County Sheriff. See Neb. Rev. Stat. § 23-1204.01 (Reissue 1997). At the conclusion of the investigation, Schirber filed informations in the Sarpy County District Court against Thomas and Dunning, alleging various criminal counts; no charges were filed against Brueggemann. The cases against Thomas and Dunning were consolidated and proceeded to trial. At trial, a jury verdict was returned in favor of Thomas, and the charges against Dunning were subsequently dismissed.

Based on these proceedings, Schirber filed an application with the Sarpy County District Court for $28,500 in attorney fees (228 hours at $125 per hour), and $4,068.94 in costs and expenses (including 34 hours of secretary time at $20 per hour and various other expenses). See § 23-1204.01. In the application, Schirber indicated that his "customary and usual hourly rate for legal fees is $125 per hour and the customary and usual rate for legal fees for associate Todd J. Hutton is $100 per hour; that no distinction is made for office time and court time."

Schirber entered into evidence a 1992 court order from the Otoe County District Court wherein he was granted $100 per hour in attorney fees. Schirber also entered his timesheets into evidence, which indicated the attorney time, the secretary time, and a description and cost amount of the services rendered. The attorney time and secretary time were calculated in terms of tenths (1/10) of an hour, copies were charged at 25 cents each, and postage was charged at 32 cents per mailing. In addition, Schirber entered into evidence numerous invoices, receipts, bills, and photocopies of checks, all indicating the various expenses incurred in investigating and prosecuting the case. Finally, Schirber submitted his resume into evidence to indicate

his years of experience (28), his education and background, his membership in various professional organizations, and the jurisdictions in which he is admitted to practice.

On March 19, 1997, a telephone conference was held between District Judge William Cassel, Schirber, and the Sarpy County Attorney. During the conference call, the county attorney stated he did not object to the application "insofar as the contents of how counsel had defined how he spent his time on the matter." The county attorney also indicated he thought Schirber's photocopy charges were acceptable. The only request made by the Sarpy County Attorney was that the court, in making an allowance for attorney fees, delineate between in-court and out-of-court time.

Schirber then addressed the court and explained why he was entitled to $125 per hour for attorney fees. Schirber began by stating he had been paid $100 per hour in a 1992 case where he was acting as appointed counsel in a similar capacity. Schirber then stated he had calculated that inflation had risen approximately 4 percent over the last 4 years. Applying the 4-percent inflation rate to the $100 per hour figure, Schirber extrapolated that he was entitled to approximately $125 per hour. Schirber also claimed he was entitled to $4,068.94 in costs and expenses because he was not provided with a budget, a staff, or office space and, in turn, was forced to use his own resources.

Both parties then requested the district court to analyze Schirber's application for attorney fees and expenses in light of several factors, including the nature of the case, the amount of time and labor involved, the services performed, the results obtained, the length of time required for preparation and presentation, the novelty and difficulty of the questions, and the customary charges of the bar.

The district court took the matter under advisement, and on March 24, 1997, the court entered an order awarding Schirber $8,892 for fees and $488.94 for costs and expenses. The court made no findings of fact, but merely entered an order which provided as follows:

IT IS ORDERED:

1. The application is granted to the extent that fees should be allowed in the amount of $8,892.00 and costs

incurred in the amount of $488.94, and that the total sum of $9,380.94 is ordered paid by the County of Sarpy.

2. Except to the extent granted above, the application is denied.

ENTERED: March 24, 1997.

Schirber filed a notice of appeal on April 24, 1997.

Rephrased and summarized, Schirber contends the district court erred in (1) failing to make an adequate allowance for fees and expenses, (2) failing to make findings of fact regarding the fees and expenses, and (3) denying his constitutional rights by requiring an involuntary servitude and depriving him of property without just compensation. Since Schirber's first assignment of error is dispositive, we will not address his remaining arguments. See *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997).

Attorney fees and expenses may be recovered only where provided for by statute, or when a recognized and accepted uniform course of procedure has been to allow recovery of an attorney fee. *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997); *Sid Dillon Chevrolet v. Sullivan*, 251 Neb. 722, 559 N.W.2d 740 (1997). When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998); *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993). To determine proper and reasonable fees, it is necessary to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997); *National Am. Ins. Co., supra*. In this respect, a judicial abuse of discretion exists when the reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Whalen v. U S West Communications*, 253 Neb. 334,

570 N.W.2d 531 (1997); *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

Section 23-1205 provides for the appointment of a county attorney to act in a temporary capacity in any investigation, appearance, or trial upon the showing of absence, sickness, disability, or good cause. Section 23-1204.01 provides for the compensation of such county attorneys, stating, in pertinent part, that "such assistant or assistants shall be allowed such compensation for said services as the court shall determine . . . ." While such attorney fees and expenses are ordinarily left to the trial court's discretion, an application for attorney fees and expenses must be granted where the record demonstrates that the amount requested was reasonable and there is no evidence or indication otherwise that the amount is unreasonable. See, *Wacker v. Wacker*, 253 Neb. 630, 573 N.W.2d 113 (1998); *Koehler, supra*; *McGreevy v. Bremers*, 205 Neb. 554, 288 N.W.2d 490 (1980).

In *McGreevy, supra*, we addressed a situation where a surety sought $8,506.61 in attorney fees, costs, and expenses. Multiple affidavits were entered into evidence; nothing entered into evidence disproved the reasonableness of the fees and expenses. In turn, the district court entered an order granting the fees and expenses. An appeal to this court followed. The issue on appeal was whether the fees and expenses were reasonable. We noted on appeal that none of the affidavits disputed the fact the fees and expenses were incurred and that none of the fees or expenses were unreasonable. We held that the surety was entitled to the requested fees, costs, and expenses.

From our holding in *McGreevy*, we conclude that where the evidence contained in the record supports the fact that the moving party's request for attorney fees and expenses is a reasonable request, per the factors enunciated in *Koehler, supra*, and no other contrary evidence exists or is offered into evidence disputing reasonableness, the request for such reasonable attorney fees and expenses must be granted. See, also, *Wacker*, 253 Neb. at 633, 573 N.W.2d at 115 (citing *McGreevy, supra*, for proposition that "absent proof of unreasonableness, surety entitled to fees, costs, and expenses incurred seeking indemnification by guardian"). Our ruling today does not, however, create a pre-

sumption of validity or abdicate the discretion granted to all trial courts to determine reasonable attorney fees and expenses. See *Koehler, supra*. Rather, our holding merely stands for the proposition that where the record plainly indicates that a litigant's request for attorney fees and expenses is in fact a reasonable request, and no evidence exists or is offered into evidence to rebut that fact, the attorney fees and expenses must be granted.

Here, the record demonstrates Schirber's application for attorney fees, costs, and expenses was reasonable. No evidence was offered into evidence or existed disproving the reasonableness of Schirber's application.

Therefore, the decision of the trial court is reversed and the cause remanded with directions to allow the requested fees, costs, and expenses, except the request for payment of secretarial services in the amount of $680, which is denied.

REVERSED AND REMANDED WITH DIRECTIONS.

NANCY ANDERSON, APPELLANT, V.
OMAHA PUBLIC SCHOOL DISTRICT, APPELLEE.
581 N.W. 2d 424

Filed July 10, 1998. No. S-97-661.

1. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
2. ____: ____. Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and HANNON and IRWIN,

Judges, on appeal thereto from the Nebraska Worker's Compensation Court. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Thomas F. Dowd, of Dowd & Dowd, for appellant.

Joseph W. Grant and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

Nancy Anderson petitioned this court for further review of the Nebraska Court of Appeals memorandum opinion and judgment on appeal filed December 18, 1997, affirming the Workers' Compensation Court review panel decision which affirmed an earlier order of the compensation court awarding Anderson temporary total disability benefits. Anderson alleges that the compensation court erred in reducing her present award of temporary total disability payments by the amount of a prior award for permanent partial disability. The compensation court ordered the reduction based on the provisions of Neb. Rev. Stat. § 48-121.01(1)(a)(iii) (Reissue 1993), which provide that an employee's maximum weekly compensation benefit may not exceed $350. We reverse, and remand for further proceedings.

BACKGROUND

Anderson was employed in the physical education department of the Omaha Public School District (OPS). On May 7, 1991, Anderson suffered a compensable injury arising out of and in the course of her employment with OPS when she attempted to "break up a fight" between students. As a result of the injury, Anderson injured her back. The compensation court found that Anderson suffered a 10-percent permanent partial disability and awarded her the sum of $56.30 per week for 300 weeks. This award was not appealed from by either party.

On March 14, 1995, Anderson again suffered a compensable injury arising out of and in the course of her employment with OPS when she was "butted in her low back by a student wearing a helmet." The compensation court found that Anderson suf-

fered a temporary total disability as a result. According to statute, based on Anderson's weekly wage, she was entitled to temporary total disability benefits of a maximum $350 per week for an indefinite period of time while she suffered the temporary total disability. Because § 48-121.01(1)(a)(iii) provides that an employee may not receive in excess of $350 per week, however, the court reduced the total temporary disability award by the amount of the prior permanent partial disability award of $56.30, resulting in a total benefit payment for both injuries of the statutory maximum of $350 per week. The court further calculated that the terms of the permanent partial disability would terminate on February 4, 1997, and that after that date, if Anderson remained temporarily totally disabled, she would be entitled to have her temporary total disability award increased back to the statutory maximum of $350 per week.

Anderson filed a motion to modify the court's prior award to remove the deduction of the prior permanent partial disability award payments from the total of her temporary total disability award. The court denied this motion. Anderson then filed an application for review with the compensation court review panel, which affirmed the award of the court. Anderson appealed this decision to the Court of Appeals, which affirmed the decision of the review panel.

ASSIGNMENTS OF ERROR

In her petition for further review, Anderson assigns as error the Court of Appeals' affirmance of the review panel's decision because the panel erred as a matter of law in reducing the amount of benefits to which Anderson was entitled by benefits previously finally adjudicated as owing to Anderson as a result of a separate and distinct accident and injury, thereby resulting in Anderson's subsidizing OPS' obligations under workers' compensation and being required to pay part of the cost thereof.

STANDARD OF REVIEW

In determining whether to affirm, modify, reverse, or set aside the judgment of the compensation court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Cunningham v. Leisure Inn*, 253 Neb. 741, 573 N.W.2d 412 (1998); *Thach v. Quality*

Pork International, 253 Neb. 544, 570 N.W.2d 830 (1997); *Acosta v. Seedorf Masonry, Inc.*, 253 Neb. 196, 569 N.W.2d 248 (1997); *Dyer v. Hastings Indus.*, 252 Neb. 361, 562 N.W.2d 348 (1997); *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997).

Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a compensation court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998); *Cunningham v. Leisure Inn, supra*; *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998); *Thach v. Quality Pork International, supra*.

An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Varela v. Fisher Roofing Co.*, 253 Neb. 667, 572 N.W.2d 780 (1998); *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997); *Winn v. Geo. A. Hormel & Co., supra*; *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997); *Ira v. Swift-Eckrich*, 251 Neb. 411, 558 N.W.2d 40 (1997).

ANALYSIS

The amount of compensation available to employees for workers' compensation is defined by statute. Neb. Rev. Stat. § 48-121 (Reissue 1993) provides in pertinent part:

> The following schedule of compensation is hereby established for injuries resulting in disability:
>
> (1) For total disability, the compensation during such disability shall be sixty-six and two-thirds percent of the wages received at the time of injury, but such compensation shall not be more than the maximum weekly income benefit specified in section 48-121.01 . . . .
>
> (2) For disability partial in character, except the particular cases mentioned in subdivision (3) of this section, the compensation shall be sixty-six and two-thirds percent of

> the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but such compensation shall not be more than the maximum weekly income benefit specified in section 48-121.01.

Section 48-121.01 states that the maximum weekly income benefit shall be $350.

Neither subsection (1) nor subsection (2) of § 48-121 states that an injured employee cannot receive the two types of disability at the same time. Our prior case law, *Foreman v. State*, 240 Neb. 716, 483 N.W.2d 752 (1992), so holds. We further stated in *Foreman* that there is nothing in the workers' compensation law to prevent an employee from receiving compensation for temporary total disability to perform duties in which he is engaged at the time of the accident merely because he is receiving an unrelated allowance for a permanent partial disability for a previous accident. We held that the plaintiff, Foreman, was not entitled to compensation in excess of the prescribed statutory maximum.

Section 48-121, subsections (1) and (2), shows on its face that the Legislature recognizes that total and partial disabilities are two distinct forms of compensation. There is no prohibition in the workers' compensation statutes, other than the statutory maximum of $350 per week, that would prevent Anderson from being paid concurrently for both her permanent partial disability and her temporary total disability.

Anderson has distinguished her facts from the rule pronounced in *Foreman v. State, supra*, however, in that she concedes the provisions of § 48-121.01(1)(a)(iii) limit the total payment to $350 per week, but argues that the payments for the permanent partial disability of $56.30 per week pursuant to the award for the 1991 injury should be suspended rather than act as a deduction from the payments for the temporary total disability, which all parties concede Anderson is experiencing. Anderson's argument is that by deducting the $56.30 per week from the temporary total disability payments, she is in effect subsidizing her employer's obligation to provide workers' compensation benefits. We agree. There is no statutory impediment to the result urged by Anderson. The payments to her will not

exceed the statutory maximum of $350 per week, but the permanent partial disability which she was awarded in 1991 will be suspended while Anderson is on temporary total disability. Once Anderson's temporary total disability has ceased, the payments under her permanent partial disability award will resume until she has received all payments due her under this award.

As stated in the compensation court's dissenting opinion in Anderson's case:

> [I]t is black-letter, axiomatic law that the Nebraska Workers' Compensation Act be liberally construed to accomplish its beneficent purposes. Among the many arbitrary limitations of workers' compensation law are maximum periods of payment, the maximum amount of weekly payments, payments for functional loss of a member regardless of loss of earning power, and the total absence of many general damages measures found in tort law. Why would we further limit indemnity payments to those who have suffered two accidents such as Ms. Anderson?

CONCLUSION

Having determined that Anderson's payments of $56.30 per week as a result of the permanent partial disability award in 1991 should be suspended rather than act as a credit toward her temporary total disability payments, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., dissenting.

I respectfully dissent. In my opinion, the majority has made an unwarranted departure from settled law, which it attempts to justify by recognizing a right to "suspend" workers' compensation benefit payments from one injury during the period when benefits from another injury are payable, a right which is not expressly or implicitly conferred by the Nebraska Workers' Compensation Act. It has long been our law that while an individual may receive concurrent workers' compensation benefits from two or more injuries, the combined amounts received may not exceed the maximum weekly benefit established by the Nebraska Workers' Compensation Act. *Peterson v. Borden's*

Produce Co., 125 Neb. 404, 250 N.W. 240 (1933). We applied this rule most recently in *Foreman v. State*, 240 Neb. 716, 483 N.W.2d 752 (1992), where the worker was receiving permanent partial disability benefits of $30.58 per week from a 1986 accident at the time he was awarded temporary total disability benefits of $245 per week as the result of an accident in 1988. At the time of the second award, the maximum weekly benefit allowable under Neb. Rev. Stat. § 48-121.01 (Reissue 1988) was $245. The employer paid the benefits pursuant to both awards for a period of time and then discontinued the benefits attributable to the first injury. We held that this "was proper because the plaintiff was not entitled to compensation in excess of the prescribed statutory maximum amount of weekly compensation." 240 Neb. at 722, 483 N.W.2d at 757. We also noted that the compensation court recognized and followed this principle by allowing the employer a credit for permanent partial disability benefits inadvertently paid during the period when the worker was receiving temporary total disability benefits in an amount equal to the statutory maximum weekly benefit. *Id.*

I disagree with the majority's statement that "Anderson has distinguished her facts" from *Foreman*. As in *Foreman*, Anderson was awarded benefits for separate injuries, and during the period when the two benefits overlapped, the combined benefits exceeded the maximum weekly benefit prescribed by § 48-121.01 (Reissue 1993). The majority reaches a result different from that in *Foreman* by recognizing a new legal principle which authorizes a worker receiving concurrent benefits from two injuries to elect to suspend one benefit until the other is exhausted and thereby remain within the statutory maximum weekly benefit. Put another way, the majority recognizes the right of a recipient of workers' compensation benefits to unilaterally modify the benefit period established in an award by electing to have a portion of it run consecutively to a benefit period resulting from a separate, subsequent award.

I find nothing in the Nebraska Workers' Compensation Act to support this principle. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997); *Village of Winside v.*

Jackson, 250 Neb. 851, 553 N.W.2d 476 (1996); *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995). If the Legislature had intended that periods of benefits payable as a result of separate injuries should run consecutively, it could have so provided, as it did with respect to injuries to multiple scheduled members sustained in a single accident. See Neb. Rev. Stat. § 48-121(3) (Reissue 1993) ("compensation benefits shall be paid for the loss or loss of use of each such member or part thereof, with the periods of benefits to run consecutively"). The Legislature placed no similar provision in the Nebraska Workers' Compensation Act with respect to compensable injuries arising from separate accidents, and we have no power to do so. I would affirm the order of the review panel.

CAPORALE and CONNOLLY, JJ., join in this dissent.

DIANE LA CROIX, APPELLANT, V.
OMAHA PUBLIC SCHOOLS, APPELLEE.
582 N.W.2d 283

Filed July 10, 1998. No. S-97-1338.

1. **Workers' Compensation: Judgments: Appeal and Error.** Absent a factual dispute, whether an injury arose out of and in the course of employment is clearly a question of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts.
2. **Workers' Compensation.** Neb. Rev. Stat. § 48-101 (Reissue 1993) compensates injury caused an employee by an accident arising out of and in the course of his or her employment.
3. **Workers' Compensation: Proof: Words and Phrases.** The phrases "arising out of" and "in the course of" in Neb. Rev. Stat. § 48-101 (Reissue 1993) are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist.
4. **Workers' Compensation: Words and Phrases.** The phrase "arising out of," as used in Neb. Rev. Stat. § 48-101 (Reissue 1993), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident.
5. **Workers' Compensation.** An injury sustained by an employee while going to and from work, at a fixed place of employment, does not arise out of and in the course of employment.

6. ____. A distinct causal connection must exist between an employer-created condition and the occurrence of an injury.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

Thomas F. Dowd and Timothy S. Dowd, of Dowd & Dowd, for appellant.

Joseph W. Grant and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

The appellant, Diane La Croix, brought the instant workers' compensation action seeking compensation for injuries she incurred when she fell in a parking lot that was not owned by her employer, appellee Omaha Public Schools (OPS), but in which OPS encouraged her to park her vehicle and from which OPS provided transportation to the workplace. A single judge of the Nebraska Workers' Compensation Court dismissed La Croix's petition based on the "bright-line" premises rule set out by this court in *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996). A panel of the Workers' Compensation Court affirmed. We conclude that there is a distinct, causal connection between OPS' sponsoring of the parking lot and the occurrence of La Croix's injury and therefore reverse, and remand for further proceedings.

BACKGROUND

The facts in this case are generally undisputed. La Croix was employed by OPS as a busdriver attendant or "driver's aide." The transportation operation center where La Croix worked had a parking lot available in front of the building, and some parking was available on one neighboring street. Additional parking was available at the Dill Field lot, a parking lot owned by the City of Omaha and located approximately two blocks away from the transportation center. OPS operated a shuttle bus to transport employees between the Dill Field lot and the trans-

portation center where La Croix worked. Unless La Croix arrived at work several hours early, she was generally unable to find a parking space in the areas adjoining the transportation center. As a result, La Croix routinely parked in the Dill Field lot and utilized the shuttle provided by OPS, because no other parking was available.

When La Croix interviewed with OPS, she was told that if the lot adjoining the building was full, she was to park in the Dill Field lot and use the shuttle service. The record contains a memorandum to OPS employees encouraging them to use the Dill Field lot and use the shuttle service. However, the record indicates that employees were not absolutely required to park in the Dill Field lot and utilize the shuttle.

On May 29, 1996, La Croix slipped and fell in the Dill Field lot while on her way to board the shuttle bus. The area in which La Croix fell consisted of mud, covered by loose grass clippings. As a result of the fall, La Croix was injured and unable to work for approximately 11 weeks.

La Croix filed the instant workers' compensation action, and OPS denied that the injury occurred as a result of an accident arising out of and in the course of her employment. A single judge of the compensation court dismissed the petition based on the bright-line rule in *Johnson v. Holdrege Med. Clinic, supra*, which requires an employee to be injured on premises owned by the employer in order to receive workers' compensation. A panel of the compensation court affirmed, stating that although the facts presented an employer-sponsored parking lot exception as discussed by the three-judge concurrence in *Johnson*, the compensation court was bound by the bright-line rule adopted by the majority. See *Johnson v. Holdrege Med. Clinic, supra* (Gerrard, Wright, and Connolly, JJ., concurring).

ASSIGNMENT OF ERROR

La Croix assigns that the panel erred as a matter of law in applying the bright-line premises rule.

STANDARD OF REVIEW

There is no factual dispute in this case. The question presented, whether the injury arose out of and in the course of La Croix's employment, is clearly one of law, in connection

with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts. *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996).

ANALYSIS

La Croix contends that because OPS encouraged employees to use the Dill Field lot and provided transportation to work from the lot, she should be able to recover workers' compensation benefits even though OPS does not own the lot. Thus, La Croix urges this court to allow recovery for injuries that occur in parking lots not owned by the employer when the employer has acted to provide parking in the lot or otherwise sponsored use of the lot.

Neb. Rev. Stat. § 48-101 (Reissue 1993) compensates injury caused an employee by an accident arising out of and in the course of his or her employment. *Johnson v. Holdrege Med. Clinic, supra.*

The phrases "arising out of" and "in the course of" in § 48-101 are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist. *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996); *Johnson v. Holdrege Med. Clinic, supra.*

The phrase "arising out of," as used in § 48-101, describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident. *Cox v. Fagen Inc., supra*; *Johnson v. Holdrege Med. Clinic, supra.*

An injury sustained by an employee while going to and from work, at a fixed place of employment, does not arise out of and in the course of employment. See, *Johnson v. Holdrege Med. Clinic, supra*; *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 380 N.W.2d 243 (1986); *Acton v. Wymore School Dist. No. 114*, 172 Neb. 609, 111 N.W.2d 368 (1961). This rule is usually referred to as the "going and coming" rule or the "premises" rule. See *Livingstone v. Abraham & Straus*, 216 N.J. Super. 685, 524 A.2d 876 (1987).

This court has characterized the premises rule as a bright-line rule, under which an employee can recover for an injury sustained while going to and from work only if that injury occurred while the employee was on the employer's premises. *Johnson v. Holdrege Med. Clinic, supra.* Thus, in *Johnson*, an employee who was injured while walking to work on public property from a public parking lot could not recover workers' compensation benefits because the injury occurred off the employer's premises. However, we have previously allowed compensation when an employer furnished transportation to work and an employee was injured while being transported in the employer-owned vehicle. *Butt v. City Wide Rock Exc. Co.*, 204 Neb. 126, 281 N.W.2d 406 (1979); *Schademann v. Casey*, 194 Neb. 149, 231 N.W.2d 116 (1975).

The concurrence in *Johnson* stated that because Johnson was injured while traveling between a public, non-employer-controlled area, Johnson's injuries did not arise out of and in the course of employment. However, citing cases where employees received workers' compensation benefits after they were injured while traveling on public areas between portions of the employers' premises, the concurrence stated that by owning or sponsoring a lot off the working premises, an employer creates a condition whereby the employee must face hazards lying between the two premises, causing a situation arising out of and in the course of employment that establishes a causal connection between the conditions of coming and going to work and the injury. Thus, the concurrence in *Johnson* would analyze cases dealing with going to and coming from work by "determining whether a distinct causal connection exists between an employer-created condition and the occurrence of an injury." 249 Neb. at 88, 541 N.W.2d at 405.

Other jurisdictions have held that when an employee is injured while on a public area between an employer-owned parking lot and the place of employment, the public area is considered to be part of the employer's premises if the employee took a reasonably direct route between the two areas. *Simkins v General Motors Corp*, 453 Mich. 703, 556 N.W.2d 839 (1996). However, when an employee parks in a public area not controlled by the employer and is injured prior to reaching the

employer's premises, the employee will not be able to recover workers' compensation benefits. *Id.* These rules allow recovery for injuries that occur on property not owned, leased, or maintained by the employer, but limits recovery to situations in which the employer has some control or responsibility over the area. *Id.* Thus, recovery has been allowed for injuries that occurred in parking lots used, but not owned, by the employer. *Livingstone v. Abraham & Straus, supra*; *Quality Car Wash v. Cox*, 438 A.2d 1243 (Del. Super. 1981), *rev'd on other grounds* 449 A.2d 231 (1982); *C. Iber & Sons, Inc. v. Ind. Com.*, 81 Ill. 2d 130, 407 N.E.2d 39 (1980).

Unlike *Johnson*, where the employer did not sponsor or provide parking, the employer in the instant case encouraged or instructed employees to park in the Dill Field lot, which was often the only parking area available. Most importantly, the employer specifically provided transportation to the workplace from the lot. By providing transportation, the employer created a condition under which its employees will necessarily encounter hazards while traveling to the premises where they work. Thus, there is a distinct, causal connection between the employer's sponsoring of the parking lot and the occurrence of La Croix's injury. Accordingly, because such a causal connection was present in the instant case, the injury to La Croix arose out of and in the course of her employment. La Croix's motion for attorney fees will be considered upon compliance with Neb. Ct. R. of Prac. 9F (rev. 1996).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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