STATE OF NEBRASKA, APPELLEE, V. HERMAN D. BUCKMAN, APPELLANT.

675 N.W.2d 372

Filed March 5, 2004. No. S-03-627.

1. **Statutes: Intent.** 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.
2. **Statutes: Legislature: Intent: Appeal and Error.** In construing a statute, an appellate court should consider the statute's plain meaning in pari materia and from its language as a whole to determine the intent of the Legislature.
3. **Statutes: Legislature: Intent.** A preamble or policy statement in a legislative act is not generally self-implementing, but may be used, if needed, for assisting in interpreting the legislative intent for the specific act of which the statement is a part.
4. **Motions for New Trial: Legislature: DNA Testing.** In the DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2002), the Legislature provided (1) an extraordinary remedy, vacation of the judgment, for the compelling circumstance in which actual innocence is conclusively established by DNA testing and (2) an ordinary remedy, a new trial, for circumstances in which newly discovered DNA evidence would have, if available at the former trial, probably produced a substantially different result.
5. **Words and Phrases.** To "exonerate" is to relieve, especially of a charge, obligation, or hardship, or clear from accusation or blame.
6. **Motions to Vacate: DNA Testing: Appeal and Error.** The court should set aside and vacate a conviction under the DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2002), only where (1) the DNA testing results exonerate or exculpate the person and (2) the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged.
7. **Criminal Law: Motions for New Trial: Evidence: Proof.** A criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.
8. **Statutes: Legislature: Presumptions: Judicial Construction.** When legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the Supreme Court construing and applying it.
9. **Motions for New Trial: DNA Testing.** To warrant a new trial, the court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2002), must be of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.
10. **Motions to Vacate: DNA Testing.** The DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2002), establishes a clear procedural framework for movants seeking relief pursuant to the DNA Testing Act. First, a movant may obtain DNA testing if, inter alia, the testing may produce noncumulative, exculpatory evidence relevant to

the claim that the person was wrongfully convicted or sentenced. Second, the court may vacate and set aside the judgment in circumstances where the DNA testing results are either completely exonerative or highly exculpatory—when the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. This requires a finding that guilt cannot be sustained because the evidence is doubtful in character and completely lacking in probative value. Third, in other circumstances where the evidence is merely exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.

11. **Motions for New Trial: DNA Testing: Appeal and Error.** A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2002), is addressed to the discretion of the district court, and unless an abuse of discretion is shown, the court's determination will not be disturbed.

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

Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Herman D. Buckman was charged with and subsequently found guilty of, pursuant to jury verdict, the first degree murder of Denise Stawkowski, and use of a weapon to commit a felony. He was also determined to be a habitual criminal. On March 2, 1989, Buckman was sentenced to life imprisonment on the murder conviction and to 20 to 60 years' imprisonment on the weapons charge, as enhanced by the habitual criminal statute, to be served consecutively to the sentence imposed for the murder. We affirmed Buckman's convictions and sentences on direct appeal, and later affirmed the district court's denial of Buckman's motion for postconviction relief. See *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991) (direct appeal), and *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000) (postconviction).

The present appeal arises from a request for deoxyribonucleic acid (DNA) testing brought by Buckman pursuant to the DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2002). An evidentiary hearing was held following DNA testing of certain forensic evidence from Buckman's trial, but the district court denied Buckman's motion to vacate and set aside his convictions, brought under § 29-4123(2), and his motion for new trial based on newly discovered evidence, brought under § 29-4123(3) and Neb. Rev. Stat. § 29-2101 et seq. (Cum. Supp. 2002). Buckman appeals from the denial of those motions, arguing that the district court erred in denying each of his motions.

I. BACKGROUND

1. Trial Evidence

The victim was found dead during the early morning hours of February 19, 1988, when a passer-by noticed her green, four-door Chevrolet in a roadside ditch in northwest Lincoln. The victim was found lying across the front seat of the car, dead from two gunshot wounds to the head. In *State v. Buckman*, 259 Neb. at 927-28, 613 N.W.2d at 469-70, we summarized the record established at Buckman's trial as follows:

> The record shows that at the time of her death on February 19, 1988, the victim was a 25-year-old wife and mother of four children. She was a drug dealer and a drug user who sold drugs to several people.
>
> The victim's husband testified that the victim began selling small quantities of methamphetamine to Buckman and Goldie Fisher in December 1987. The victim kept a record of her drug transactions in a blue trifold ledger, along with the drugs, money, and razor blades for dividing the drugs. In January 1988, Buckman and Fisher began to purchase cocaine from the victim. Buckman and Fisher paid for the drugs with cash or offered merchandise in exchange for the drugs.
>
> Shortly before the murder, Buckman became dissatisfied with either the quantity or quality of the drugs he was buying from the victim. On at least one occasion, Buckman threatened to steal any drugs the victim might have had.

The morning before the day of the murder, Buckman and Fisher traded a VCR for the balance due on an "eight-ball" of drugs received earlier in the week from the victim. Later that day, they were trying to sell leather jackets and baby clothes to get money to pay Fisher's babysitter. A few hours before the murder, they tried to sell or trade a ".38 Special" gun to the victim's husband for drugs. The same caliber gun was used to kill the victim.

It was established that when the victim was with Fisher at approximately 1 a.m. on February 19, 1988, the victim's purse contained roughly $2,000 and three eight-balls of cocaine. None of these items were found with the victim's body when it was discovered at approximately 3:20 the same morning. On February 19, after the murder, Buckman and Fisher spent large amounts of cash in Lincoln, but when they were arrested, the baby clothes and leather coats were still in Buckman's car. At that time, Buckman had $656 in cash in his possession.

Karen Niemann testified that she picked up Fisher, who was alone on a road near the location of the murder, at approximately 1:30 a.m. This was within the timeframe for the victim's death as set by the pathologist. Other evidence placed Fisher with Buckman immediately before and after the murder.

Certain evidence placed Buckman at the scene of the murder. There were bloodstains on his clothing and on the steering wheel cover and floormats in his car. A Kool cigarette butt was found in the victim's car, and a package of Kool cigarettes and brown slippers were found near the murder scene. A cellmate of Buckman's testified that Buckman bragged that he had killed the victim in the presence of Fisher and that he had used the money he stole from the victim to pay debts.

As part of the original investigation of the murder, the bloodstains mentioned above were tested by Dr. Reena Roy, who has a Ph.D. in molecular biology and biochemistry and postdoctoral training in proteins, enzymes, and nucleic acids. Roy was a forensic serologist with the Nebraska State Patrol and was the

supervisor of the forensic serology section. The cigarette butts were tested by Dr. Moses Schanfield, who has a Ph.D. in human genetics and postdoctoral training in immunology. Schanfield was certified as a clinical laboratory director and was director of a biogenetics laboratory.

Pursuant to Buckman's request under the DNA Testing Act, the bloodstains and cigarette butts were sent to the University of Nebraska Medical Center (UNMC), where they were tested at the human DNA identification laboratory. Further details concerning each of these items, including the trial testimony and results of subsequent DNA testing, are set forth below.

2. DNA-Tested Evidence

(a) Black Leather Jacket

Buckman's clothing was seized when he was arrested, including his black leather jacket. Dr. Roy saw what she believed was blood on the jacket and cut out those areas of the fabric for analysis. Roy found blood on the jacket and concluded that the blood could not have come from Buckman, but could have come from the victim. Roy testified that she removed all the suspected bloodstains from the jacket and that she consumed all of the samples during her testing.

In the instant case, UNMC tested the jacket, and cuttings from the jacket, for hemoglobin. UNMC was unable to detect any blood on the jacket or the cuttings. As a result, no DNA testing was attempted on the jacket. DNA testing was attempted on the cuttings, but no DNA profile was recovered.

(b) Yellow Sweater

A yellow sweater was seized from Buckman when he was arrested, and scrapings from possible bloodstains were tested. Dr. Roy found blood she concluded was not Buckman's, but could have been the victim's. Roy also found another area on the sweater that she believed was blood; the area tested positive for blood, but no further testing was conducted at the time. The scrapings were entirely consumed by the testing.

In the instant case, UNMC tested the sweater for hemoglobin and found none. DNA testing was performed on two stains on the sweater, but no DNA profile was found.

(c) Black Jeans

Buckman's black jeans were seized when he was arrested and scrapings from possible bloodstains were presented to Dr. Roy, who opined that Buckman could be excluded as the source of the blood, but that the victim could not. All of the scrapings were consumed by the testing.

In the instant case, UNMC tested the jeans for hemoglobin, but found none. As a result, no DNA testing was attempted.

(d) Black Leather Cap

Buckman's black leather cap was seized when he was arrested. Dr. Roy found blood on the cap, but the amount was too small to conduct further testing.

In the instant case, UNMC tested three areas on the leather cap for hemoglobin, but because the dye from the leather was the same color as the positive control for the blood tests, the results of the tests were uninterpretable. DNA testing was nonetheless performed, but no DNA profile was detected.

(e) Brown Slippers

Investigators searched the area where the victim's car was found and discovered two brown suede slippers. One brown slipper was found on the shoulder of the road south of where the car was found, and the other was located in a nearby field. Evidence at trial suggested that Buckman was known to often wear slippers in public. Cuttings were taken from each brown slipper and tested by Dr. Roy, who excluded Buckman as the source of the blood, but found that the victim could not be excluded as the source of the blood. All the material extracted from the brown slippers was consumed during the testing.

In the instant case, UNMC tested the cuttings from each of the brown slippers for hemoglobin. The test on the cutting from the left brown slipper was negative, but the test for the cutting from the right brown slipper was a weak positive. DNA testing was performed on each of the cuttings, but no DNA profile was found.

At the original trial, Roy's opinion regarding the jacket, sweater, jeans, and brown slippers was based on her findings that the blood was blood group A and enzyme AK 2-1. It should be noted that identical bloodstains, containing blood group A

and enzyme AK 2-1, were found on the steering wheel cover and floormats of Buckman's Cadillac.

(f) Cigarette Butts

A search of the victim's automobile revealed two smoked cigarette butts on the rear floorboard behind the passenger seat. One of the cigarette butts was identified as being a Kool cigarette, while the other was later identified as a Camel cigarette. In a field near the vehicle, investigators found a pair of blue house slippers, which were near an open package of Kool cigarettes, opened from the bottom. Evidence at trial indicated that Buckman smoked Kool cigarettes and opened his cigarette packages from the bottom. Testimony at trial also indicated that Fisher was known to often wear blue bedroom slippers, even in public.

Dr. Schanfield tested the cigarette butts as part of the original investigation. Schanfield tested the two cigarette butts and two control-group cigarettes, also Kool and Camel brand, for four different qualities: (1) A2M immunoglobin allotype, (2) KM immunoglobin allotype, (3) ABH blood group, and (4) Lewis blood group substance. These findings were compared to samples from Buckman, Fisher, and Eric Beckwith, the resident of the apartment outside which Fisher and Buckman were arrested.

The results of these tests were complicated by the possibility that each of the cigarettes might have been smoked by more than one person. Schanfield concluded that Buckman could not be excluded as the person who smoked the Kool and that if the Kool was smoked by only one person, Beckwith and Fisher were excluded as that person. Schanfield testified that the frequency of the qualities for which the cigarette butts were tested, listed above, was such that the qualities found on the Kool were found in 0.7 percent of the white population of the United States and 4.8 percent of the black population of the United States. With respect to the Camel cigarette, Schanfield was able to determine only that the victim and Beckwith were excluded as the smoker of the Camel, but that Fisher and Buckman were not.

In the instant case, the cigarette butts were presented to UNMC for testing in a plastic bag labeled as "Exhibit 114" at Buckman's original trial. At the trial, the bag had contained the two cigarette butts from the victim's car and the two control-group cigarettes.

When received by UNMC in the instant case, the bag contained seven commingled items, which were organized by UNMC and labeled as items 4A through 4G. UNMC attempted to extract DNA from each of the items, and a partial DNA profile was obtained from two of the items: 4B, a cigarette butt consisting of paper and a partial filter, and 4C, a cigarette butt consisting only of paper. No DNA profile was obtained from any of the other items. Because DNA testing had already been ordered and completed, the State did not argue, pursuant to § 29-4120(5), that the cigarette butts had not been retained under circumstances likely to safeguard the integrity of their original physical composition.

Item 4B appears to have come from a smoked cigarette, but it is impossible to determine if it came from the Kool or Camel cigarette. UNMC's testing indicated that the DNA on item 4B came from more than one individual. Buckman could have been a contributor of some of the alleles detected, but could not have been a contributor of some of the others. Dr. Ronald Rubocki, the director of the UNMC's human DNA identification laboratory, at one point opined that Buckman was not a contributor to the DNA found on item 4B. Rubocki later retreated from that opinion and characterized the results of the testing as "inconclusive."

Item 4C is from a Kool cigarette, apparently unsmoked—probably the control-group Kool cigarette. How the control-group cigarette would have come to have DNA on it is unknown, but could have resulted from the handling or storage of the contents of exhibit 114. The test results for item 4C were consistent with a partial profile from the victim, but also with a possible mixture from more than one individual. Buckman could have contributed some of the alleles found on item 4C, but could not have contributed some others. As with item 4B, the results of the testing of item 4C are best summarized as inconclusive.

3. District Court Findings

The district court found, with respect to Buckman's jacket, sweater, and jeans, and the brown slippers, that it was questionable whether UNMC's findings were favorable to Buckman or material to the issue of his guilt. The court found no reasonable probability that any of the evidence from UNMC's testing of these items would have, if presented at trial, led to a different result.

Because UNMC was unable to derive any results from testing of the leather cap, the court found that there was no newly discovered evidence with respect to this item.

With respect to the cigarette butts, the court discussed the inconclusive nature of UNMC's results. The court found that although it was possible that UNMC's test results from cigarette butts 4B and 4C were favorable to Buckman and material to the issue of his guilt, there was no reasonable probability that presentation of that evidence to a trier of fact would have ended in a different result.

The court concluded that none of the evidence resulting from UNMC's testing exonerated, exculpated, or proved the innocence of Buckman; therefore, the court denied Buckman's motion to vacate and set aside his convictions. The court also concluded there was no reasonable possibility that presentation of UNMC's testing results at trial would have produced a different result. Thus, the court also denied Buckman's motion for a new trial.

II. ASSIGNMENT OF ERROR

Buckman assigns, consolidated, that the district court erred in refusing to vacate his convictions and grant a new trial as provided in the DNA Testing Act and § 29-2101 et seq.

III. ANALYSIS

1. Statutory Framework of DNA Testing Act

The factual findings of the district court are not disputed by the parties. Rather, the parties disagree about the legal significance of those findings. Buckman's motions for relief are brought pursuant to § 29-4123, which provides:

> (1) The results of the final DNA or other forensic testing ordered under subsection (5) of section 29-4120 shall be disclosed to the county attorney, to the person filing the motion, and to the person's attorney.
>
> (2) Upon receipt of the results of such testing, any party may request a hearing before the court when such results exonerate or exculpate the person. Following such hearing, the court may, on its own motion or upon the motion of any party, vacate and set aside the judgment and release the person from custody based upon final testing results exonerating or exculpating the person.

> (3) If the court does not grant the relief contained in subsection (2) of this section, any party may file a motion for a new trial under sections 29-2101 to 29-2103.

Our disposition of this appeal is governed by the principles we recently articulated in *State v. Bronson, ante* p. 103, 672 N.W.2d 244 (2003). At oral argument, however, Buckman took issue with our holding in *Bronson*. Because Buckman's appearance at oral argument was his only opportunity to address our decision in *Bronson*, we choose to consider and respond to his arguments in that regard. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

Buckman argues that *Bronson* interpreted the DNA Testing Act too restrictively, making it too difficult for a movant under the DNA Testing Act to obtain relief based on the results of DNA testing. Buckman's argument, as we understand it, is that a movant should be entitled to have his conviction vacated and set aside whenever the results of DNA testing show a reasonable probability that had the DNA evidence been available at trial, the result of the proceeding would have been different. Compare *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (establishing standard for when constitutional due process is violated by prosecutorial failure to disclose evidence favorable to accused). However, Buckman's argument is not consistent with the legislative scheme established by the DNA Testing Act and does not account for the Legislature's express provision of separate remedies based upon differing results of DNA testing.

The initial step toward obtaining relief under the DNA Testing Act is for a person in custody to file a motion requesting forensic DNA testing of biological material. See § 29-4120. Forensic DNA testing is available for any biological material that is related to the investigation or prosecution that resulted in the judgment; is in the actual or constructive possession of the state, or others likely to safeguard the integrity of the biological material; and either was not previously subjected to DNA testing or can be retested with more accurate current techniques. See *id.* Once these thresholds are met, the court may order testing upon a determination that such testing was not effectively available at the time of trial, that the biological material has been retained

under circumstances likely to safeguard its integrity, and that the testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced. See *id.* See, generally, *State v. Poe*, 266 Neb. 437, 665 N.W.2d 654 (2003).

The most significant part of this process, for purposes of the current analysis, is the requirement that the testing "may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced." See § 29-4120(5). Exculpatory evidence is defined as evidence favorable to the person in custody and material to the issue of the guilt of the person in custody. § 29-4119. Contrary to Buckman's suggestion, this requirement is relatively undemanding for a movant seeking DNA testing and will generally preclude testing only where the evidence at issue would have no bearing on the guilt or culpability of the movant. See, generally, *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

Once DNA testing is conducted, and results are obtained, the question is whether the evidence obtained exonerates or exculpates the movant. Based on the test results, the movant may obtain relief in one of two ways, each of which requires a different quantum of proof. As previously noted, when the test results exonerate or exculpate the movant, the court may "vacate and set aside the judgment and release the person from custody." § 29-4123(2). However, if the court does not vacate and set aside the judgment, the movant may file a motion for new trial based upon "newly discovered exculpatory DNA or similar forensic testing obtained under the DNA Testing Act." See § 29-2101(6).

[1] It would make little sense to conclude that the Legislature provided two separate remedies, but intended those remedies to be redundant. 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. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). Rather, the Legislature explained that the DNA Testing Act is intended to respond to two different circumstances. "Because of its scientific precision and reliability, DNA testing can, *in some cases*, conclusively establish the guilt or innocence of a criminal defendant. *In other cases*, DNA may not conclusively establish guilt or

innocence but may have significant probative value to a finder of fact." (Emphasis supplied.) § 29-4118(2). The Legislature further explained that DNA testing "can in some circumstances prove that a conviction which predated the development of DNA testing was based upon incorrect factual findings," but in other circumstances, "can provide a more reliable basis for establishing a correct verdict than any evidence proffered at the original trial." § 29-4118(4).

[2-4] In construing a statute, an appellate court should consider the statute's plain meaning in pari materia and from its language as a whole to determine the intent of the Legislature. *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). A preamble or policy statement in a legislative act is not generally self-implementing, but may be used, if needed, for assisting in interpreting the legislative intent for the specific act of which the statement is a part. See *Southern Neb. Rural P.P. Dist. v. Nebraska Electric*, 249 Neb. 913, 546 N.W.2d 315 (1996). When read in pari materia, both the language and expressed intent of the DNA Testing Act support the conclusion that the Legislature provided (1) an extraordinary remedy, vacation of the judgment, for the compelling circumstance in which actual innocence is conclusively established by DNA testing and (2) an ordinary remedy, a new trial, for circumstances in which newly discovered DNA evidence would have, if available at the former trial, probably produced a substantially different result. See *State v. Bronson, ante* p. 103, 672 N.W.2d 244 (2003).

[5,6] Section 29-4123(2) provides that a court may vacate and set aside a judgment based on test results that "exonerate or exculpate" an accused. This is a greater remedy than merely granting a new trial and is logically intended to apply to those cases in which DNA test results "conclusively establish the guilt or innocence of a criminal defendant." See § 29-4118(2). This is reflected in the Legislature's use of the word "exonerate," which means "to relieve[,] esp. of a charge, obligation, or hardship . . . clear from accusation or blame." Webster's Third New International Dictionary of the English Language, Unabridged 797 (1993). Accord 5 The Oxford English Dictionary 548 (2d ed. 1989) (to "exonerate" is "to free from blame"). Clearly, the Legislature expected that a judgment would be vacated and set aside only

where the results of DNA testing either completely exonerated the movant or were highly exculpatory. In order to effectuate the Legislature's intent, we held in *Bronson, supra*, that the court should set aside and vacate a conviction only where (1) the DNA testing results exonerate or exculpate the person and (2) the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged.

[7] But as the Legislature noted, in other cases, "DNA may not conclusively establish guilt or innocence but may have significant probative value to a finder of fact." See § 29-4118(2). For those cases, where the evidence obtained is merely exculpatory, the Legislature provided a lesser but still effective remedy: a motion for new trial under § 29-2101 et seq. Section 29-2101 is the operative version of the statute governing new trials in criminal cases that has been in effect for well over a century. Compare Gen. Stat. ch. 58, § 490, p. 831 (1873). It is equally well established that a criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result. See, e.g., *State v. Atwater*, 245 Neb. 746, 515 N.W.2d 431 (1994). Compare *Ogden v. The State*, 13 Neb. 436, 438, 14 N.W. 165, 166 (1882) ("general rule as to newly discovered evidence may be stated thus: That if, with the newly discovered evidence before them, the jury should not have come to the same conclusion, a new trial will be granted").

[8,9] At the same time it enacted the DNA Testing Act, the Legislature amended § 29-2101 to provide that "[a] new trial, after a verdict of conviction, may be granted, on the application of the defendant" based upon "(6) newly discovered exculpatory DNA or similar forensic testing evidence obtained under the DNA Testing Act." When legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the Supreme Court construing and applying it. *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000); *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). See, also, *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994). Because the

Legislature specifically provided that motions for new trial based on newly discovered exculpatory DNA evidence were to be brought under § 29-2101, we presume that the Legislature intended for our long-established interpretation of § 29-2101 to apply to those motions. Consequently, we held in *State v. Bronson, ante* p. 103, 672 N.W.2d 244 (2003), that to warrant a new trial, the district court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act must be of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.

[10] In short, the DNA Testing Act, and our decision in *Bronson, supra*, establish a clear procedural framework for movants seeking relief pursuant to the DNA Testing Act. First, a movant may obtain DNA testing if, inter alia, the testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced. See § 29-4120(5). Second, the court may vacate and set aside the judgment in circumstances where the DNA testing results are either completely exonerative or highly exculpatory—when the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. See, § 29-4123(2); *Bronson, supra*. This requires a finding that guilt cannot be sustained because the evidence is doubtful in character and completely lacking in probative value. Third, in other circumstances where the evidence is merely exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result. See, §§ 29-4123(3) and 29-2101(6); *Bronson, supra*.

Having considered Buckman's arguments, we decline his invitation to reconsider our holdings in *Bronson, supra*, and conclude that the principles articulated in *Bronson* are controlling in the instant case. Based on those principles, we in turn address Buckman's arguments with respect to each of his motions in the district court.

2. MOTION TO VACATE AND SET ASIDE JUDGMENT

We explained in *Bronson, supra*, that a motion to vacate and set aside the judgment pursuant to § 29-4123(2) is similar to a motion to dismiss in a criminal case and that therefore, a standard comparable to that which is applied to a motion to dismiss in a criminal case should apply with respect to a motion under § 29-4123(2). We held that

> a court may properly grant a motion to vacate and set aside the judgment under § 29-4123(2) when (1) the DNA testing results exonerate or exculpate the person and (2) the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. This requires a finding that guilt cannot be sustained because the evidence is doubtful in character and completely lacking in probative value.

State v. Bronson, ante p. 103, 111, 672 N.W.2d 244, 250-51 (2003).

It is evident, without unnecessary elaboration, that none of the DNA testing results in this case meet the standard articulated in *Bronson, supra*. As did the district court, we question whether any of the DNA testing results can be said to exonerate or exculpate Buckman. But it is clear that those results, when considered with the evidence of the case resulting in Buckman's convictions, do not show a complete lack of evidence to establish any element of the crimes charged. The evidence from Buckman's trial, as summarized above, remains sufficient to establish all the elements of Buckman's convictions. As will be explained in further detail below, the DNA testing performed in this case does not serve to falsify or even undermine any of the evidence upon which Buckman's convictions were based. The district court correctly denied Buckman's motion to set aside or vacate the judgment against him pursuant to § 29-4123(2).

3. MOTION FOR NEW TRIAL

[11] As previously stated, to warrant a new trial, the district court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act must be of such a nature that if it had been offered and admitted at the former

trial, it probably would have produced a substantially different result. *Bronson, supra.* A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is addressed to the discretion of the district court, and unless an abuse of discretion is shown, the court's determination will not be disturbed. *Bronson, supra.*

We first address the testing of bloodstains on Buckman's clothing. We note the similarity between the circumstances presented here and those presented in *Bronson, supra.* In *Bronson*, the defendant's fingerprint was found, apparently left in blood, on a vase located at the scene of a murder. Dr. Roy conducted a presumptive test for blood, which she testified was positive. Pursuant to the defendant's motion for DNA testing, the substance on the vase was tested by UNMC. The substance generated partial DNA profiles, but results regarding the contributors to those profiles were inconclusive. See *id.*

On appeal, the defendant in *Bronson* asserted that the DNA testing of the fingerprint failed to prove that it was made in his blood or the victim's blood, or even that the substance was human blood. We rejected the defendant's argument, stating in part:

> With respect to the vase, the DNA testing did not establish that the substance was not human blood. Furthermore, the DNA-tested evidence is not inconsistent with the evidence presented at trial which indicated that the substance likely was blood. . . .
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> . . . .
>
> In sum, the DNA testing results do not warrant the relief [the defendant] seeks. The evidence obtained under the DNA Testing Act is not of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.

Bronson v. State, ante p. 103, 114-15, 672 N.W.2d 244, 253 (2003).

In the instant case, UNMC's testing of Buckman's clothing was unable to discern the presence of blood. But this is entirely consistent with Dr. Roy's testimony that the scrapings of blood she obtained were entirely consumed by the testing conducted during the original investigation. UNMC's results do not verify the testimony and evidence adduced at Buckman's trial regarding

the bloodstains, but neither do they serve to discredit or falsify that testimony and evidence. The evidence obtained pursuant to the DNA Testing Act is not such that if it had been presented at Buckman's trial, it probably would have produced a substantially different result.

We now turn to the claim upon which Buckman primarily relies: that the DNA testing of the cigarette butts warrants a new trial. Buckman argues that Dr. Schanfield's opinion at his original trial was premised on the assumption that only one person smoked the Kool cigarette and that since the cigarettes that were tested for DNA each showed genetic material from multiple contributors, Schanfield's opinion is "now basically worthless." Brief for appellant at 24.

This argument overstates the reliability and import of the results from UNMC's testing of the cigarette butts. First, Buckman's argument is premised on an unproven assumption: that the genetic material found on the cigarette butts by UNMC accurately reflects the condition of the evidence when it was tested by Schanfield for the original investigation. This is not a safe assumption, however, given the method with which the evidence was stored and the inability to even identify the items tested by UNMC with reference to the exhibits from trial. Simply stated, by the time the cigarette butts reached UNMC, it had become impossible to tell which cigarette butt was which. Moreover, since the cigarette butts were all stored together, it cannot be assumed that the genetic material found on each cigarette was deposited there by a smoker. Testimony from Drs. Schanfield and Rubocki indicated that simply handling evidence can result in cross-contamination of genetic material.

Furthermore, even if we accept Buckman's contentions that more than one person smoked the cigarettes and that the cigarettes tested were the same cigarettes found in the victim's car, the most that can be definitively concluded is that at least one person other than Buckman contributed genetic material to the cigarettes. Schanfield testified at Buckman's trial that his testimony about the percentage of the population who could have smoked the cigarette, based on the percentage of the population who shared the immunoglobin allotypes and blood group substances found on the Kool cigarette, was premised on the assumption that only one

person smoked the cigarette. Schanfield testified that if more than one person smoked the cigarette, that interpretation would change. In other words, the jury at Buckman's trial was informed of the assumption that only one person smoked the cigarette, the possibility that more than one person smoked the cigarette, and the meaning attached to that possibility.

Finally, like the district court, we note the extremely inconclusive nature of UNMC's test results. The best assessment of those results is that Buckman can neither be included or excluded as being a contributor of some of the genetic material found on the tested cigarettes. The test results, especially when considering the problems created by the commingling of the evidence, defy meaningful interpretation.

In short, UNMC's inconclusive test results, obtained after the deterioration of the evidence, do not significantly undermine Dr. Schanfield's opinion at trial, which was based on test results obtained before the deterioration of the evidence. When viewed in relation to the evidence adduced at Buckman's trial, we cannot say that the district court abused its discretion in concluding that UNMC's test results, had they been offered and admitted at Buckman's trial, would probably not have produced a substantially different result. Buckman's assignment of error is without merit.

IV. CONCLUSION

The district court did not err in denying Buckman's motion to vacate and set aside the judgment, and did not abuse its discretion in denying Buckman's motion for a new trial. The judgment of the district court is affirmed.

AFFIRMED.

WARREN STRONG, APPELLANT, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

676 N.W.2d 15

Filed March 12, 2004. No. S-02-292.

1. **Motor Vehicles: Licenses and Permits: Revocation: Equity: Appeal and Error.** In an appeal of a revocation of a motor vehicle operator's license, the district court hears the appeal as in equity without a jury and determines anew all questions raised before the director of the Department of Motor Vehicles.
2. **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.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Criminal Law: Bail Bond: Words and Phrases.** An appearance bond is generally defined as a type of bail bond required to insure the presence of the defendant in a criminal case.
5. **Motor Vehicles: Licenses and Permits: Convictions: States: Words and Phrases.** Under article III(b) of the Driver License Compact, the "conduct" to which the compact refers is the conduct which occurred in the party state, which conduct led to the proceedings in the party state resulting in a "conviction" under the compact.
6. **Motor Vehicles: Licenses and Permits: Revocation: States: Final Orders: Collateral Attack.** Under the Driver License Compact, in a proceeding to revoke a commercial driver's license in the driver's home state based on out-of-state conduct leading to a "conviction" under the compact, such conviction is final and conclusive and generally not subject to collateral attack in Nebraska.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Scotts Bluff County, RANDALL L. LIPPSTREU, Judge. Judgment of Court of Appeals affirmed.

Bell Island, of Island & Huff, Attorneys at Law, P.C., L.L.O., for appellant.

Don Stenberg, Attorney General, Milissa D. Johnson-Wiles, and, on brief, Hobert B. Rupe for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

The commercial driver's license of Warren Strong, appellant, was administratively revoked by the Department of Motor Vehicles, appellee, based on the determination of the department that Strong's conduct and legal proceedings in Wyoming amounted to a "conviction" under the Driver License Compact (Compact), 2A Neb. Rev. Stat. app. § 1-113 (Reissue 1995). The case in Wyoming commenced on May 14, 2001, when Strong was issued a citation for driving under the influence of alcohol. The Scotts Bluff County District Court sustained the administrative revocation of Strong's commercial driver's license. The Nebraska Court of Appeals affirmed the district court's order. *Strong v. Neth*, No. A-02-292, 2003 WL 21523796 (Neb. App. July 8, 2003) (not designated for permanent publication). Strong filed a petition for further review of the decision of the Court of Appeals. We granted the petition for further review. We affirm.

STATEMENT OF FACTS

The facts, which are essentially undisputed, are as follows: On May 14, 2001, Strong was operating a commercial vehicle in Goshen County, Wyoming, when he came into contact with Trooper David Cunningham of the Wyoming State Patrol at a weigh station. As a result of that contact, Cunningham administered a preliminary breath test (PBT). The PBT revealed that Strong's blood alcohol concentration exceeded Wyoming's 0.04-percent legal limit for commercial drivers. As a result of the PBT, Cunningham issued Strong a citation for driving under the influence. The citation is not part of the record on appeal.

In an affidavit Strong filed with the district court and contained in the bill of exceptions, he states that he "received a ticket" on May 14, 2001. He further states that at the time he received the ticket, he did not post a bond, bail, or security to guarantee his appearance in court on the ticket. He also asserts in his affidavit that he did not sign any document guaranteeing any type of bond, bail, or security to secure his appearance. In his affidavit, he states that "he sent in a fine in lieu of appearing in court."

A copy of the "Abstract of Court Record" from the State of Wyoming is found in the transcript on appeal. The abstract

identifies Strong as the "Defendant," provides "Statute No: 31-18-701a" under the offense information, and gives a description for the offense as ".04% Alcohol Viol Reg." The abstract identifies the court in which the action took place as "CCTOR" and "Judge: Arp/ Randal." Elsewhere in the abstract, there is a stamp certifying the abstract, and the stamp identifies the court as the Circuit Court for the Eighth District in Goshen County and the judge as Randal R. Arp. The abstract also sets forth that there was no trial. The abstract reflects that there was a "Finding of Forfeiture Entered on" June 7, 2001. The abstract provides that Strong paid a "Forfeiture" in the amount of $130, plus "Costs" in the amount of $30, for a total payment of $160. The abstract provides a space to enter the amount of a "Fine," if any, and in this space, the abstract indicates that the fine was "$0.00."

As a result of receiving notice from the State of Wyoming concerning the Wyoming proceeding, on June 29, 2001, the Nebraska Department of Motor Vehicles revoked Strong's commercial driver's license for 1 year. Strong appealed the department's decision to the Scotts Bluff County District Court, which sustained the revocation.

Strong appealed the district court's order to the Court of Appeals. For his single assignment of error before the Court of Appeals, Strong asserted that the district court erred "when it determined that the Wyoming offense properly complied with the [Compact], and therefore, required a revocation of Strong's Commercial Drivers License."

The Compact, which has been adopted by both Nebraska and Wyoming, provides in pertinent part:

> ARTICLE I
> Definitions
>
> As used in this compact:
>
> . . . .
>
> (c) Conviction means a conviction of any offense related to the use or operation of a motor vehicle which is prohibited by state law . . . or a forfeiture of bail, bond, or other security deposited to secure appearance by a person charged with having committed any such offense, and which conviction or forfeiture is required to be reported to the licensing authority.

ARTICLE II
Reports of Conviction

The licensing authority of a party state shall report each conviction of a person from another party state occurring within its jurisdiction to the licensing authority of the home state of the licensee. Such report shall clearly identify the person convicted; describe the violation specifying the section of the statute . . . violated; identify the court in which action was taken; indicate whether a plea of guilty or not guilty was entered, or the conviction was a result of the forfeiture of bail, bond or other security; and shall include any special findings made in connection therewith.

ARTICLE III
Effect of Conviction

. . . .

(b) [T]he licensing authority in the home state shall give such effect to the conduct as is provided by the laws of the home state.

See 2A Neb. Rev. Stat. app. § 1-113.

Relying in part upon this court's four-part analysis in *Jacobson v. Higgins*, 243 Neb. 485, 500 N.W.2d 558 (1993), the Court of Appeals concluded that under the Compact, the Wyoming proceeding could be used by the department as the basis for the revocation of Strong's commercial driver's license issued in Nebraska if certain requirements were met. See *Strong v. Neth*, No. A-02-292, 2003 WL 21523796 (Neb. App. July 8, 2003) (not designated for permanent publication). Those requirements are as follows:

(1) The Wyoming proceeding met the Compact's definition of a "conviction,"

(2) the conviction was one which Wyoming law required to be reported to the state licensing authority,

(3) the Wyoming abstract contained the information required under the Compact, and

(4) Nebraska law provided that Strong's conduct could be used to revoke Strong's commercial driver's license.

The Court of Appeals analyzed each of these four requirements. First, referring to Strong's admission that he " 'sent a fine in lieu of appearing in court' " and the language in the abstract

that indicated that $130 was allocated to "forfeiture," the Court of Appeals concluded that the Wyoming proceeding met the Compact's definition of a "conviction." *Strong v. Neth*, 2003 WL 21523796 at *2. Second, the Court of Appeals reviewed relevant provisions of Wyoming's driving under the influence laws and determined that "the Goshen County Court was required . . . to report Strong's conviction to the Wyoming licensing authority." *Id.* Third, the Court of Appeals examined the abstract and concluded that it contained the information required under the Compact. Finally, based upon Neb. Rev. Stat. § 60-4,168 (Reissue 1998), the Court of Appeals concluded that Strong's conduct in Wyoming could also be used in Nebraska to revoke his commercial driver's license. Section 60-4,168 provides that

> a person shall be disqualified from driving a commercial motor vehicle for one year:
>
> . . . .
>
> . . . Upon a first administrative determination . . . that such person while driving a commercial motor vehicle in this or any other state . . . had a concentration of . . . four-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath . . . .

Based upon this reasoning, the Court of Appeals affirmed the district court's decision sustaining the department's revocation order. *Strong v. Neth, supra*. Strong filed a petition for further review, which we granted. We affirm.

ASSIGNMENT OF ERROR

In his petition for further review, Strong claims that the "Court of Appeals erred in determining the conviction from Wyoming properly complied with the . . . Compact for purposes of allowing a [revocation] under Nebraska Law."

STANDARDS OF REVIEW

[1,2] In an appeal of a revocation of a motor vehicle operator's license, the district court hears the appeal as in equity without a jury and determines anew all questions raised before the director of the Department of Motor Vehicles. See, Neb. Rev. Stat. § 60-4,105(3) (Cum. Supp. 2000); *Jacobson v. Higgins*, 243 Neb. 485, 500 N.W.2d 558 (1993). 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. *Jacobson, supra.*

[3] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Estate of Breslow*, 266 Neb. 953, 670 N.W.2d 797 (2003).

ANALYSIS

In his petition for further review, Strong does not challenge the Court of Appeals' reliance on the four-part analysis derived from *Jacobson* to the effect that the Wyoming proceeding must satisfy four requirements under the Compact in order to be used by the department as the basis to revoke his commercial driver's license. Rather, on further review, Strong claims that the Court of Appeals erred in concluding that the Wyoming proceeding met two of those requirements. First, he claims that the Court of Appeals erred when it concluded that the Wyoming proceeding met the Compact's definition of a "conviction." Second, Strong claims the Court of Appeals erred in concluding that under Nebraska law, Strong's conduct in Wyoming could be used to revoke his commercial driver's license in Nebraska.

Strong's Wyoming Forfeiture as "Conviction" Under Compact.

On further review, Strong claims for his first argument that the Wyoming abstract fails to show a "conviction" as defined under the Compact. We disagree.

Under article I(c) of the Compact, "Conviction means a conviction of any offense related to the use or operation of a motor vehicle which is prohibited by state law . . . or a forfeiture of bail, bond, or other security deposited to secure appearance by a person charged with having committed any such offense." For the reasons cited below, we conclude Strong effectively forfeited a bond under Wyoming law and, therefore, there was a "conviction" as "conviction" is used in article I(c) of the Compact.

Pursuant to Neb. Rev. Stat. § 25-12,101 (Reissue 1995), we take judicial notice of the fact that the offense listed in the

Wyoming abstract with which Strong was charged is a misdemeanor under Wyoming law. See Wyo. Stat. Ann. § 31-18-701(a) (Lexis 2003). Pursuant to Wyo. R. Crim. P. 3(b)(2) (rev. 2001), a "citation may be issued as a charging document for any misdemeanor." (This language is currently found at rule 3(b)(3) as amended.) The parties agree that Cunningham issued Strong a "citation."

Under Wyoming law, when a citation is issued, the person charged may sign a promise to appear later in court to answer the citation. Wyo. R. Crim. P. 3.1(b)(1) (rev. 2001). The person may "satisfy a promise to appear" by paying to the court "the amount of the fine and court costs." *Id.* at 3.1(d)(1).

[4] An appearance bond is generally defined as a "[t]ype of bail bond required to insure [the] presence of [the] defendant in [a] criminal case." Black's Law Dictionary 178 (6th ed. 1990). Under Wyoming law, a promise to appear serves the office of a bond in securing the defendant's appearance in court. Under rule 3.1(d)(1), a forfeiture occurs when the defendant pays "the amount of the fine and court costs" in lieu of making an actual appearance in court. In this case, Strong paid the amount of the fine but did not appear and, therefore, there was a "forfeiture."

Strong argues that when he received his citation, he did not promise to pay any "bond, bail, or other security" to secure his appearance in court. Brief for appellant at 7. Strong admits in his affidavit, however, that he paid money in lieu of appearing in court, and as a matter of law, this payment of money satisfies the definition of a "forfeiture" under Wyoming law. See rule 3.1(d)(1). Strong's payment in lieu of an appearance amounted to a forfeiture of a bond, and the Compact's definition of a "conviction" includes a "forfeiture" of a bond. Thus, Strong's Wyoming forfeiture constituted a "conviction" as used in the Compact. Accordingly, we conclude that Strong's first argument is without merit.

Conduct in Wyoming Resulting in Commercial Driver's License Revocation in Nebraska.

For his second argument, Strong claims the Court of Appeals erred when it concluded that under Nebraska law, Strong's conduct in Wyoming could be used to revoke his commercial driver's license in Nebraska. Strong refers the court to *State v.*

Klingelhoefer, 222 Neb. 219, 382 N.W.2d 366 (1986), which states that in general, PBT's are admissible for limited purposes only. We recognize that under Nebraska law, a PBT standing alone does not satisfy the requirements for a conviction for driving under the influence. *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997). Strong asserts that the Wyoming conviction based on a PBT cannot be used in Nebraska as a basis to administratively revoke Strong's commercial driver's license in Nebraska. In this way, Strong attempts to relitigate the Wyoming proceedings in a Nebraska court. This attempt is unavailing.

[5] Article III(b) of the Compact provides that "the licensing authority in the home state shall give such effect to the conduct as is provided by the laws of the home state." Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Estate of Breslow*, 266 Neb. 953, 670 N.W.2d 797 (2003). We conclude that under article III(b) of the Compact, the "conduct" to which the Compact refers is the conduct which occurred in the party state, which conduct led to the proceedings in the party state resulting in a "conviction" under the Compact. Our reading of "conduct" in article III(b) is in accord with Compact authority elsewhere. For example, in *Rigney v. Edgar*, 135 Ill. App. 3d 893, 897-98, 482 N.E.2d 367, 370, 90 Ill. Dec. 548, 551 (1985), it was observed under comparable Compact language that the "Compact clearly expresses the legislative intent to discipline [home state] licensed drivers for conduct occurring in another State" and that the "Compact gives [the home state] authority to treat the out-of-State conduct of [a home state] licensed driver as if it occurred in [the home state]." Thus, under the Compact, Nebraska must give the same effect to the conduct of driving a commercial vehicle under the influence of alcohol in Wyoming as if that conduct had occurred in Nebraska.

[6] Notwithstanding the language of article III(b) of the Compact, Strong collaterally challenges the sufficiency of the evidence derived from Wyoming's method of testing blood alcohol concentration where such method is disfavored in Nebraska. In *Johnston v. Department of Motor Vehicles*, 190 Neb. 606, 608, 212 N.W.2d 342, 343-44 (1973), a Compact case, this court

"observe[d] the licensee cannot relitigate the question of his guilt [as determined by another state] in Nebraska." Furthermore, it is generally recognized in Compact cases that a licensee cannot attack the validity of the result of the foreign proceeding when the licensee's home state commences an action to revoke the operator's license based on the out-of-state proceeding. See Annot., 87 A.L.R.2d 1019 (1963), and Annot., 85-87 A.L.R.2d Later Case Service 573 (2001 & Supp. 2003). See, e.g., *Earp v. Fletcher*, 183 Ga. App. 593, 594, 359 S.E.2d 456, 457 (1987) (stating in Compact case that motorist cannot collaterally attack underlying conviction unless it is "void on its face"); *Fetters v. Degnan*, 250 N.W.2d 25, 31 (Iowa 1977) (concluding in Compact case that trial court decision which permitted collateral attack on foreign proceeding was "erroneous as a matter of law"); *Fetty v. Com., Dept. of Transp.*, 784 A.2d 236 (Pa. Commw. 2001) (stating in Compact case that if no appeal is taken in foreign proceeding, motorist cannot collaterally attack validity of that proceeding in subsequent home state revocation proceeding). Thus, under the Compact, in a proceeding to revoke a commercial driver's license in the driver's home state of Nebraska based on out-of-state conduct leading to a "conviction" under the Compact, the outcome of the out-of-state proceeding is final and conclusive and generally not subject to collateral attack in Nebraska. See *Johnston, supra*.

In the instant appeal, the "conduct" referred to under the Compact is Strong's driving a commercial vehicle while his blood alcohol concentration was in excess of Wyoming's 0.04-percent legal limit for commercial drivers. Under the Compact, Nebraska is required to give the same effect to this conduct as if the conduct had occurred in Nebraska. Indeed, under Nebraska law, this conduct would result in the revocation of a commercial driver's license for a period of 1 year. See § 60-4,168. Thus, we conclude there is no merit to Strong's second argument on further review that the Court of Appeals erred in determining that under Nebraska law, Strong's conduct in Wyoming could be used to revoke his commercial driver's license in Nebraska.

CONCLUSION

For the reasons stated above, we conclude that the Wyoming proceeding met the Compact's definition of a "conviction." We

further conclude that Strong's conduct of driving a commercial vehicle in Wyoming while under the influence of alcohol could be used to revoke his commercial driver's license in Nebraska. We affirm the decision of the Court of Appeals which affirmed the district court's decision sustaining the department's order revoking Strong's commercial driver's license for 1 year.

AFFIRMED.

RONALD D. MEFFERD, APPELLANT, V. SIELER AND COMPANY, INC., DOING BUSINESS AS CAPRI MOTEL, APPELLEE, AND UNION INSURANCE COMPANY, GARNISHEE-APPELLEE.

676 N.W.2d 22

Filed March 12, 2004. No. S-02-885.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing 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. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.
3. **Insurance: Breach of Contract: Notice.** An insurer cannot assert a breach of a policy's notice and cooperation provision as a policy defense in the absence of a showing of prejudice or detriment to the insurer.
4. **Summary Judgment: Evidence: Proof.** A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
5. ____: ____: ____. After the movant makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents summary judgment as a matter of law shifts to the party opposing the motion.
6. **Summary Judgment.** Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.
7. **Insurance: Notice: Proof.** Prejudice is established by examining whether the insurer received notice in time to meaningfully protect its interests.

Appeal from the District Court for Hamilton County: MICHAEL OWENS, Judge. Affirmed.

Rubina S. Khaleel and David J. Feeney, of Copple & Rockey, P.C., and Jim K. McGough for appellant.

Robert W. Shively and Scott E. Tollefsen, of Shively Law Offices, P.C., L.L.O., for garnishee-appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

Ronald D. Mefferd was injured when he fell from a balcony at the Capri Motel. Seeking compensation for his injuries, Mefferd filed suit against Sieler and Company, Inc., doing business as Capri Motel (SCI). SCI did not acknowledge or respond to the summons, and Mefferd obtained a default judgment in the amount of $422,872.03. Thereafter, Mefferd instituted garnishment proceedings against SCI's insurer, Union Insurance Company (Union), to collect on the default judgment. On Union's motion for summary judgment, the district court determined that SCI failed to comply with the notice and cooperation provision of the insurance policy and granted summary judgment in favor of Union. Mefferd's appeal requires us to determine whether, as a matter of law, SCI breached the notice and cooperation provision of the policy, and if so, whether Union was prejudiced by the breach.

FACTUAL AND PROCEDURAL BACKGROUND

On September 12, 1996, Mefferd was injured when he fell from a balcony at the Capri Motel. At that time, Union insured SCI under a commercial lines policy. On January 27, 1997, Union received notice of the incident and LaWayne Nissen, a claims specialist, commenced an investigation into the accident. During his investigation, Nissen learned that at the time of the accident, Mefferd had a blood alcohol content of .230 grams of alcohol per 100 milliliters of blood. In addition, Nissen learned that Mefferd had incurred medical bills in excess of $10,000 and that he had retained the services of legal counsel. Nissen completed his investigation in March 1997, concluding that any claim by Mefferd for

damages would be without merit under Nebraska's comparative negligence statute. At that time, Mefferd had yet to file a claim against SCI. Nissen instructed the manager of the Capri Motel to refer any questions or matters concerning the incident to Union.

On December 1, 1999, Mefferd filed suit against SCI in the district court. On December 2, Barbara Sieler, the president and registered agent of SCI, was served with summons and a copy of Mefferd's petition. SCI failed to respond to the petition, and on February 9, 2000, Mefferd filed a motion for default judgment against SCI. Sieler was served with a copy of Mefferd's motion the same day. SCI failed to contest the motion, and the district court entered an order of default judgment against SCI in the amount of $422,872.03. Thereafter, Sieler received notice of the order of default judgment against SCI.

On September 27, 2000, shortly after the date on which the statute of limitations would have run on Mefferd's claim, Nissen contacted Sieler to confirm that no lawsuit had been filed. Nissen stated that this was his first contact with SCI since the completion of his investigation in March 1997 and that neither he nor Union had any knowledge of Mefferd's suit prior to this telephone call. According to Nissen, it was during this conversation that Sieler informed him of the default judgment against SCI. In response, Nissen stated that he told Sieler that Union was likely to deny coverage because the policy required SCI to notify Union when the suit was filed.

On May 23, 2001, Mefferd instituted garnishment proceedings against Union. Union answered and, subsequently, filed a motion for summary judgment against Mefferd. Essentially, Union argued that SCI failed to comply with certain policy conditions, thereby voiding Union's responsibility to provide insurance coverage to SCI for the accident. Specifically, Union asserted that SCI failed to provide it with notice of the suit and failed to cooperate in the defense of the suit and that said failures prejudiced Union because it was unable to raise, inter alia, Mefferd's contributory negligence as a bar to his claim.

The district court granted summary judgment in favor of Union. The court determined that SCI breached the policy conditions with respect to notice of the suit and cooperation in

defense of the suit and that the breach prejudiced Union. Mefferd filed a timely appeal.

ASSIGNMENT OF ERROR

Mefferd's sole assignment of error is that the district court erred in granting summary judgment in favor of Union because "genuine issues of material facts existed."

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing 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. *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003).

ANALYSIS

[2] An insurance policy is a contract. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003). Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute. *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002).

At issue here is Union's claim that SCI breached the notice and cooperation provision of the policy. The disputed provision states, in relevant part:

> **Section IV - COMMERCIAL GENERAL LIABILITY CONDITIONS**
>
> . . . .
>
> **2. Duties In The Event Of Occurrence, Offence, Claim or Suit.**
>
> . . . .
>
> **b.** If a claim is made or "suit" is brought against any insured, you must:
>
> **(1)** Immediately record the specifics of the claim or "suit" and the date received; and
>
> **(2)** Notify us as soon as practicable.

> You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
>
> c. You and any other involved insured must:
>
> (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
>
> . . . .
>
> (3) Cooperate with us in the investigation, settlement or defense of the claim or "suit". . . .

As defined in the policy, "[s]uit means a civil proceeding in which damages because of 'bodily injury', 'property damage', 'personal injury' or 'advertising injury' to which this insurance applies are alleged."

[3] The parties agree that an insurer cannot assert a breach of a policy's notice and cooperation provision as a policy defense in the absence of a showing of prejudice or detriment to the insurer. See *MFA Mutual Ins. Co. v. Sailors*, 180 Neb. 201, 141 N.W.2d 846 (1966). Accord, *Wright v. Farmers Mut. of Neb.*, 266 Neb. 802, 669 N.W.2d 462 (2003); *Herman Bros. v. Great West Cas. Co.*, 255 Neb. 88, 582 N.W.2d 328 (1998); *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998); *Pupkes v. Sailors*, 183 Neb. 784, 164 N.W.2d 441 (1969). Therefore, in order to be entitled to summary judgment, Union was required to establish, as a matter of law, that (1) SCI breached the policy's notice and cooperation provision and (2) said breach prejudiced Union.

Breach

[4] Mefferd's main argument on appeal is that a genuine issue of material fact exists as to whether SCI notified Union of Mefferd's lawsuit. As it did in the district court, Union argues that SCI breached the notice and cooperation provision of the policy because it failed to notify Union that a suit had been filed and to forward the legal papers that had been served upon it. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003). Nissen's deposition testimony, if uncontroverted, would establish that SCI breached the notice and cooperation provision of the policy by failing to notify

Union that Mefferd had filed suit and to forward copies of the legal papers served upon SCI. For example, Nissen stated that his conversation with Sieler on September 27, 2000, had been his first contact with Sieler or any other representative of SCI since he finished his investigation in March 1997. In addition, Nissen stated that neither he nor Union had any knowledge of Mefferd's suit prior to when he called Sieler on September 27. Moreover, Nissen's file memorandum, dated March 1, 2001, confirms the substance of his deposition testimony, i.e., that SCI failed to notify Union of the suit and that Union had no knowledge of the suit prior to Nissen's conversation with Sieler on September 27. Union established its prima facie case.

[5] After the movant makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents summary judgment as a matter of law shifts to the party opposing the motion. *Id.* We conclude that Mefferd failed to rebut the prima facie case established by Union and, therefore, no genuine issue of material fact exists as to whether SCI notified Union that Mefferd had filed suit.

Mefferd's sole evidence that SCI notified Union of the suit is Sieler's deposition testimony. Specifically, Mefferd points to Sieler's statement, during recross, that she could not remember the exact timeframe of a conversation she had had with a Union representative in which they discussed Mefferd's suit, i.e., whether the conversation took place before or after she received notice of the court's order of default judgment. It is Mefferd's contention that this statement creates a factual issue as to whether Union received timely notice of the suit.

[6] We conclude that Sieler's statement is insufficient to create a genuine issue of a material fact. Sieler's statement is simply a piece of equivocal testimony, which, because of its uncertainty, does not stand contrary to Nissen's assertion that neither he nor Union had notice of the suit prior to his conversation with Sieler. See *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997) (conclusions based upon guess, speculation, conjecture, or choice of possibilities do not create material issues of fact for purposes of summary judgment).

Moreover, the remainder of Sieler's deposition testimony makes it clear that the conversation Sieler remembers having with

a Union official was actually the conversation she had had with Nissen on September 27, 2000, after the order of default judgment had been entered. First, Sieler stated that the conversation took place because a Union official contacted her. Second, Sieler stated that her only conversation with a Union official was when she told the official that she had received notice that a default judgment had been entered against SCI. Third, Sieler stated that during this conversation, the Union representative told her that "the time that [Union] could do something was over." These facts corroborate Nissen's deposition testimony that (1) his only contact with Sieler was when he called her on September 27; (2) during this conversation, Sieler informed him that a default judgment against SCI had been entered; and (3) upon learning that a default judgment had been entered, the Union representative told Sieler that Union was likely to deny coverage for failing to notify it of the suit.

Furthermore, a review of Sieler's deposition testimony shows that Sieler had originally, and unequivocally, stated that she failed to notify Union of the lawsuit prior to receiving notice that a default judgment had been entered.

> [Counsel]: So, from the time you were served a copy of the lawsuit until the time you received a notice that a judgment had been entered, you didn't notify anybody at the insurance company that the lawsuit had been filed; is that correct?
>
> [Sieler]: That's correct.
>
> [Counsel]: And you didn't tell anyone at the insurance agent's agency that the lawsuit had been filed at any time prior to receiving notice that a judgment had been entered; is that correct?
>
> [Sieler]: That's correct.

Simply put, what Mefferd contends has created a contested issue of material fact has, at best, merely served to call Sieler's testimony into question. Moreover, when placed in the context of Sieler's entire deposition testimony, the statement serves only to buttress Nissen's recollection of events. We conclude that the statement is insufficient to create a genuine issue of material fact.

Contrary to Mefferd's assertion, Nissen's preliminary investigation on behalf of Union does not alter this result. During his investigation, Nissen learned that Mefferd had sustained medical

expenses of over $10,000 and was represented by counsel. However, such knowledge is not tantamount to knowing that a suit had been filed, nor does it alter the duty the policy placed on SCI to notify Union when a "suit" was filed. Under the policy, "suit" was defined as "a civil proceeding in which damages because of 'bodily injury', 'property damage', 'personal injury' or 'advertising injury' to which this insurance applies are alleged." Therefore, by merely providing notice of the initial incident or occurrence, SCI did not comply with the policy. See *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998) (noting difference between notice of incident and notice that suit had been filed).

PREJUDICE

As stated above, in order for Union to assert a breach of the notice and cooperation provision as a defense, it must prove that the breach resulted in prejudice or detriment. See *MFA Mutual Ins. Co. v. Sailors*, 180 Neb. 201, 141 N.W.2d 846 (1966). Union argues that it was prejudiced because SCI's failure to notify Union of the suit deprived it of the opportunity to (1) raise Mefferd's contributory negligence as a bar to his claim and (2) attack alleged inconsistencies in the testimony presented at the hearing on the motion for default judgment.

[7] We have stated that prejudice is established by examining whether the insurer received notice in time to meaningfully protect its interests. *Herman Bros. v. Great West Cas. Co.*, 255 Neb. 88, 582 N.W.2d 328 (1998). See, also, *Deprez v. Continental Western Ins. Co.*, 255 Neb. 381, 584 N.W.2d 805 (1998). Obviously, SCI's failure to notify Union of Mefferd's suit until after a default judgment had been entered prevented Union from protecting its interests. As noted elsewhere:

> [I]t would be difficult to conceive of greater prejudice, and of a confiscatory result being reached, than a demand for payment of a default judgment of which a defendant is totally ignorant, and which, through the failure of the assured to comply with the terms of the contract and forward the process and pleadings to the insurer, it has been deprived of its right to defend the action.

Hallman v. Marquette Casualty Company, 149 So. 2d 131, 135 (La. App. 1963). Thus, it is clear that SCI's inaction prejudiced Union as a matter of law.

ARGUED BUT NOT ASSIGNED

Mefferd also argues that the district court erred by (1) construing the notice and cooperation provision as a condition precedent to coverage and (2) failing to recognize that the policy does not adequately explain when an insured must provide notice of a suit because neither the policy nor industry standard defines the phrase "as soon as practicable." Mefferd, however, failed to assign the court's alleged misinterpretations as error, and therefore, his arguments are not appropriate for appellate review. See *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000) (errors argued but not assigned are not appropriate for appellate review).

CONCLUSION

Because there is no genuine issue of material fact as to SCI's failure to notify Union of Mefferd's suit or the resulting prejudice upon Union, the district court's grant of summary judgment in favor of Union is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DEBRA M. SWANSON, RESPONDENT.

675 N.W.2d 674

Filed March 12, 2004. No. S-02-979.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings.** Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
3. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.

5. ____. Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the Nebraska Supreme Court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
6. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (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.
7. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions.

Original action. Judgment of disbarment.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for respondent.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

Debra M. Swanson was formally charged with violations of the Code of Professional Responsibility and her oath of office as an attorney. After a hearing, the referee filed a report and recommended that Swanson be disbarred from the practice of law. Swanson filed exceptions to the referee's report and recommendation.

BACKGROUND

Swanson was admitted to the practice of law in the State of Nebraska on April 12, 1994, and at all times relevant to these proceedings was engaged in a solo private practice in York, Nebraska.

On February 12, 2003, we sustained a motion by the Counsel for Discipline of the Nebraska Supreme Court requesting leave to file amended formal charges, and pursuant thereto, the Counsel for Discipline filed seven counts against Swanson.

Count I alleged that in February 2000, Swanson was paid $500 to represent Patsy Van Ness in a dissolution of marriage action. In early March, Van Ness withdrew funds from bank accounts she held jointly with her husband and gave $2,290 in cash to Swanson

for safekeeping. Swanson did not deposit these funds into a trust account, nor did she keep an accounting of the funds as they were distributed to Van Ness or on her behalf. Van Ness also removed approximately $3,850 in bonds from a safe deposit box and gave this and other personal property to Swanson for safekeeping.

When Van Ness moved out of the family home, she took most of the furnishings. Van Ness' complaint alleged that Swanson took some of the furniture to apply toward attorney fees but did not provide an accounting to Van Ness for the value of the furniture.

Van Ness terminated Swanson's services in June 2000 and requested that Swanson return the remaining funds which she had been holding for Van Ness. Van Ness also requested that Swanson return attorney fees that had not yet been earned.

The Counsel for Discipline alleged that the above acts and omissions constituted a violation of Swanson's oath of office as an attorney, see Neb. Rev. Stat. § 7-104 (Reissue 1997), and that such actions were in violation of, among others, the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> (A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> . . . .
>
> (B) A lawyer shall:
>
> . . . .
>
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.

As to count I, the referee found that during her representation of Van Ness, Swanson received money for safekeeping and did

not deposit the money in an identifiable bank or savings and loan association account. When she distributed the money as Van Ness requested, Swanson did not keep a record of the disbursements. The referee found that Swanson had returned all of the property given to her by Van Ness for safekeeping.

Count II charged that on November 3, 2000, Rick Siemsen contacted Swanson about representing him in a civil matter. The parties met at Swanson's home office on November 4, at which time Swanson explained that she billed her time at $100 per hour. Siemsen gave her $500 in cash as an advance fee payment and stated he would contact her in a few days. Swanson did not place the money in her trust account.

It was alleged in count II that Siemsen became dissatisfied with the progress of his case and made an appointment to pick up certain documents from Swanson in order to retain a different attorney. Swanson did not keep this appointment. Swanson refused to return Siemsen's documents to him but agreed to forward them to his new attorney. Swanson also refused to return any portion of the $500, claiming that she had earned the entire amount. Count II further alleged that Swanson created a billing statement after Siemsen's grievance was filed with the Counsel for Discipline. It was also alleged that in her billing statement, Swanson falsely claimed to have spent 3 hours doing research at the University of Nebraska-Lincoln law library and also billed Siemsen 1.75 hours for her travel time to the library. When Swanson's deposition was taken, she could not identify any research she had done concerning Siemsen's case, nor could she produce photocopies of cases she had made or notes she had taken while at the library.

On May 6, 2002, Siemsen sued Swanson in small claims court. A judgment was subsequently entered against Swanson in the amount of $500 plus costs. Swanson had not paid any portion of the judgment against her as of January 2003.

The Counsel for Discipline alleged that the above acts and omissions constituted a violation of Swanson's oath of office as an attorney and were in violation of, among others, the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.

. . . .

(5) Engage in conduct that is prejudicial to the administration of justice. . . .

(6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

. . . .

DR 2-110 Withdrawal from Employment.

(A) In general.

. . . .

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

. . . .

DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows . . . .

At the hearing before the referee, Swanson claimed that the $500 was a nonrefundable retainer and that she expected to be paid for time over 5 hours. Siemsen stated that he had negotiated a flat fee of $500 to file the lawsuit. The referee found by clear and convincing evidence that the arrangement was a flat fee of $500 to file the lawsuit. The referee found that Siemsen had called Swanson and had terminated the relationship, complaining that Swanson had not taken any action. When Siemsen requested to pick up his documents, Swanson refused to give them directly to him and would give the documents only to another attorney.

The referee also found that Swanson had not completed any work on Siemsen's behalf and that Swanson's claimed billing statement was not a legitimate, contemporaneously generated, or accurate account of her efforts on Siemsen's behalf. The referee found that Swanson had lied to him and to others when she said she had completed work and had sent a bill to Siemsen. The referee found that Swanson had not returned any part of Siemsen's fee and had not paid the $500 judgment.

Count III alleged that in July 1999, Swanson represented a client in a dissolution of marriage action. At some time late in 1999 or early in 2000, Swanson began a sexual relationship with the client while she was still representing him. The Counsel for Discipline alleged that such conduct constituted a violation of Swanson's oath of office as an attorney and violated, among others, the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> . . . .
> DR 7-101 Representing a Client Zealously.
> (A) A lawyer shall not intentionally:
> . . . .
> (3) Prejudice or damage his or her client during the course of the professional relationship, except as required under DR 7-102(B).

The referee found by clear and convincing evidence that Swanson had engaged in an improper sexual relationship with a client during a divorce case which involved a custody dispute over the minor children of the parties.

As to count IV, the referee found that there was no clear and convincing evidence as to the facts and circumstances involved. Counts V and VI were dismissed and are not at issue.

Count VII alleged that on or about April 7, 1998, Nyla Anderson retained Swanson to represent her in a dissolution of marriage action. Anderson paid Swanson an advance fee of $9,865. In July, Swanson was discharged by Anderson, who obtained another attorney. The new attorney wrote Swanson, asking for an accounting of her time while representing Anderson and for a refund of any unearned portion of the advance fee. Swanson claimed no refund was due and asserted that Anderson owed Swanson an additional $14,000 for services rendered.

Anderson sued Swanson to recover the advance fee paid to her, and Swanson cross-petitioned, alleging that Anderson owed her over $14,000. Swanson was deposed but refused to answer any questions by Anderson's attorney. Swanson was ultimately sanctioned by the York County District Court in the amount of

$399.80 and ordered to answer the questions. A default judgment was later entered against Swanson in the amount of $9,365 for the advance fee paid to Swanson but not earned. Swanson has not paid the sanction or the judgment against her as of May 2003.

The Counsel for Discipline alleged that the foregoing acts and omissions constituted a violation of Swanson's oath of office as an attorney and were in violation of, among others, the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (5) Engage in conduct that is prejudicial to the administration of justice. . . .
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.
>
> . . . .
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> . . . .
>
> (B) A lawyer shall:
>
> . . . .
>
> (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

The referee found that in April 1998, Swanson deposited Anderson's payment of $9,865 into a trust account which immediately before this deposit contained $5.24. On the same day, Swanson transferred $3,200 out of the account, which she claimed was for time spent on Anderson's behalf in April. In May, Swanson transferred $1,500 from her trust account to her business account and from there transferred the $1,500 but did not remember where or to whom. In May 1998, she transferred $2,560 out of her trust account into her business account. When Swanson received a letter from Anderson's new attorney advising that he was taking over Anderson's representation and asking for a refund of the advance, Swanson knew that there was a dispute regarding the advance fee, including the balance she still had in her trust account.

Swanson received a second letter from the office of Anderson's new attorney demanding an accounting of the advance fee. Swanson testified that prior to that date, she had provided Anderson with a written statement of fees charged and that she had maintained a copy in the computer. Swanson claimed that she sent a letter to Anderson's attorney on September 16, 1998, and enclosed a purported earlier letter to him dated August 13, 1998, which in turn enclosed a "statement" to Anderson.

The referee found that Swanson's September 16, 1998, letter was intended to create the appearance that Swanson had previously sent a letter with an enclosed statement to Anderson's attorney on August 13. The referee also found the evidence was undisputed that Swanson had removed money from the trust account which belonged to Anderson and that Swanson's purported bill for expended professional time on Anderson's behalf in the amount of $23,865 was not credible.

The referee found that Swanson's billing statement was entirely lacking as a credible accounting of her time spent on behalf of Anderson if, indeed, she spent any time at all. The referee concluded that the billing statement sent by Swanson was an after-the-fact composition in an attempt to justify her retention of the advance fee. The referee found that Swanson had lied about the time she spent representing Anderson and that as a consequence of Swanson's misrepresentations and as a consequence of her failure to keep accurate records, Swanson engaged in conduct that was prejudicial to the administration of justice, in violation of Canon 1, DR 1-102(A)(5), and that Swanson had engaged in conduct that adversely affected her fitness to practice law, in violation of DR 1-102(A)(6).

Anderson sued Swanson, and on January 30, 2002, a default judgment was entered against Swanson in the amount of $9,365. The referee found that Swanson had violated Canon 9, DR 9-102(4), by not refunding Anderson the advance fee even though she was clearly entitled to it by virtue of a court judgment.

The referee also found that Swanson engaged in conduct prejudicial to the administration of justice when she refused without justification to answer questions at her deposition. She was subsequently sanctioned for her behavior, and she failed or refused to pay the court-ordered sanction. As a consequence of

all the foregoing, the referee found that Swanson violated DR 1-102(A)(1) and her oath of office as an attorney.

In his report, the referee concluded with regard to count I that Swanson's offenses were relatively benign and that they did not evidence an effort to conceal or to cheat any individual and that it appeared no money or property was lost. However, the referee found that Swanson's attitude was noteworthy in that she did not seem to appreciate the need for care in the handling of client property. The referee concluded that these violations did not in themselves cast serious doubt on Swanson's fitness to practice law but were part of a "larger mosaic which forms a darker picture."

The referee concluded as to count II that Swanson's conduct involved lies, deception, and ruses in order to keep money to which she was not entitled. Swanson's attitude was troubling to the referee in that she did not recognize that her behavior was improper. The referee found that Swanson had made earnest and involved efforts to deceive in hopes of keeping her client's money and her license to practice law.

The referee noted that count III was the one offense to which Swanson had admitted. He concluded as to count III that it did not appear that anyone was significantly hurt in the legal sense and that Swanson appeared to be appropriately contrite about this behavior, as compared to her attitude toward the other charges against her.

As to count VII, the referee concluded that Swanson's offenses were more serious. Taken together with her other offenses, the referee believed that they completed a "dark mosaic of a woman bereft of the practical and moral tools to practice the business of a profession based on good order, honor and integrity."

The referee determined that Swanson had displayed an indifference to the disciplinary process and to the administration of justice which reflected a disregard for the plight of her unhappy clients, her license, and her reputation. In summary, the referee concluded that Swanson lied to him about the work she did for Siemsen and for Anderson and that she used falsified billing statements to shore up her stories. The referee stated that "[a] lawyer who would engage [in] such an elaborate bodyguard of lies is one acting deliberately and with a specific intention to deceive." Swanson did not demonstrate to the referee that probation or

suspension would be effective in punishing and correcting her behavior. The referee concluded that Swanson had lied to anyone who would listen, had created fictitious documents, and had taken clients' money and refused to give it back, even though she had not earned it. The referee found that Swanson exhibited a disturbing indifference when confronted with allegations and accusations which would have been of great concern to other lawyers had they been confronted with such allegations.

Finally, the referee concluded that Swanson had not demonstrated any mitigating circumstances; had not demonstrated a sincere regret for her behavior, with the exception of her sexual relationship with a client; and had shown disrespect for her clients and the legal system. Given the nature of Swanson's offenses, the need to deter others from committing similar offenses, and Swanson's poor attitude, the referee recommended that Swanson be disbarred.

EXCEPTIONS

Swanson has filed exceptions to the referee's report and recommendation, wherein she asserts that the evidence was insufficient to support the charges in counts I, II, and VII and that the recommended sanction is unreasonable and excessive.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Counsel for Dis. v. Achola*, 266 Neb. 808, 669 N.W.2d 649 (2003).

[2] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. *State ex rel. Special Counsel for Dis. v. Shapiro*, 266 Neb. 328, 665 N.W.2d 615 (2003).

[3] Disciplinary charges against an attorney must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Achola, supra.*

ANALYSIS

As to count I, the stipulation of the parties attests that Swanson never deposited the money given to her by her client into an attorney trust account. Instead, this money was kept in Swanson's office for "safekeeping." Swanson has stipulated that she never presented her client with a billing statement and that she failed to keep a contemporaneous record of the client's funds as they were disbursed to the client. As such, the Counsel for Discipline has submitted clear and convincing evidence that Swanson violated DR 1-102(A)(1), DR 9-102(A) and (B)(3), and her oath of office as an attorney.

As to count II, the Counsel for Discipline has presented clear and convincing evidence that the money Swanson received during her first visit with the client was never deposited into an attorney trust account. It is undisputed that this client obtained a default judgment against Swanson for the full amount Swanson had received during their first meeting. More troubling, Swanson stipulated that nearly 3 years after the entry of this default judgment, she had yet to pay the client any of the money that is owed to him. This evidence clearly and convincingly demonstrates that Swanson violated DR 1-102(A)(1), (5), and (6); Canon 2, DR 2-110(A)(3); DR 9-102(A); and her oath of office as an attorney.

As to count III, Swanson stipulated that she engaged in a sexual relationship with a client while she was representing him in a dissolution of marriage action. The evidence established that the case involved issues of child custody, and as such, we find that clear and convincing evidence was presented to show that Swanson violated DR 1-102(A)(1); Canon 7, DR 7-101(A)(3); and her oath of office as an attorney.

With regard to count VII, the Counsel for Discipline presented clear and convincing evidence that Swanson refused to answer questions by opposing counsel during a deposition. In addition, there is no dispute that Swanson continued to refuse to answer these questions, in direct violation of an order issued by the York County District Court, which subsequently led that court to order sanctions. The evidence was undisputed that a default judgment had been entered against Swanson for the return of funds that had been given to her as an advance fee by

a client. The Counsel for Discipline presented sufficient evidence to show that Swanson had failed to pay any portion of this judgment. We therefore conclude that there was clear and convincing evidence presented to establish that Swanson had violated DR 1-102(A)(1), (5), and (6); DR 9-102(B)(4); and her oath of office as an attorney.

[4,5] The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. James, ante* p. 186, 673 N.W.2d 214 (2004). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by this court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. *State ex rel. Counsel for Dis. v. James, supra.*

[6,7] Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *Id.* To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (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. Counsel for Dis. v. Mills, ante* p. 57, 671 N.W.2d 765 (2003). Cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions. *State ex rel. Counsel for Dis. v. Cannon*, 266 Neb. 507, 666 N.W.2d 734 (2003).

Based upon Swanson's actions and her attitude and conduct during the proceedings, the referee recommended disbarment as the appropriate sanction. Swanson claims that such punishment is excessive and unreasonable. We acknowledge that a judgment of disbarment is a most severe penalty; however, the charges against Swanson involve multiple incidents with various clients over a number of years. The evidence shows that Swanson has repeated the same questionable acts with different clients. With respect to counts I and II, she failed to deposit the money in an

appropriate trust account. More disturbing is the evidence concerning counts II and VII that Swanson failed to pay any portion of the two default judgments entered against her.

Most disturbing to this court is the referee's finding that Swanson lied in order to keep her clients' money without justification. While it was noted by the referee that Swanson's conduct regarding count I was relatively benign in that it did not evidence an effort to conceal or to cheat any individual, the referee found with regard to counts II and VII that Swanson's conduct involved lies, deception, and ruses in order to keep money to which she was not entitled. It is this type of behavior that caused the referee to question Swanson's fitness to continue in the practice of law. The referee also found that Swanson's indifference to the disciplinary process and to the administration of justice evidenced a disregard for her clients, her license, and her reputation.

When this court considers the cumulative nature of Swanson's actions, the need to protect the public, the need to deter others from similar conduct, the reputation of the bar as a whole, Swanson's fitness to practice law, and the lack of mitigating circumstances, we conclude that disbarment is the appropriate sanction.

CONCLUSION

It is the judgment of this court that Swanson should be and hereby is disbarred from the practice of law in the State of Nebraska, effective immediately. Swanson is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, she shall be subject to punishment for contempt of this court. Swanson is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT.

CHARLES V. AND DIXIE L. FRANCIS ET AL., APPELLANTS, V. CITY OF COLUMBUS, NEBRASKA, A MUNICIPAL CORPORATION, AND BOARD OF EQUALIZATION OF THE CITY OF COLUMBUS, NEBRASKA, APPELLEES.

676 N.W.2d 346

Filed March 12, 2004. No. S-02-1003.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing 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.
3. **Taxes: Declaratory Judgments: Injunction: Civil Rights: States.** When a litigant seeks declaratory or injunctive relief against a state tax under 42 U.S.C. § 1983 (2000), state courts, like their federal counterparts, must refrain from granting relief under § 1983 when there is an adequate legal remedy.
4. **Municipal Corporations: Civil Rights: Damages.** A plaintiff may seek damages in a 42 U.S.C. § 1983 (2000) claim against a municipality.
5. **Taxes: Civil Rights: Courts: Damages.** When a litigant seeks damages in a 42 U.S.C. § 1983 (2000) claim challenging a state or local tax, Nebraska courts must refrain from granting such relief, so long as state law offers an adequate legal remedy.
6. **Taxes: Civil Rights: Statutes.** In determining if a litigant may maintain a 42 U.S.C. § 1983 (2000) claim challenging a state or local tax, courts measure the adequacy of a state remedy by procedural, not substantive criteria.
7. ____: ____: ____. In determining if a litigant may maintain a 42 U.S.C. § 1983 (2000) claim challenging a state or local tax, the state remedy, to be adequate, need not be identical to § 1983 remedies. It need not be the best remedy available, the most convenient remedy, or equal to or comparable with federal remedies.
8. **Constitutional Law: Taxes: Civil Rights.** In determining if a litigant may maintain a 42 U.S.C. § 1983 (2000) claim challenging a state or local tax, a state remedy is adequate if it provides the taxpayer with the opportunity for a full hearing and judicial determination at which he or she may raise any and all constitutional objections to the tax.
9. **Constitutional Law: Special Assessments.** A special tax assessment which violates the federal Constitution is illegal, and thus a claim that a special tax assessment violates the federal Constitution can be raised and adjudicated in claims made under Neb. Rev. Stat. § 16-637 (Reissue 1997).
10. ____: ____. Neb. Rev. Stat. §§ 19-2422, 19-2423, and 19-2425 (Reissue 1997) provide a taxpayer with a means by which his or her constitutional challenges to a special tax assessment can be fairly and fully adjudicated.
11. **Taxes: States: Attorney Fees.** When an adequate state legal remedy exists for challenging a state or local tax, litigants cannot recover attorney fees under 42 U.S.C. § 1988(b) (Supp. V 1999).

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

Lyle Joseph Koenig, of Koenig Law Firm, and William D. Sutter, Jr., of Stephens & Sutter, for appellants.

Dean Skokan for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The appellants own property in the City of Columbus, a city of the first class (City). After the City levied a special tax assessment for street improvements, the appellants filed a petition challenging the constitutionality of the special tax assessment. In their petition, the appellants sought relief under state law and 42 U.S.C. § 1983 (2000). The district court determined that state courts cannot entertain § 1983 claims challenging state or local taxes unless the state fails to provide an adequate legal remedy. After determining that state law provides an adequate legal remedy, the court entered summary judgment against the appellants on their § 1983 claims. We affirm.

I. BACKGROUND

The City created Special Improvement District No. 135 (SID 135) by ordinance in 1992. The appellants claim that each of them own real property located within SID 135. When the construction was completed in 1999, the City assessed and levied the costs of the project.

Most of the appellants paid the first installment of the tax under protest. They then filed this action naming the City and the board of equalization for the City (Board) as defendants. The appellants alleged that the City and the Board had violated their due process and equal protection rights by (1) failing to give them proper notice of their right to challenge the creation of SID 135; (2) misrepresenting the costs of the construction project and thereby inducing them to refrain from objecting to the creation of SID 135; (3) assessing as part of the costs of the construction project repair work done to a county road; (4) accepting a bid that exceeded the amount that the City's engineers estimated the

construction would cost when the City created SID 135; (5) imposing a special tax assessment that exceeded in value the benefits conferred on the property; and (6) transforming a street that runs through SID 135 from a residential street into a "major collector street" and imposing the costs of the transformation on the appellants when in the past, such projects were paid for through general obligation bonds.

The appellants' petition sought injunctive and declaratory relief and compensatory and punitive damages under § 1983, as well as attorney fees under 42 U.S.C. § 1988(b) (Supp. V 1999). The trial court also construed the appellants' petition as seeking a refund under Neb. Rev. Stat. § 16-637 (Reissue 1997).

The City and the Board subsequently moved for summary judgment, claiming that the court lacked jurisdiction over the appellants' § 1983 claims and that concerning their § 16-637 claims, the appellants had failed to abide by the statute's timing requirements.

The court granted the City and the Board summary judgment against all of the appellants on their § 1983 claims. The court interpreted *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995), to mean that in cases challenging state and local taxes, state courts cannot grant federal relief under § 1983 when there is an adequate state legal remedy. The court noted that § 16-637 allows a taxpayer to bring a civil suit to recover any illegal, inequitable, or unjust special tax assessment that a taxpayer has paid under protest. Reasoning that this was an adequate state remedy, the court granted the City and the Board summary judgment on the appellants' § 1983 claims.

Concerning the appellants' § 16-637 claims, the court granted summary judgment for the City and the Board against some, but not all, of the appellants.

To preserve the right to bring a suit under § 16-637, a taxpayer must pay the tax, under protest, "before the same shall become delinquent." The court determined that a question of fact existed whether the tax became delinquent on June 21, 2000, or July 20, 2000. None of the appellants had paid the tax under protest by June 21, but some had paid under protest on or before July 20. The court granted summary judgment to the City and the Board

against those appellants who had not paid under protest on or before July 20. But the court allowed the § 16-637 claims of those appellants who had paid under protest on or before July 20 to proceed.

After the court granted summary judgment in part to the City and the Board, all of the appellants filed this appeal. The order was certified as required by Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002).

II. ASSIGNMENTS OF ERROR

The appellants assign, restated, that the court erred in concluding that (1) they could not maintain their § 1983 claims because an adequate state legal remedy existed and (2) some of the appellants had failed to preserve their right to bring a claim under § 16-637.

III. STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing 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. *Continental Cas. Co. v. Calinger*, 265 Neb. 557, 657 N.W.2d 925 (2003).

[2] 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. *Id.*

IV. ANALYSIS

1. § 1983 Claims

(a) Limitations on § 1983 in State Tax Cases

The appellants seek damages and injunctive and declaratory relief under § 1983. "Generally speaking, section 1983 provides a cause of action in state or federal courts to redress federal constitutional and statutory violations by state officials." *General Motors Corp. v. City of Linden*, 143 N.J. 336, 341, 671 A.2d 560, 562 (1996). In its pertinent part, § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or

> causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

However, the availability of § 1983 to challenge a state or local tax is limited. The Tax Injunction Act, 28 U.S.C. § 1341 (2000), prohibits federal courts from entertaining § 1983 claims that seek injunctive or declaratory relief from a state tax "where a plain, speedy and efficient remedy may be had in the courts of such State." See, e.g., *California v. Grace Brethren Church*, 457 U.S. 393, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982); *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981). In addition to the limits placed on § 1983 by Congress, the U.S. Supreme Court has ruled that § 1983 must be read in light of the longstanding principle of federal noninterference in state tax systems. *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100, 102 S. Ct. 177, 70 L. Ed. 2d 271 (1981) (Fair Assessment). Relying on this principle, the Court has held that federal courts cannot award damages in § 1983 claims challenging the administration of a state tax when the state provides a plain, adequate, and complete remedy. *Fair Assessment, supra.*

Following *Fair Assessment*, a divergence of opinion arose over whether state courts could grant relief in § 1983 claims challenging a state or local tax. Some courts ruled that the Tax Injunction Act and the U.S. Supreme Court's decision in *Fair Assessment* applied only to federal courts. See, e.g., *Kerr v. Waddell*, 183 Ariz. 1, 899 P.2d 162 (Ariz. App. 1994); *Murtagh v. County of Berks*, 535 Pa. 50, 634 A.2d 179 (1993). Other courts ruled that the principle of federal noninterference in state tax systems relied upon by the U.S. Supreme Court in *Fair Assessment* prohibited state courts from granting relief in a § 1983 claim, so long as the state offered an adequate remedy. See, e.g., *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d 292 (Tenn. 1991); *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985).

The conflict was settled in *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 115 S. Ct. 2351, 132 L.

Ed. 2d 509 (1995). *National Private Truck Council, Inc.* involved an Oklahoma tax on motor carriers that were licensed in 25 other states. The petitioners had filed a § 1983 claim in Oklahoma state court, alleging that the tax violated the dormant Commerce Clause and the Privileges and Immunities Clause of U.S. Const. art. IV, § 2, cl. 1. The Oklahoma Supreme Court ruled that injunctive and declaratory relief was not available under § 1983 because state law offered an adequate legal remedy.

[3] The U.S. Supreme Court affirmed. It held, "When a litigant seeks declaratory or injunctive relief against a state tax pursuant to § 1983 . . . state courts, like their federal counterparts, must refrain from granting federal relief under § 1983 when there is an adequate legal remedy." *National Private Truck Council, Inc.*, 515 U.S. at 592. In reaching this conclusion, the Court, as it did in *Fair Assessment*, relied upon the principle of federal noninterference in state tax systems.

National Private Truck Council, Inc. left open the question whether state courts could award damages in a § 1983 claim challenging the administration of a state or local tax. The issue was not before the Court because the defendants were a state agency and state officials acting in their official capacities. Earlier case law had established that damages are unavailable in a § 1983 claim against a state or a state official acting in his or her official capacity. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

[4] Here, however, the appellants seek damages from a municipality. A plaintiff may seek damages in a § 1983 claim against a municipality. See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Thus, we must determine whether Nebraska courts may entertain a § 1983 claim for damages when the claim challenges the administration of a state or local tax by a municipality.

[5] The lesson of both *National Private Truck Council, Inc.* and *Fair Assessment* is that § 1983 must be construed in light of the background principle of federal noninterference in state and local tax schemes. In *Fair Assessment*, the U.S. Supreme Court recognized that a § 1983 claim for damages offers as much chance for interference as a § 1983 claim for injunctive or declaratory relief. The Court explained:

> The recovery of damages under the Civil Rights Act first requires a "declaration" or determination of the unconstitutionality of a state tax scheme that would halt its operation. And damages actions, no less than actions for an injunction, would hale state officers into federal court every time a taxpayer alleged the requisite elements of a § 1983 claim. We consider such interference to be contrary to "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts."

Fair Assessment, 454 U.S. at 115-16 (quoting *Matthews v. Rodgers*, 284 U.S. 521, 52 S. Ct. 217, 76 L. Ed. 447 (1932)). Although *Fair Assessment* was limited only to § 1983 claims in federal court, its concerns apply with equal force to § 1983 claims brought in state court. If such suits were allowed, litigants in state courts could use a federal remedy to grind to a halt state and local taxation schemes. We conclude that when a litigant seeks damages in a § 1983 claim challenging a state or local tax, Nebraska courts must refrain from granting such relief, so long as state law offers an adequate legal remedy. Accord, *Union Oil Co. of Cal. v. City of Los Angeles*, 79 Cal. App. 4th 383, 94 Cal. Rptr. 2d 81 (2000); *G.M.C. v. City and County of San Francisco*, 69 Cal. App. 4th 448, 81 Cal. Rptr. 2d 544 (1999); *Murtagh v. County of Berks*, 715 A.2d 548 (Pa. Commw. 1998); *Kerr v. Waddell*, 185 Ariz. 457, 916 P.2d 1173 (Ariz. App. 1996); *General Motors Corp. v. City of Linden*, 143 N.J. 336, 671 A.2d 560 (1996).

(b) Adequacy of Nebraska's Remedies

Because we have concluded that Nebraska courts cannot entertain a § 1983 claim challenging a state or local tax unless the state fails to provide an adequate legal remedy, the question becomes whether state law offers the appellants such a remedy.

[6-8] Courts measure the adequacy of a state remedy by procedural, not substantive criteria. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981). Thus, the "state remedy need not be identical to section 1983 remedies. . . . It need not be the best remedy available . . . the most convenient remedy . . . or equal to or comparable with federal remedies." (Citations omitted.) *General Motors Corp.*, 143 N.J. at 348, 671

A.2d at 566. Rather, a state remedy is adequate if it provides the taxpayer with the opportunity for a "'"full hearing and judicial determination"' at which [he or] she may raise any and all constitutional objections to the tax." *Rosewell*, 450 U.S. at 515 n.19. See, also, *Kerr, supra*; *General Motors Corp., supra.*

[9] Nebraska provides a taxpayer of a city of the first class at least two adequate methods for challenging a special tax assessment for street improvements. First, under § 16-637, a taxpayer can recover any part of a special tax that it believes to be illegal, inequitable, or unjust if it (1) pays the tax under protest before it becomes delinquent; (2) provides notice to the city treasurer that it intends to sue to recover the tax, giving enough detail to advise the city of the "exact nature" of the grievance; and (3) brings suit within 60 days of paying the tax and providing notice. A special tax assessment which violates the federal Constitution is illegal, and thus a claim that a special tax assessment violates the federal Constitution can be raised and adjudicated in § 16-637 claims. Further, that § 16-637 allows for only a refund and not injunctive or declaratory relief does not render it inadequate. *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 587, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995) ("[a]s long as state law provides a '"clear and certain remedy,"' . . . the States may determine whether to provide predeprivation process (*e.g.*, an injunction) or instead to afford postdeprivation relief (*e.g.*, a refund)"). Nor does the relatively short timeframe within which the taxpayer has to determine whether to protest the tax and file suit render § 16-637 inadequate. This is so because "individuals who wish to challenge the assessment of a state tax are immediately aware of the precise nature and amount of their injury on the date the assessment is rendered." *Jade Aircraft Sales, Inc. v. Crystal*, 236 Conn. 701, 709-10, 674 A.2d 834, 838 (1996).

[10] In addition to the remedy provided by § 16-637, a taxpayer can challenge a special assessment for municipal improvements under Neb. Rev. Stat. §§ 19-2422, 19-2423, and 19-2425 (Reissue 1997). See *Reiser v. Hartzler*, 213 Neb. 802, 331 N.W.2d 523 (1983). Under these sections, an owner of real property who feels aggrieved by the levy of a special assessment made by any city of the first or second class or village may appeal to district

court the special assessment as to both validity and amount. See § 19-2422. The owner appealing the special assessment must (1) file a written notice of appeal with the city clerk within 10 days of the levy, (2) post a bond of $200, and (3) file a petition on appeal and transcript with the district court within 30 days of the levy of the special assessment. See §§ 19-2423 and 19-2425. Like with § 16-637, these statutes provide a taxpayer with a means by which his or her constitutional challenges to a special tax assessment can be fairly and fully adjudicated.

[11] Thus, Nebraska offers at least two adequate remedies for raising federal constitutional challenges to a special tax assessment for street improvements in cities of the first class. As a result, the district court could not entertain the appellants' § 1983 claims. In addition, because an adequate state remedy exists, no attorney fees were available to the appellants under § 1988(b). See, *Union Oil Co. of Cal. v. City of Los Angeles*, 79 Cal. App. 4th 383, 94 Cal. Rptr. 2d 81 (2000); *New England Legal Foundation v. Boston*, 423 Mass. 602, 670 N.E.2d 152 (1996).

2. Appellants' State Claims

The trial court construed the appellants' petition as seeking a refund under § 16-637. However, the court dismissed some of the appellants' § 16-637 claims because of their failure to comply with the procedural requirements of § 16-637.

As a prerequisite to bringing suit for a refund under § 16-637, a party must pay the tax under protest before it becomes delinquent. The court determined that a question of fact existed whether the tax became delinquent on June 21, 2000, or July 20, 2000. None of the appellants had paid the tax under protest by June 21, but some had paid on or before July 20. The court granted summary judgment to the City and the Board against those appellants who had failed to pay on or before July 20. But for those appellants who had paid on or before July 20, the court allowed their § 16-637 claims to proceed.

The appellants against whom the court entered summary judgment do not challenge the court's determination that they failed to pay their taxes under protest by July 20, 2000. Rather, as we understand it, they argue that they were not required to comply with the procedural requirements of § 16-637 because they also

raised claims under § 1983. We disagree. Their § 16-637 claims for refunds were separate and distinct from their § 1983 claims, and thus, to recover under § 16-637, they were required to comply with its procedural prerequisites.

V. CONCLUSION

The court correctly concluded that it could not entertain the appellants' § 1983 claims challenging the special tax assessment because state law offered them adequate legal remedies. The court also correctly concluded that it was undisputed that some of the appellants had failed to comply with the procedural requirements of § 16-637.

AFFIRMED.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. PMI FRANCHISING, INC., ET AL., APPELLEES.
675 N.W.2d 660

Filed March 12, 2004. No. S-02-1417.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing 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 was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Guaranty: Limitations of Actions.** The statute of limitations provided in Neb. Rev. Stat. § 25-205 (Reissue 1995) applies to an action on a contract of guaranty.
4. **Contracts: Guaranty: Limitations of Actions: Liability: Debtors and Creditors.** The statute of limitations begins to run against a contract of guaranty the moment a cause of action first accrues, and a guarantor's liability arises when the principal debtor defaults.
5. ____: ____: ____: ____: ____. In the absence of provisions to the contrary in the controlling documents, a cause of action does not accrue against a guarantor until the guarantor's liability has arisen and a guarantor's liability does not arise until the debtor defaults.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded for further proceedings.

Dana W. Roper, Lincoln City Attorney, and James D. Faimon for appellant.

Joel D. Nelson, of Keating, O'Gara, Davis & Nedved, P.C., L.L.O., for appellees James E. Hershberger and Sandra M. Hershberger.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

The City of Lincoln (the City) filed suit in the district court for Lancaster County against PMI Franchising, Inc. (PMI), James E. Hershberger, and Sandra M. Hershberger to recover money that was loaned to PMI pursuant to a financing agreement in aid of an economic development program sponsored by the City. The Hershbergers were guarantors on the loan to PMI. The Hershbergers moved for summary judgment. The district court concluded that the City's action against the Hershbergers was barred by the statute of limitations. The court, inter alia, granted summary judgment in favor of the Hershbergers and dismissed the petition. Following various procedural events recited in part below, the City appealed. We note that although PMI and the Hershbergers are all denominated as appellees, the substance of the City's argument shows that the City's appeal is limited to the court's determination that the City's action against the Hershbergers was time barred and to the court's corresponding order granting summary judgment and dismissing the City's action against the Hershbergers. We reverse, and remand for further proceedings.

STATEMENT OF FACTS

On June 8, 1993, the City and PMI entered into a "Project Financing Agreement" pursuant to which the City agreed to loan $49,500 to PMI and PMI agreed to repay the loan. Paragraph 5 of the agreement provided for monthly payments of interest only for the first 24 months and amortized payments of principal and interest over the following 60 months, for a total term of 7 years. Paragraph 16 of the agreement provided that in the event PMI

defaulted on its obligations, the City was to provide notice of such default to PMI and, in the absence of a cure, the City could thereafter terminate the agreement. Specifically, if PMI failed to correct the default within 30 days of receipt of written notice, then under paragraph 16, "the unpaid balance plus accrued interest to the date of termination [would] become due and payable in full immediately on the date of termination." The Hershbergers executed the agreement as officers of PMI. As part of the financing arrangement, each of the Hershbergers signed an individual guaranty for PMI's obligations under the agreement. Each guaranty provided that the guarantor would unconditionally repay funds loaned to PMI "when due, pursuant to the financing agreement."

According to the record, on July 7, 1993, the City disbursed $23,753.43 to PMI. In the Hershbergers' answer, they do not dispute that "approximately $23,000.00" was loaned. The next document in the record is a December 10, 1993, letter written by James Hershberger to the City, reporting on the progress of the project and seeking a deferral of payments. Evidently, there was a failure of payment at some point, because, in a February 28, 1995, letter contained in the record, the City wrote the Hershbergers declaring that PMI had defaulted under the minimum repayment terms of the agreement. The City's letter stated that if the default was not corrected, the agreement would be terminated and the entire unpaid principal balance of $23,753.43 plus accrued interest would be due and payable. On March 21, James Hershberger sent a letter to the City stating that he wanted to meet to "discuss [the] terms of [the] agreement and a Repayment schedule."

On September 20, 1999, the City filed a petition in the district court against PMI and the Hershbergers. The City filed a second amended petition on December 17, 1999, which is the operative petition. In the second amended petition, the City alleged that PMI had failed to repay the loan contrary to the provisions of the agreement and that the Hershbergers had failed to comply with the provisions of the guaranties. The City alleged that pursuant to the agreement, the City had sent a letter on February 28, 1995, declaring PMI to be in default. In the petition, the City alleged that the unpaid principal and accrued interest was due and payable. The City prayed for a judgment against PMI and the Hershbergers in the amount of the unpaid

principal of $23,753.43 plus accrued interest, as well as costs and attorney fees.

The Hershbergers filed an answer in which, inter alia, they admitted the loan of "approximately $23,000.00" and affirmatively alleged that the City's action against them was barred by the statute of limitations. The Hershbergers also filed a counterclaim alleging that the City breached the agreement by failing to loan PMI the full $49,500, thereby causing the business which was the subject of the agreement to fail.

Although PMI was served, no answer or other appearance was filed on behalf of PMI. Eventually, during the course of the proceedings before the district court, a default money judgment against PMI was entered.

The Hershbergers moved for summary judgment on the basis that the action against them was time barred. An evidentiary hearing on the Hershbergers' motion was held October 16, 2000. Various items of evidence, including correspondence, were admitted. The court agreed with the Hershbergers, and on January 31, 2001, dismissed the second amended petition as to the Hershbergers and, although it had not appeared, PMI. The court reasoned that the cause of action against the Hershbergers was barred by the 5-year statute of limitations pertaining to contracts contained in Neb. Rev. Stat. § 25-205 (Reissue 1995). Included in the court's reasoning was the statement that the City was required to bring its action "within five years after the agreement was signed on June 8, 1993." Because the City did not file its action until 1999, the court concluded that the action was time barred.

The City appealed the January 31, 2001, order of summary judgment to the Nebraska Court of Appeals. The Court of Appeals dismissed the appeal on the basis that the January 31, 2001, order was not a final, appealable order because it did not dispose of the Hershbergers' counterclaim against the City. See *City of Lincoln v. PMI Franchising*, 11 Neb. App. xxiii (No. A-01-269, June 10, 2002). Upon remand, the district court entered an order dismissing the Hershbergers' counterclaim. Further, upon remand, on December 3, 2002, the district court filed a nunc pro tunc order striking reference to PMI in the January 31, 2001, order and granted a default money judgment against PMI. The action having thus been concluded as to all parties and all causes of action,

the City filed a notice of appeal on December 6, 2002. A motion to dismiss the appeal as untimely filed was correctly denied by the Court of Appeals prior to the transfer of this case to this court's docket.

On appeal, the City claims the grant of summary judgment in favor of the Hershbergers and the corresponding dismissal were error.

ASSIGNMENTS OF ERROR

The City generally asserts that the district court erred in determining that the 5-year statute of limitations under § 25-205 barred the City's petition and in granting summary judgment in favor of the Hershbergers.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing 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. *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Section 25-205 provides that an action upon any agreement, contract, or promise in writing can only be brought within 5 years. The district court reasoned that the statute of limitations on the City's action against the Hershbergers began to run when the Hershbergers signed the guaranties on June 8, 1993. The court therefore concluded that the initial petition filed against the Hershbergers on September 20, 1999, was barred by the 5-year statute of limitations. Giving the City the favorable inferences from the record, we conclude that the court erred in determining that the statute of limitations barred the City's action against the Hershbergers. We reverse.

[3-5] The statute of limitations provided in § 25-205 applies to an action on a contract of guaranty. *Production Credit Assn.*

of the Midlands v. Schmer, 233 Neb. 749, 448 N.W.2d 123 (1989). We have stated that "[t]he statute of limitations begins to run against a contract of guaranty the moment a cause of action first accrues" and that "[a] guarantor's liability arises when the principal debtor defaults." *Id.* at 756, 448 N.W.2d at 128. Taking these principles together, and in the absence of provisions to the contrary in the controlling documents, a cause of action does not accrue against a guarantor until the guarantor's liability has arisen, and a guarantor's liability does not arise until the debtor defaults. Nothing in the guaranties in this case is to the contrary. Therefore, unlike the view of the district court, and assuming a default, the statute of limitations in the present case began to run when PMI defaulted and the Hershbergers' liability arose, rather than when the Hershbergers initially signed the guaranties.

The Hershbergers moved for summary judgment. As the moving party, they had the burden to demonstrate that they were entitled to judgment as a matter of law. See *Misle, supra*. Specifically, in order to succeed on their assertion that the City's case against them as guarantors was filed out of time, the Hershbergers had to show when a default by PMI occurred which triggered their liability and in turn triggered the running of the statute of limitations. The Hershbergers failed to do so.

In their brief, the Hershbergers state that PMI "never paid anything back to the City," brief for appellees the Hershbergers at 4, but elsewhere in their brief, the Hershbergers question "if" PMI defaulted "at all," *id.* at 10. As reflected in the Hershbergers' written argument on appeal, the record is unclear.

We are aware of the December 10, 1993, letter in the record in which James Hershberger requests a deferral of payments, and the letter suggests a default may have or was about to occur. On review, we are required to take inferences in favor of the City as the party against whom judgment was entered. See *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004). Although a default on or about December 10, 1993, may be inferred from the letter, that is not the only reasonable inference, and for statute of limitations purposes, it is not the inference most favorable to the City.

Other than the December 10, 1993, letter, the only material evidence in the record of a default and when it occurred is the City's letter of February 28, 1995, in which the City declares a default.

Whereas the December 10, 1993, letter offered by the Hershbergers establishes neither a default nor when it occurred, the City's February 28, 1995, letter, by its terms, indicates that a default occurred and, logically, that the default had occurred sometime prior to the writing of the letter. Because the City filed its action on September 20, 1999, a default occurring after September 20, 1994, would be within 5 years of September 20, 1999, and the action against the guarantors would not be time barred.

We further observe that the February 28, 1995, letter was written during the period when only interest was due. Under the terms of the agreement, and in the absence of a cure of default, the unpaid principal became due 30 days after the February 28 letter declaring default. Therefore, on the record before us, default in the payment of the unpaid principal that became due upon termination of the agreement appears to have occurred sometime after the February 28 letter, and the initial petition filed September 20, 1999, would thus have been filed within the 5-year limitations period. A suit seeking recovery of the principal from the guarantors would not appear to be time barred.

Given the record before us, the reasonable inferences are (1) that the Hershbergers' liability arising from default on interest payments arose at an unspecified time prior to the City's February 28, 1995, letter and (2) that pursuant to the agreement, the Hershbergers' liability arising from unpaid principal arose 30 days after the February 28 letter. At the hearing on their motion for summary judgment, the Hershbergers did not establish when their liability as guarantors arose and the statute of limitations commenced. We cannot determine from the record when the statute of limitations started. In sum, the Hershbergers did not establish their entitlement to judgment as a matter of law, see *Misle, supra*, and, therefore, they were not entitled to summary judgment based on an allegation that the City's action was time barred.

CONCLUSION

We conclude that the district court erred when it determined that the statute of limitations on the City's cause of action against the Hershbergers began to run when the Hershbergers signed the guaranties on June 8, 1993. Instead, the statute of limitations began to run when PMI defaulted and the Hershbergers' liability

arose. Viewing the evidence in the light most favorable to the City, we determine the Hershbergers failed to demonstrate when PMI defaulted and they therefore failed to demonstrate that the City's action was time barred in toto and that they were entitled to judgment as a matter of law. We therefore conclude that the court erred in granting summary judgment in favor of the Hershbergers and entering a corresponding dismissal. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., not participating.

THOMAS POULTON AND KAREN POULTON, APPELLANTS, V. STATE FARM FIRE AND CASUALTY COMPANIES, APPELLEE.

675 N.W.2d 665

Filed March 12, 2004. No. S-02-1418.

1. **Insurance: Contracts: Appeal and Error.** The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
2. **Insurance: Contracts.** A specific perils policy excludes all risks not specifically included in the contract.
3. ____: ____. An all-risk or open perils policy provides coverage for all direct losses not otherwise excluded.
4. ____: ____. In order to recover under an insurance policy of limited liability, the insured must bring himself or herself within its express provisions.
5. ____: ____. A specific perils policy covers losses caused by specified perils; to the extent not specified, no coverage results.
6. ____: ____. In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved.
7. **Insurance: Contracts: Intent: Appeal and Error.** In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
8. **Insurance: Contracts.** The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
9. **Contracts.** Whatever the construction of a particular clause of a contract, standing alone, may be, it must be read in connection with other clauses.
10. ____. A party may not pick and choose among the clauses of a contract, accepting only those that advantage it.

11. **Insurance: Contracts.** Whether the language in an insurance policy is ambiguous presents a question of law.
12. **Insurance: Contracts: Words and Phrases.** A contract, such as an insurance policy, is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
13. **Insurance: Contracts.** While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract.
14. ____: ____. A policy will not be considered ambiguous merely because a word or phrase, isolated from its context, is susceptible to more than one meaning.
15. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

David A. Hecker, Angela D. Melton, and Richard P. Jeffries, of Kutak Rock, L.L.P., for appellants.

Joseph E. Jones and Andrea F. Scioli, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

GERRARD, J.

NATURE OF CASE

Due to mold and fungi in their home, Thomas Poulton and Karen Poulton suffered a significant loss of personal property. Seeking compensation for their loss, the Poultons filed a claim with their insurer, State Farm Fire and Casualty Companies (State Farm). State Farm denied the claim, and the Poultons sued State Farm for coverage. The trial court determined the Poultons' insurance policy did not provide coverage and dismissed their petition. The issue on appeal is whether the Poultons' personal property is covered under the "resulting loss" provision of their policy.

FACTUAL AND PROCEDURAL BACKGROUND

On June 23, 2000, the Poultons purchased real estate in Omaha, Nebraska. Shortly thereafter, they noticed a mold and fungi infestation problem in their home. This problem, the Poultons claim, caused them to suffer the loss of all of the personal property that

they had placed inside of the home. Seeking compensation for the damage, the Poultons turned to their insurer.

The Poultons had insured their property under a homeowner's policy of insurance (the Policy) issued by State Farm. On September 25, 2000, the Poultons made a claim to State Farm for loss of their personal property caused by a mold and fungal infestation of their home. Upon receiving notice of the claim, State Farm sent an adjuster to investigate the Poultons' loss. After the investigation, State Farm sent a letter to the Poultons, dated October 6, 2000, denying coverage. The letter stated that State Farm was denying coverage because the Poultons' loss was not caused by 1 of the 16 named perils in the section of the Policy dealing with insured losses to personal property.

On November 29, 2000, the Poultons, via letter, sought reconsideration of State Farm's determination. The Poultons argued that coverage for their personal property existed under the plain language of the policy. In addition, the Poultons argued that their loss was the direct result of a mold and fungal infestation of their home and, therefore, was covered as a resulting loss under the Policy.

On December 19, 2000, State Farm denied coverage for a second time. State Farm repeated its position that the Poultons' loss was not caused by 1 of the Policy's 16 named perils and that therefore, the Policy did not cover their loss. In addition, State Farm argued that the resulting loss provision, properly interpreted, did not provide coverage for the loss of personal property.

The Poultons then filed a petition for declaratory relief in district court. The petition requested a declaration that the Policy covered the Poultons' loss and an order requiring State Farm to pay the Poultons for the damage sustained to their personal property. After State Farm answered, a trial on stipulated facts was held; thereafter, the district court entered a judgment in favor of State Farm. The court determined that (1) the Policy was a "specific risk" policy that did not provide coverage for damage to personal property caused by mold or fungi, (2) the resulting loss provision applied only to structural damage to the dwelling and not to personal property damage, and (3) the Policy was not ambiguous. The Poultons' petition was dismissed with prejudice, and they subsequently filed a timely notice of appeal.

ASSIGNMENTS OF ERROR

The Poultons assign three errors, more properly restated as two: the district court erred in determining that (1) the Policy's resulting loss provision did not cover damage to their personal property and (2) the Policy is not ambiguous.

STANDARD OF REVIEW

[1] The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002).

ANALYSIS

RESULTING LOSS

Obviously, the focus of this appeal is the coverage provided under the Policy. Before examining the relevant provisions, however, a brief overview of the Policy will provide context for our subsequent analysis. The Policy's table of contents shows that the Policy is divided into five parts and a number of subparts. Here, the disputed provisions are found in Section I, which is entitled "**SECTION I - YOUR PROPERTY**." The table of contents, with respect to Section I, is as follows:

In the body of the Policy, under the provision entitled "COVERAGES," the Policy states that under "Coverage A," State Farm covers the "dwelling used principally as a private residence on the **residence premises** shown in the **Declarations**." As to personal property, the Policy states that under "Coverage

B," State Farm covers "personal property owned or used by an **insured** while it is anywhere in the world."

Under the provision entitled "**LOSSES INSURED**," the Policy divides itself into two categories of covered losses: (1) "**COVERAGE A - DWELLING**" and (2) "**COVERAGE B - PERSONAL PROPERTY**." They state:

> **COVERAGE A - DWELLING**
>
> We insure for accidental direct physical loss to the property described in Coverage A, except as provided in **SECTION I - LOSSES NOT INSURED**.
>
> **COVERAGE B - PERSONAL PROPERTY**
>
> We insure for accidental direct physical loss to property described in Coverage B caused by the following perils, except as provided in **SECTION I - LOSSES NOT INSURED**:
>
> 1. **Fire or lightning**.
> 2. **Windstorm or hail**. . . .
> . . . .
> 3. **Explosion**.
> 4. **Riot or civil commotion**.
> 5. **Aircraft** . . . .
> 6. **Vehicles** . . . .
> 7. **Smoke** . . . .
> 8. **Vandalism or malicious mischief** . . . .
> 9. **Theft** . . . .
> 10. **Falling objects**. . . . .
> 11. **Weight of ice, snow or sleet** . . . .
> 12. **Sudden and accidental discharge or overflow** of water or steam . . . .
> 13. **Sudden and accidental tearing asunder, cracking, burning or bulging** of a steam or hot water heating system . . . .
> 14. **Freezing** of a plumbing, heating, air conditioning or automatic fire protective sprinkler system . . . .
> 15. **Sudden and accidental damage** to electrical appliances, devices, fixtures and wiring . . . .
> 16. **Breakage of glass** . . . .

This action arises out of a claim for damage done to personal property; therefore, we turn to Coverage B - Personal Property.

As listed above, Coverage B sets forth 16 specific perils for which personal property damages are covered. Because the provision is clear that an insured's personal property is only covered for damages caused by the 16 listed perils, this provision of the Policy can be described as providing "specific perils" or "named perils" coverage. See 7 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 101:7 at 101-17 (1997).

[2-5] A specific perils policy "exclude[s] all risks not specifically included in the contract." *Id.* In other words, a specific perils policy provides coverage in accordance with the legal maxim "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of the others), and is the converse of an all-risks or open perils policy, which provides coverage for all direct losses not otherwise excluded. See, 7 Russ & Segalla, *supra* at 101-17 to 101-18 (under all-risks policies "all risks are included in the coverage unless specifically excluded in the terms of the contract"); Annot., 30 A.L.R.5th 170 (1995) ("[a]ll-risks insurance is a special type of insurance extending to risks not usually contemplated, and generally allows recovery for all fortuitous losses, unless the policy contains a specific exclusion expressly excluding the loss from coverage"). Consequently, in order for there to be coverage for damage to personal property under the Policy, the damage to the personal property must arise out of one of the 16 listed perils. See, *Curtis O. Griess & Sons v. Farm Bureau Ins. Co.*, 247 Neb. 526, 530, 528 N.W.2d 329, 332 (1995) ("[i]n order to recover under an insurance policy of limited liability, the insured must bring himself or herself within its express provisions"); *Thorell v. Union Ins. Co.*, 242 Neb. 57, 492 N.W.2d 879 (1992); *Barish-Sanders Motor Co. v. Fireman's Fund Ins. Co.*, 134 Neb. 188, 278 N.W. 374 (1938). See, also, *Harrigan v. Liberty Mut. Fire Ins. Co.*, 170 A.D.2d 930, 566 N.Y.S.2d 755 (1991) (property insurance only provides coverage for harm caused by named perils); 10 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 148:48 at 148-84 (1998) (specific perils policy covers "losses caused by specified perils; to the extent not specified, no coverage results").

Here, both parties agree that mold is not a listed peril. Therefore, the Policy would not appear to provide coverage for damage to the Poultons' personal property. The Poultons,

however, argue that coverage still exists via one of the Policy's resulting loss provisions.

The disputed resulting loss provision is found in "**SECTION I - LOSSES NOT INSURED**," and states, in relevant part:

> 1. We do not insure for any loss *to the property described in Coverage A* which consists of, or is directly and immediately caused by, one or more of the perils listed in items a. through n. below, regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> . . . .
>
> i. mold, fungus or wet or dry rot;
>
> . . . .
>
> However, we do insure for any resulting loss from items a. through m. unless the resulting loss is itself a Loss Not Insured by this Section.

(Emphasis supplied.) The Poultons argue that although damage to the dwelling caused by mold is excluded under "i," coverage exists because (1) their loss of personal property was the result of the mold contamination of their insured dwelling and (2) the phrase "any resulting loss" suggests that all resulting losses, including losses to personal property, are covered. On the other hand, State Farm argues that under the Policy's plain language, the resulting loss provision provides coverage for loss to the dwelling (Coverage A) but does not provide coverage for loss to personal property (Coverage B).

[6-8] The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002). In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved. *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001). In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded

their plain and ordinary meaning. *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 647 N.W.2d 599 (2002). Furthermore, the language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

Although the parties cite numerous cases from other jurisdictions to support their respective arguments, our independent review leads us to conclude that the meaning of the Policy can be determined from its clear and unambiguous language. After reviewing the Policy, we conclude that under its plain language, the disputed "resulting loss" provision does not provide coverage for loss to personal property.

As noted previously, under the provision entitled "**LOSSES INSURED**," the Policy provides coverage for two main, and distinct, categories of losses: (1) to the dwelling (Coverage A) and (2) to personal property (Coverage B). We have already concluded that Coverage B is appropriately characterized as providing specific perils coverage for the Poultons' personal property. Our review of Coverage A leads us to conclude that this section of the Policy provides all-risks coverage for the dwelling, subject to a limited number of exclusions. Stated otherwise, under Coverage A, the Poultons' dwelling was insured against all risks except those specifically excluded in Section I - Losses Not Insured, and under Coverage B, the Poultons' personal property was insured against loss caused by the listed perils except as provided in Section I - Losses Not Insured.

Thus, we must turn to Section I - Losses Not Insured. This section is divided into three numbered paragraphs, and for clarity, the disputed paragraph is restated below:

> 1. We do not insure for any loss to the property described in Coverage A which consists of, or is directly and immediately caused by, one or more of the perils listed in items a. through n. below, regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> . . . .
>
> i. mold, fungus or wet or dry rot;

. . . .

However, we do insure for any resulting loss from items a. through m. unless the resulting loss is itself a Loss Not Insured by this Section.

We conclude that the plain language of paragraph 1 shows that the 14 listed exclusions ("a" through "n") apply only to the dwelling (Coverage A). In other words, the listed exclusions, including the exclusion for mold, were drafted to operate as exclusions to the all-risks coverage provided for the dwelling under Coverage A.

[9,10] Furthermore, we conclude that the plain language of the Policy shows that the resulting loss paragraph, which immediately follows the 14 exclusions, was intended to be limited to the dwelling (Coverage A). Obviously, the resulting loss provision should be read in the context of where it is located, i.e., as a subset of paragraph 1. See 2 Eric Mills Holmes & Mark S. Rhodes, Holmes's Appleman on Insurance § 5.1 (2d ed. 1996). Because the 14 exclusions referenced in, and immediately subsequent to, paragraph 1 are clearly limited to the dwelling (Coverage A), it would be illogical to conclude that the resulting loss provision, which follows and references the same exclusions, is not likewise limited. See 2 Holmes & Rhodes, *supra* at 20 ("[w]hatever the construction of a particular clause standing alone may be, it must be read in connection with other clauses . . ."). Simply put, the Poultons' interpretation must be rejected because they seek to expand the intended coverage of the Policy by plucking a provision out of the context in which it was meant to apply. See *Bedrosky v. Hiner*, 230 Neb. 200, 204, 430 N.W.2d 535, 539 (1988) ("party may not pick and choose among the clauses of the contract, accepting only those that advantage it").

Our reading of the Policy is further supported by the language used in the remaining two paragraphs of this section. As quoted above, paragraph 1 states that State Farm does "not insure for any loss to the property described in Coverage A." Paragraphs 2 and 3, however, are expressly not so limited: "2. We do not insure *under any coverage* for any loss which would not have occurred in the absence of one or more of the following . . . . 3. We do not insure *under any coverage* for any loss consisting of one or more of the items below." (Emphasis supplied.) Thus, while paragraph

1 is specifically limited to the dwelling (Coverage A), paragraphs 2 and 3 use the phrase "under any coverage" to refer to both, inter alia, the dwelling (Coverage A) and personal property (Coverage B). This distinction is important because it shows the resulting loss provisions which follow paragraphs 2 and 3 were intended to apply to both Coverages A and B, whereas paragraph 1 was intended to be expressly limited to Coverage A (the dwelling). In sum, we conclude that the Policy, under the resulting loss provision found in Section I - Losses Not Insured, paragraph 1, does not provide coverage for the Poultons' loss of personal property.

AMBIGUITY

As an alternative argument, the Poultons contend that coverage exists under the resulting loss provision because the phrase "any resulting loss" is ambiguous. The Poultons suggest that a reasonable insured would read the phrase and conclude that all resulting losses, including losses to personal property, are covered under the resulting loss provision. Therefore, according to the Poultons, the policy is ambiguous as to what the resulting loss provision covers, and the ambiguity should be construed against State Farm. See *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003) (ambiguous insurance policy will be construed against drafter).

[11-13] Whether the language in an insurance policy is ambiguous presents a question of law. *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001). A contract, such as an insurance policy, is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 647 N.W.2d 599 (2002). Moreover, while an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract. *Farm Bureau Ins. Co. v. Martinsen*, 265 Neb. 770, 659 N.W.2d 823 (2003).

[14] Here, the policy is not ambiguous. We have already concluded that, properly read, the resulting loss provision applies only to the dwelling (Coverage A). Therefore, the phrase "any resulting loss" could not reasonably extend to the Poultons'

personal property, which is covered solely under Coverage B. See 2 Eric Mills Holmes & Mark S. Rhodes, Holmes's Appleman on Insurance § 5.1 at 21-22 (2d ed. 1996) ("[a] policy will not be considered ambiguous merely because a word or phrase, isolated from its context, is susceptible to more than one meaning").

[15] In sum, the Policy provided limited coverage for the Poultons' personal property. While the hardship that the loss of personal property has imposed upon the Poultons is regrettable, "[p]arties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute." *City of Scottsbluff v. Employers Mut. Ins. Co.*, 265 Neb. 707, 711, 658 N.W.2d 704, 708 (2003). Here, we are bound to enforce the contract in accordance with the plain meaning of the words of the contract, see *Trimble v. Wescom, ante* p. 224, 673 N.W.2d 864 (2004), and under the plain meaning of the words in the Policy, the Poultons' personal property was not insured against this type of loss.

CONCLUSION

For the foregoing reasons, we conclude that the Policy does not cover the Poultons' loss of personal property. The judgment of the district court is affirmed.

AFFIRMED.

MILLER-LERMAN, J., not participating.

ROBERT E. ROBINSON, APPELLEE, V.
COMMISSIONER OF LABOR, APPELLANT.
675 N.W.2d 683

Filed March 12, 2004. No. S-03-908.

1. **Employment Security: Appeal and Error.** In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record.
2. **Administrative Law: Judgments: Appeal and Error.** Judgments issued by a district court on a petition for review under the Administrative Procedure Act may be appealed to the Nebraska Court of Appeals under general civil procedure rules.

3. **Judgments: Appeal and Error.** A decision in the district court may be reversed, vacated, or modified by an appellate court for errors appearing on the record. The inquiry on appeal, however, is limited to whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Employment Security: Labor and Labor Relations.** The general test whether a person is available for work is whether the claimant is able, willing, and ready to accept suitable work which he or she does not have good cause to refuse.
5. ____: ____. After a person becomes unemployed, he or she must remain able to work to receive benefits.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed.

John H. Albin and Thomas A. Ukinski for appellant.

Patrick T. Carraher, of Legal Services of Southeast Nebraska, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The Commissioner of Labor (Commissioner) appeals the district court's order holding that Robert E. Robinson, who was incarcerated, was eligible for unemployment compensation. We determine that the record does not show that Robinson was available for employment and thus, he was ineligible to receive unemployment compensation. Accordingly, we reverse.

BACKGROUND

Robinson was incarcerated in October 2002 and was later approved for work release. At that time, he was employed by a local roofing company. Robinson was laid off work on January 14 or 15, 2003, and his employer stated that it expected to recall him in 4 to 6 weeks. Robinson applied for unemployment benefits and asked his girl friend to call and file his weekly claim for benefits. On January 29, an adjudicator at the Department of Labor discovered that Robinson was incarcerated. The adjudicator testified that she then spoke with a correctional officer who stated that Robinson was no longer on work release effective January 15.

Robinson testified, however, that the work release coordinator advised him to file for unemployment benefits and told Robinson

that he should be eligible because he was not required to seek other employment. Robinson stated that his work release privilege was temporarily suspended because he was laid off and that it was not revoked. He then stated: "A judge's order from the District Court in Lancaster County has been temporarily rescinded." The adjudicator determined that Robinson was not available for employment and issued a determination that he was ineligible for benefits.

Robinson appealed to the appeal tribunal of the Department of Labor. The tribunal determined that a work release authorization was not in place and that Robinson was unavailable to immediately accept employment; the tribunal affirmed the denial of benefits. Robinson appealed to the district court.

The district court reversed, finding that Robinson was available for employment because he was not required to seek additional employment to receive benefits and could return to his employer on work release after the layoff ended. The Commissioner appeals.

ASSIGNMENT OF ERROR

The Commissioner assigns, rephrased, that the district court erred when it found that Robinson was available for work and thus entitled to benefits.

STANDARD OF REVIEW

[1] In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record. *Vlasic Foods International v. Lecuona*, 260 Neb. 397, 618 N.W.2d 403 (2000).

[2,3] Judgments issued by a district court on a petition for review under the Administrative Procedure Act may be appealed to the Nebraska Court of Appeals under general civil procedure rules. *Id.* The decision in the district court may be reversed, vacated, or modified by an appellate court for errors appearing on the record. The inquiry on appeal, however, is limited to whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

ANALYSIS

The Commissioner contends that because Robinson was incarcerated, he was not available for employment. Availability is

required for eligibility to receive unemployment compensation benefits. Robinson argues that because he was an "'attached'" employee who was not required to seek employment while he was laid off, he was available for employment. Brief for appellee at 7.

Neb. Rev. Stat. § 48-627(3) (Reissue 1998) provides that an unemployed individual is eligible for benefits only when "[h]e or she is able to work and is available for work."

[4,5] The general test whether a person is available for work is whether the claimant is able, willing, and ready to accept suitable work which he or she does not have good cause to refuse. See *George A. Hormel & Co. v. Hair*, 229 Neb. 284, 426 N.W.2d 281 (1988). After a person becomes unemployed, he or she must remain able to work to receive benefits. *Ponderosa Villa v. Hughes*, 224 Neb. 627, 399 N.W.2d 813 (1987).

Under Neb. Rev. Stat. § 47-401 (Reissue 1998), "[a]ny person sentenced to a city or county jail upon conviction for a misdemeanor, a felony, contempt, or nonpayment of any fine or forfeiture may be granted the privilege of leaving the jail during necessary and reasonable hours for . . . [w]orking at his or her employment." Neb. Rev. Stat. § 47-402 (Reissue 1998) provides:

> The privilege of leaving the jail as set forth in section 47-401 shall be granted only by written order of the sentencing court, after conferring with the chief of police, county sheriff, or such other person as may be charged with the administrative direction of the jail, specifically setting forth the terms and conditions of the privilege granted. The prisoner may petition the court for such privilege at the time of sentencing, or thereafter, and, in the discretion of the court, may renew his or her petition. The court may withdraw the privilege at any time by written order entered with or without prior notice.

Here, the record shows that Robinson was not required to look for new employment to be eligible for unemployment compensation. But he also had to be available for work which, under § 47-402, requires a written order from the sentencing court. At the hearing, Robinson stated that an order of the court had been temporarily rescinded. Thus, the record contains no evidence that an order was in effect that would allow Robinson to leave the jail to return to work. Without an order from the sentencing

court granting Robinson the privilege to leave the jail for work, he could not be "available" for work under § 48-627(3).

Because the record contains no evidence showing a work-related order was in effect, we determine that the district court's conclusion that Robinson was available for work did not conform to the law and was not supported by competent evidence. Accordingly, we reverse.

REVERSED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ELAINE A. WAGGONER, RESPONDENT.

675 N.W.2d 686

Filed March 12, 2004. No. S-03-1290.

Original action. Judgment of public reprimand and probation.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

Respondent, Elaine A. Waggoner, was admitted to the practice of law in the State of Nebraska on September 14, 1978, and at all times relevant hereto was engaged in the private practice of law in Lincoln, Nebraska. On November 13, 2003, formal charges were filed against respondent. The formal charges set forth three counts, including charges that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); Canon 6, DR 6-101(A)(3) (neglecting legal matter); and Canon 9, DR 9-102(A)(2) (failing to deposit client funds in trust account), as well as her oath of office as an attorney. Neb. Rev. Stat. § 7-104 (Reissue 1997).

On January 27, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002). In her conditional admission, respondent, in substance, knowingly admitted the facts essential to support the above formal charges; knowingly

admitted that she violated DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A)(2), as well as her oath of office as an attorney; and effectively waived all proceedings against her in connection with the formal charges in exchange for a judgment of a formal public reprimand and probation for 18 months with monitoring. Upon due consideration, the court approves the conditional admission and orders that respondent be publicly reprimanded and that respondent shall be subject to probation with monitoring as outlined *infra* for 18 months.

FACTS

In summary, the formal charges allege that during the course of her representation of two separate clients, respondent unduly delayed in completing certain legal matters entrusted to her on behalf of those clients. The formal charges further allege that as to a third client, respondent failed to deposit a retainer paid to her by the client in her attorney trust account. As noted above, respondent filed a conditional admission on January 27, 2004.

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to the conditional admission, in addition to the public reprimand, respondent agreed that during her probationary period, she would be monitored subject to the following terms:

> Probation for 18 months with monitoring and costs taxed to respondent. The probation shall include the monitoring of respondent by Kathryn A. Olson . . . . Kathryn A. Olson shall not be compensated for her monitoring duties; however, she shall be reimbursed by respondent for actual expenses incurred. At the conclusion of the term of probation, the monitoring lawyer shall notify the Court of respondent's successful completion thereof.
>
> During the 18 month probationary period, respondent shall provide the monitor, at least monthly, a list of all cases for which the respondent is then responsible. During each of the first six months, respondent shall personally meet with the monitor to discuss the list of cases for which respondent is then responsible. The monitor shall also assist respondent in developing and implementing appropriate office procedures.
>
> The names of respondent's clients shall be kept confidential by way of a number assigned to each case. The list of cases shall include the following for each case:
>
> 1. Date attorney-client relationship began.
>
> 2. General type of case (i.e. divorce, adoption, probate, contract, real estate, civil litigation, criminal).
>
> 3. Date of last contact with client.
>
> 4. Last type and date of work completed on file (pleading, correspondence, document preparation, discovery, court hearing).
>
> 5. Next type and date of work that should be completed on case.
>
> 6. Any applicable statute of limitation and its date.
>
> The monitor shall have the right to contact respondent with any questions the monitor may have regarding the list. If at any time the monitor believes respondent has violated a disciplinary rule, or has failed to comply with the terms of probation, she shall report the same to the Counsel for Discipline.

Pursuant to rule 13, we find that respondent knowingly admits the essential relevant facts outlined in the formal charges and knowingly admits that she violated DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A)(2), as well as her oath of office as an attorney. We further find that respondent waives all proceedings against her in connection herewith. Upon due consideration, the court approves the conditional admission and enters orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1), DR 6-101(A)(3), and DR 9-102(A)(2), as well as her oath of office as an attorney, and that respondent should be and hereby is publicly reprimanded. It is further ordered that respondent be subject to probation with monitoring as outlined above for a period of 18 months, effective immediately. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF PUBLIC REPRIMAND AND PROBATION.

JILL A. ARTHUR AND NANCY WATERS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS, V. MICROSOFT CORPORATION, A WASHINGTON CORPORATION, APPELLEE.

676 N.W.2d 29

Filed March 19, 2004. No. S-01-1325.

1. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Demurrer: Pleadings: Appeal and Error.** In 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 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: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
5. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
6. **Consumer Protection: Intent.** The purpose of the Consumer Protection Act is to provide consumers with protection against unlawful practices in the conduct of any trade or commerce which directly or indirectly affects the people of Nebraska.
7. ____: ____. The Consumer Protection Act was intended to be an antitrust measure to protect Nebraska consumers from monopolies and price-fixing conspiracies.

Appeal from the District Court for Dodge County: F.A. GOSSETT III, Judge. On motion for rehearing, reargument granted. Original memorandum opinion withdrawn. Affirmed in part, and in part reversed and remanded for further proceedings.

Robert M. Hillis, Nicholas J. Lamme, and Timothy M. Schulz, of Yost, Schafersman, Lamme, Hillis, Mitchell & Schulz, P.C., L.L.O., for appellants.

Norman M. Krivosha, Robert M. Slovek, and Todd C. Kinney, of Kutak Rock, L.L.P., and David B. Tulchin, Joseph E. Neuhaus, Anastasia A. Angelova, and Richard C. Pepperman II, of Sullivan & Cromwell, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ., and CARLSON, Judge.

WRIGHT, J.

NATURE OF CASE

Jill A. Arthur and Nancy Waters, the plaintiffs, filed a class action against Microsoft Corporation in the district court for Dodge County. The plaintiffs brought the action on behalf of themselves and others similarly situated, alleging a violation of Nebraska's Consumer Protection Act (Act), Neb. Rev. Stat. § 59-1601 et seq. (Reissue 1998 & Cum. Supp. 2000), and Neb.

U.C.C. § 2-302 (Reissue 2001). The district court sustained Microsoft's demurrer and dismissed the action without leave to amend, finding that the plaintiffs failed to state a cause of action. On appeal, we affirmed by an equally divided court. Subsequently, we granted the plaintiffs' motion for rehearing. Today, we affirm in part, and in part reverse the judgment of the district court and remand the cause for further proceedings. The memorandum opinion filed June 25, 2003, is withdrawn.

SCOPE OF REVIEW

[1] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002).

[2] In 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 the conclusions of the pleader. *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002).

FACTS

In their amended petition, the plaintiffs alleged that Microsoft is a for-profit corporation organized and existing under the laws of the State of Washington. It is the leading supplier of operating systems for personal computers, and it markets and licenses its Windows 98 operating system throughout the United States, including Nebraska.

For purposes of this action, a personal computer is a digital information-processing device for use by one person and includes desktop and laptop models. "Intel-based" personal computers, or computers designed for compatibility with Intel Corporation's "Pentium" family of microprocessors, are the dominant type of personal computers sold and used in the United States. Microsoft has licensed its Windows 98 operating system for Intel-based personal computers.

The plaintiffs' class is defined as all end-user licensees of Windows 98 residing in Nebraska for whom Microsoft has an electronic mail or surface address that is accessible by Microsoft.

The plaintiffs are informed and believe that the membership of the class is well in excess of 4,000, the exact number being known to Microsoft.

As of June 1998, more than 90 percent of new Intel-based personal computers had been shipped with a version of Windows preinstalled in the computer. The plaintiffs further alleged that Microsoft possesses a dominant and increasing share of the market for operating systems, which share over the decade leading up to the filing of the plaintiffs' petition exceeded 90 percent. During the 2 years leading up to the filing of the plaintiffs' petition, Microsoft's share was at least 95 percent, and it was projected that Microsoft's share would increase in the years immediately following the filing of the petition.

On June 7, 1999, Waters purchased a personal computer from Gateway Direct Computer Sales, a computer distributor. In addition to the computer hardware purchased from Gateway Direct Computer Sales, Waters acquired a license to use the Windows 98 operating system which had been placed on CD-ROM by Microsoft and copied to the hard drive of the computer. On June 4, 2000, Arthur acquired a Windows 98 operating system CD-ROM from CompUSA, a computer distributor, and installed it on her computer. As a precondition to loading and using the Windows 98 operating system, both Waters and Arthur were required to accept an end-user license agreement. The plaintiffs alleged that upon accepting the agreement, both Waters and Arthur became end-user licensees of Microsoft as to Windows 98.

The plaintiffs further alleged that Microsoft's pricing behavior demonstrated that it possessed monopoly power in the market for operating systems for Intel-based personal computers and that Microsoft unlawfully and willfully maintained its monopoly power by anticompetitive and unreasonably exclusionary conduct. They claimed that as a consequence of Microsoft's monopoly, it was able to exercise unfettered discretion in setting the price for a Windows 98 license. The plaintiffs contended that Microsoft licensed Windows 98 at a monopoly price in excess of the amount it would have been able to charge in a competitive market.

The plaintiffs brought their claim pursuant to the Act and § 2-302. The plaintiffs alleged that they and all others similarly situated incurred a monopoly price charged by Microsoft for the

use of Windows 98. The plaintiffs alleged that they were entitled to damages according to proof as to the difference between a competitive price and the monopoly price that they incurred as end-user licensees for their use of Windows 98.

Microsoft's demurrer to the plaintiffs' amended petition was sustained as to the antitrust claim. Relying upon *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), the district court held that the plaintiffs, as indirect purchasers, could not bring suit under the Act. The court then dismissed the plaintiffs' amended petition without leave to further amend, finding that the plaintiffs failed to state a cause of action for both the antitrust claim and the claim alleging an unconscionable contract. The plaintiffs timely appealed, and we affirmed, by an equally divided court, the judgment of the district court via a memorandum opinion filed June 25, 2003. We subsequently granted the plaintiffs' motion for rehearing.

ASSIGNMENTS OF ERROR

The plaintiffs assign that the district court erred (1) in holding that this case is controlled by *Illinois Brick Co.* and that the plaintiffs failed to state a cause of action, (2) in holding that the plaintiffs are indirect purchasers and thus failed to state a cause of action, and (3) in holding that the plaintiffs' claim based upon unconscionable contract terms and § 2-302 failed to state a cause of action.

ANALYSIS

STANDING

We first consider whether the plaintiffs have standing to bring a cause of action under the Act. The Act provides: "It shall be unlawful for any person to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce." § 59-1604. "Any person who is injured in his business or property by a violation of sections 59-1602 to 59-1606 . . . may bring a civil action in the district court to enjoin further violations, to recover the actual damages sustained by him, or both, together with the costs of the suit . . . ." § 59-1609.

Federal antitrust law contains provisions corresponding to §§ 59-1604 and 59-1609: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (2000). Pursuant to 15 U.S.C. § 15(a) (2000), any person who shall be injured in his business or property because of a violation of the antitrust laws may bring a civil action for treble damages.

Neb. Rev. Stat. § 59-829 (Reissue 1998) provides: "When . . . any provision of Chapter 59 is the same as or similar to the language of a federal antitrust law, the courts of this state in construing . . . any provision of Chapter 59 shall follow the construction given to the federal law by the federal courts." In dismissing the plaintiffs' antitrust claim, the district court determined that § 59-829 required it to accept the construction of the federal courts in federal antitrust actions in determining who has standing to bring an action under the Act. The district court concluded that the issue of standing was controlled by *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), which held that under federal law, indirect purchasers are not entitled to sue for damages for a violation of the Sherman Act, 15 U.S.C. § 1 et seq. (2000).

In *Illinois Brick Co.*, the State of Illinois brought suit against concrete block manufacturers, alleging a violation of the Clayton Act. Pursuant to § 4 of the Clayton Act, codified at 15 U.S.C. § 12 et seq. (2000), any person injured by reason of anything forbidden in the antitrust laws may bring suit to recover damages sustained by him. The U.S. Supreme Court held that the state was an indirect purchaser because it did not buy concrete blocks directly from the manufacturers. The Court explained that the "direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property'" within the meaning of § 4 of the Clayton Act. See *Illinois Brick Co.*, 431 U.S. at 729. Therefore, the Court concluded that federal antitrust law barred claims by indirect purchasers.

In *Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990), the Court reaffirmed *Illinois Brick Co.* by holding that indirect purchasers were barred from

bringing suit even though the direct purchasers (natural gas utilities) were required by law to pass on the entire amount of an overcharge to the consumers.

In the case at bar, the plaintiffs claim that indirect purchasers have standing to sue under the Act because its language is different from federal law. They argue that when considering the Act in its entirety, certain sections have no counterpart in federal law and that, therefore, this court is not required to follow the construction given to the Sherman Act by the federal courts in deciding whether to permit recovery by indirect purchasers.

The plaintiffs point out that § 59-1601(2) has no counterpart in federal antitrust law. Section 59-1601(2) defines trade and commerce as "the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska." Commerce is defined by federal law as "trade or commerce among the several States and with foreign nations." See 15 U.S.C. § 12. The plaintiffs claim that § 59-1601(2) differentiates the Act from federal antitrust law, and they contend that the plain language of the Act provides a cause of action for the benefit of any person who is damaged as a result of prohibited activity under the Act. They assert that they were damaged as a result of Microsoft's activity and therefore have standing to bring suit under the Act.

Microsoft argues that in construing the Act, the courts of Nebraska are required to follow federal court interpretations of similar provisions of federal antitrust law. It claims that § 59-1604, which is relied upon by the plaintiffs, is based upon § 2 of the Sherman Act, 15 U.S.C. § 2. Microsoft asserts that because the Act mirrors federal law and is the state version of the Sherman Act, see *Raad v. Wal-Mart Stores, Inc.*, 13 F. Supp. 2d 1003 (D. Neb. 1998), and *State ex rel. Douglas v. Associated Grocers*, 214 Neb. 79, 332 N.W.2d 690 (1983), § 59-829 requires that the construction given to federal law by federal courts be applied to the Act. Microsoft also claims that § 59-1609 is similar to 15 U.S.C. § 15.

Microsoft argues that the phrase "[t]rade and commerce," as it is defined in § 59-1601(2), does not provide standing to indirect purchasers because the terms "trade" and "commerce" do not appear in § 59-1609, which regulates who is injured and who may sue under the Act. Microsoft asserts that the terms

"trade" and "commerce" appear in the sections that address the substantive conduct governed by the Act, i.e., monopolization, and that, therefore, the terms define business conduct that is regulated but do not define who can sue. Microsoft claims that § 59-1601(2) uses the phrase "directly or indirectly" to define the scope of the Act's jurisdiction but does not define the class of persons entitled to bring an action under the Act. See, *Arnold v. Microsoft Corp.*, No. 2000-CA-002144-MR, 2001 WL 1835377 (Ky. App. Nov. 21, 2001); *Blewett v. Abbott Lab.*, 86 Wash. App. 782, 938 P.2d 842 (1997). Microsoft points out that courts in Washington and Kentucky have rejected plaintiffs' arguments regarding antitrust statutes which contain identical language defining the terms " 'trade' " and " 'commerce.' " See *Arnold*, 2001 WL 1835377 at *4.

[3] The issue presented is whether an indirect purchaser may bring a civil action under the Act. In our examination of this question, we are guided by several legal principles. When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002). 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. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002).

[4,5] In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Id.* It is a canon of statutory construction that " 'the primary source of insight into the intent of

the Legislature is the language of the statute.' " See *Ciardi v. F. Hoffmann-La Roche, Ltd.*, 436 Mass. 53, 60, 762 N.E.2d 303, 310 (2002), quoting *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 443 N.E.2d 1308 (1983).

We believe that if this court were to construe the provisions of the Act such that only direct purchasers are injured parties, then the purpose of the Act would be defeated. Section 59-829 does not require us to hold that indirect purchasers have no standing under the Act if to do so would not support the Act's purpose. In construing the Act, we must look to the objective to be accomplished, the problem to be remedied, or the purpose to be served, and then give the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.

Section 59-1609 provides that any person injured by a violation may sue for damages. The clear purpose of the Act is to provide consumer protection against the monopolization of trade or commerce. In this action, it is alleged that over 4,000 consumers have been injured. The Act describes a very broad category of persons who are permitted to maintain an action for damages resulting from monopolistic conduct in trade or commerce. Therefore, we conclude that § 59-1609, as it relates to a cause of action for any person injured in violation of § 59-1604, contemplates an action by indirect purchasers.

In *California v. ARC America Corp.*, 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989), the Court held that state indirect purchaser laws were not preempted by federal law, notwithstanding the federal rule limiting federal antitrust recoveries to direct purchasers. The Court noted that *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), had construed federal antitrust law but did not hold that state law was preempted by federal antitrust law. The Court found no language in *Illinois Brick Co.* to suggest that it would be contrary to Congressional purpose for states to allow indirect purchasers to recover under their own state antitrust laws. State indirect purchaser laws did not interfere with accomplishing the federal law purposes identified in *Illinois Brick Co.*

We first considered the scope of the Act in *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000), in which an automobile buyer brought an action against a private seller, a corporation, and the corporation's president for fraudulent representation, fraudulent concealment, and violation of the Act. We addressed the standing of a private person to bring an action and whether the trial court correctly applied the Act to a private transaction between the parties.

In construing the Act, we recognized that § 59-1609 created a private right of action to persons injured by certain provisions of the Act, including violations of § 59-1602. We read the definition of the phrase "[t]rade and commerce" in § 59-1601(2) as limiting the disputes that fall within the ambit of § 59-1602 to unfair or deceptive acts or practices that affect the public interest.

We held that to be actionable under the Act, the unfair or deceptive act or practice must have an impact upon the public interest and that the Act is not available to redress a private wrong where the public interest is unaffected. We refused to apply the Act to isolated transactions between individuals that did not have an impact on consumers at large. In *Nelson*, the transfer of the automobile affected no one other than the parties to the transaction, and therefore, it had not been shown that there was a sufficient impact directly or indirectly on the public to qualify the transaction as an act or practice which was prohibited under § 59-1602.

The Supreme Court of Iowa addressed similar issues in *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002). In *Comes*, a group of computer consumers brought a class action against Microsoft, alleging a violation of the Iowa Competition Law. The trial court, relying on *Illinois Brick Co., supra*, granted Microsoft's motion to dismiss. It concluded that the indirect purchaser rule set forth in *Illinois Brick Co.* applied to the Iowa Competition Law. The trial court noted a similarity between the federal and state statutes and the statutory directive to harmonize state and federal laws. It concluded that the indirect purchasers had no standing to bring the action.

On appeal, the only issue was whether *Illinois Brick Co.* should be followed in interpreting the Iowa Competition Law. The plaintiffs argued that *Illinois Brick Co.* should not be applied

because Iowa law did not limit the class of plaintiffs who could bring a state antitrust suit. Microsoft argued that harmonization with federal law was required and that, therefore, only direct purchasers could recover damages for antitrust violations.

The court held that the Iowa Competition Law authorized a broad category of persons who could maintain a suit in state court for damages due to anticompetitive conduct. "[A] person who is injured . . . by conduct prohibited [by the Iowa Competition Law] may bring suit." Iowa Code Ann. § 553.12 (West 1997). Relying upon *California v. ARC America Corp.*, 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989), the Iowa court stated that neither the Sherman Act nor *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), prevented states from allowing indirect purchasers to bring antitrust actions even if this resulted in multiple recoveries. Therefore, the court found that states were authorized to provide a cause of action for indirect purchasers based on state antitrust laws.

The Iowa Supreme Court stated that the legislature did not specifically limit standing to direct purchasers, but, instead, authorized "'[a] person who is injured' to sue." *Comes*, 646 N.W.2d at 445. The court did not consider the legislative failure to explicitly authorize an indirect purchaser to maintain a suit for antitrust violations as an expression of its agreement with *Illinois Brick Co.* The court concluded that the Iowa Competition Law created a cause of action for all consumers regardless of their status as a direct or indirect purchaser.

Having so concluded, the court proceeded to address Microsoft's argument that indirect purchasers did not have standing as a result of the harmonization statute, which provided:

> "This chapter shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this chapter. This construction shall not be made in such a way as to constitute a delegation of state authority to the federal government, but shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices."

(Emphasis omitted.) *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 446 (Iowa 2002). The court concluded that the harmonization

statute did not require Iowa courts to interpret the Iowa Competition Law in the same manner that federal courts have interpreted federal law.

The Iowa Supreme Court stated that given there was no federal preemption on this issue, it was required to construe the Iowa Competition Law in a manner to encourage the primary goal of the antitrust law, citing *Neyens v. Roth*, 326 N.W.2d 294 (Iowa 1982) (antitrust laws are remedial and should be broadly construed to effect their purposes). The court explained:

> The purpose behind both state and federal antitrust law is to apply a uniform standard of conduct so that businesses will know what is acceptable conduct and what is not acceptable conduct. To achieve this uniformity or predictability, we are not required to define who may sue in our state courts in the same way federal courts have defined who may maintain an action in federal court. Rather, our guiding principle in interpreting the Iowa Competition Law is to do so in such way as to prohibit "restraints of economic activity and monopolistic conduct." Harmonizing our construction and interpretation of state law as to what conduct is governed by the law satisfies the harmonization provision.

Comes, 646 N.W.2d at 446. The court concluded that contrary to Microsoft's assertion, the harmonization provision of Iowa law was not aimed at defining who can sue under state antitrust law, but was designed to achieve uniform application of the state and federal laws prohibiting monopolistic practices.

[6] We find the Iowa court's reasoning instructive, and we adopt its rationale. In attempting to facilitate the consistent application of antitrust laws in state and federal courts, the Legislature has required state courts to harmonize their interpretation of state law with the interpretation of similar federal law by federal courts. The purpose of the Act is to provide consumers with protection against unlawful practices in the conduct of any trade or commerce which directly or indirectly affects the people of Nebraska. See *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000).

[7] The Act was intended to be an antitrust measure to protect Nebraska consumers from monopolies and price-fixing conspiracies. *Id.* The limitation that the Legislature placed on the Act

was that it could not be used to address a private wrong where the public interest was unaffected. See *id.*

Giving the language of the Act its plain and ordinary meaning while construing its provisions in pari materia to determine the intent of the Legislature, we conclude that the Act allows any person who is injured by a violation of §§ 59-1602 to 59-1606 which directly or indirectly affects the people of Nebraska to bring a civil action to recover damages.

We interpret the provisions of § 59-829 in a manner similar to the reasoning of the court in *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002). We do not interpret § 59-829 as a delegation of state authority to the federal government, but, rather, as having the purpose to achieve uniform application of the state and federal laws regarding monopolistic practices. The goal is to establish a uniform standard of conduct so that businesses will know what conduct is permitted and to protect the consumer from illegal conduct.

The plaintiffs alleged that Microsoft had at least 95 percent of the market share for operating systems for Intel-based personal computers. Direct purchasers that pass on overcharges may not need or seek the protection of the Act. Direct purchasers may not be inclined to jeopardize their major source of supply of the operating systems contained within the personal computers they manufacture and distribute. To deny the indirect purchaser, who in this case is the ultimate purchaser, the right to seek relief from unlawful conduct would essentially remove the word "consumer" from the Consumer Protection Act.

It is important to achieve and maintain a consistency in defining the types of business activity that are to be prohibited as unlawful. Harmonizing state law with federal law and its interpretation by federal courts will achieve uniformity and predictability as to the practices that are prohibited. As the Iowa Supreme Court succinctly stated: "Harmonizing our construction and interpretation of state law as to what conduct is governed by the law satisfies the harmonization provision." *Comes*, 646 N.W.2d at 446.

Section 59-1609 provides both a private right of action and a public right. We find no limitation on who may sue for violations of §§ 59-1602 to 59-1606 except that such violations must

directly or indirectly affect the people of Nebraska. *Nelson, supra*, requires us to determine whether the alleged unfair activities of Microsoft affect the people of Nebraska.

The plaintiffs alleged that membership of the class affected by Microsoft's activities is in excess of 4,000, the exact number being known to Microsoft. In 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 the conclusions of the pleader. *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002). We conclude that the plaintiffs have set forth sufficient facts in their amended petition to show that the public interest is affected. Under the facts alleged, the practices of Microsoft affect the people of the State of Nebraska. Thus, the district court erred in sustaining Microsoft's demurrer as to the plaintiffs' antitrust claim under the Act.

NEB. U.C.C. § 2-302

We next address the plaintiffs' claim pursuant to § 2-302. The plaintiffs alleged that as end-user licensees of Microsoft and its Windows 98 operating system, they incurred a monopoly price charged by Microsoft. They claimed that the price versus cost disparity associated with their purchase and use of Windows 98 renders the contract between Microsoft and the plaintiffs unconscionable under § 2-302. The plaintiffs sought damages in the amount of the difference between a competitive price and the monopoly price that they incurred as end-user licensees/purchasers of Windows 98, as well as costs, attorney fees, and other relief.

The operative portion of § 2-302 provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Microsoft correctly points out that § 2-302 does not provide for money damages. The doctrine of unconscionability set forth in

§ 2-302 is not a basis for the award of money damages. As certain courts have noted, this provision of the Uniform Commercial Code was not intended to create a cause of action and cannot be used as a basis for damages. See, *Cowin Equipment Co., Inc. v. General Motors Corp.*, 734 F.2d 1581 (11th Cir. 1984); *Dean Witter Reynolds v. Superior Court*, 211 Cal. App. 3d 758, 259 Cal. Rptr. 789 (1989) (unconscionability provision does not create affirmative cause of action, but only defense); *Best v. U.S. National Bank*, 78 Or. App. 1, 714 P.2d 1049 (1986) (no authority that doctrine of unconscionability is basis for restitutionary relief).

The plaintiffs' claim for damages under § 2-302 is without merit. Thus, the district court properly dismissed their cause of action with regard to a claim pursuant to § 2-302.

CONCLUSION

The district court erred in its interpretation of the Act. Section 59-1609 permits indirect purchasers to bring a civil action under the terms of the Act. For the reasons set forth in this opinion on rehearing, the judgment of the district court is affirmed in part and in part reversed, and the cause is remanded for further proceedings. The memorandum opinion filed June 25, 2003, is withdrawn.

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

MILLER-LERMAN, J., not participating.

STEPHAN, J., dissenting in part.

While I agree with the majority that the appellants' claim under Neb. U.C.C. § 2-302 (Reissue 2001) is without merit, I respectfully dissent with respect to its conclusion that the district court erred in dismissing the appellants' claim under Nebraska's Consumer Protection Act (Act), Neb. Rev. Stat. § 59-1601 et seq. (Reissue 1998 & Cum. Supp. 2000). In my view, the provisions of the Act which define who may bring a private civil action for damages were, at all relevant times, substantially similar to corresponding language in § 4 of the Clayton Act, see 15 U.S.C. § 15(a) (2000), and the district court was therefore correct in concluding that it was obligated under Neb. Rev. Stat. § 59-829 (Reissue 1998) to follow *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), in construing the Nebraska statute.

Section 59-829 requires that when any language in the Act is "the same as or similar to the language of a federal antitrust law," Nebraska courts in construing the Act "shall follow the construction given to the federal law by the federal courts." It is difficult to imagine how the Legislature could have been more clear in articulating its intent that provisions of the Act which were modeled after federal antitrust law must be construed in the same manner that the U.S. Supreme Court construes the corresponding federal statutes. In carrying out this directive, it is imperative that we clearly identify the state and federal statutes which are counterparts of each other so that we do not commit the error of comparing state apples to federal oranges.

The appellants' claim is based upon an alleged violation of the substantive provision of § 59-1604, which states: "It shall be unlawful for any person to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce." The corresponding substantive provision of federal antitrust law is § 2 of the Sherman Act, which provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (2000). While the federal statute applies to monopolization of "trade or commerce among the several States," i.e., interstate commerce, the corresponding Nebraska statute uses only the phrase "[t]rade and commerce," which is defined elsewhere in the Act as "the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska." § 59-1601(2). In *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 684, 605 N.W.2d 136, 142 (2000), we held that this definitional language limited the scope of the Act to acts or practices which have "an impact upon the public interest," and concluded that the Act is not available "to redress a private wrong where the public interest is unaffected."

Thus, while it must be shown that challenged conduct affects interstate commerce in order to be actionable under the federal antitrust laws, it is only necessary to show that such conduct affects the public interest in order to fall within the scope of the Act. But that is not the issue before us. Assuming arguendo that

the conduct at issue in this case is proscribed by the Act, the question presented here is whether the appellants, as indirect purchasers, are authorized by law to bring a civil action for damages resulting from such conduct. The Act, as it was written when this suit was commenced, authorized "[a]ny person who is injured in his business or property" by a violation of the substantive provisions of the Act to bring an action for injunctive relief and damages. § 59-1609. The corresponding provision of federal antitrust law is § 4 of the Clayton Act, which permits "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to bring a civil action for treble damages. 15 U.S.C. § 15(a). The U.S. Supreme Court construed this federal statutory provision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). In that case, the Court reaffirmed its holding in *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968), that a defendant in an antitrust suit could not assert as a defense that the plaintiff suffered no injury in its business as required by § 4 of the Clayton Act because it had passed on the claimed illegal overcharge to its customers. Specifically, the Court in *Illinois Brick Co.* declined "to construe § 4 [of the Clayton Act] to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers." *Illinois Brick Co.*, 431 U.S. at 735.

Under both § 4 of the Clayton Act and § 59-1609 as it was written when this action was commenced, a private civil action may be maintained by one whose "business or property" is injured by the claimed substantive law violation. Because of the similar language employed by each statute in defining who may be a plaintiff, it is my view that § 59-829 requires this court to construe § 59-1609 in the same manner that the U.S. Supreme Court construed § 4 of the Clayton Act in *Illinois Brick Co.* to exclude indirect purchasers from the class of potential plaintiffs. This is purely a matter of statutory construction.

As the majority notes, the U.S. Supreme Court has specifically held that states are free to enact legislation permitting indirect purchasers to bring civil antitrust actions under state law. *California v. ARC America Corp.*, 490 U.S. 93, 109 S. Ct. 1661,

104 L. Ed. 2d 86 (1989). Indeed, the Nebraska Legislature did precisely that in 2002 when it amended § 59-1609 to permit a person injured in his or her business or property to sue "whether such injured person dealt directly or indirectly with the defendant." 2002 Neb. Laws, L.B. 1278 (effective July 20, 2002). While that is the law in Nebraska now, it was not the law when this action was commenced on February 28, 2001, or when the district court dismissed the action in November 2001. If, in a subsequent amendment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law. *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003); *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002). In my view, the majority ignores both this principle and the harmonization provision of § 59-829 by concluding that § 59-1609 authorized suit by an indirect purchaser before the Legislature amended the statute to specifically create that right.

Nor am I persuaded that the decision of the Iowa Supreme Court in *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002), relieves this court of its responsibility to interpret the Act in accordance with the specific rule of construction prescribed by our Legislature in § 59-829. The Iowa case is distinguishable on at least two grounds. First, it interpreted language in the Iowa Competition Law authorizing a private civil action by a " 'person who is injured . . . by conduct prohibited under this chapter.' " *Comes*, 646 N.W.2d at 443. This language is different from the language of § 59-1604 and § 4 of the Clayton Act as construed in *Illinois Brick Co.*, which authorizes a civil suit by a "person injured in his business or property" as a result of claimed unlawful conduct. Second, the harmonization provision in the Iowa Competition Law differs from § 59-829 in that it directs Iowa courts to construe its statute " 'to complement and be harmonized with the applied laws of the United States' " having a similar purpose in order to achieve " 'uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices.' " (Emphasis omitted.) *Comes*, 646 N.W.2d at 446, citing and quoting Iowa Code Ann. § 553.2 (West 1997). Against this statutory background, the Iowa Supreme

Court defined the issue as whether it "should interpret Iowa antitrust law in the same way the United States Supreme Court has interpreted federal antitrust law" and resolved the issue by concluding that Iowa courts were not required "to interpret the Iowa Competition Law the same way federal courts have interpreted federal law." *Comes*, 646 N.W.2d at 445-46. I conclude that the opposite result is compelled by the language of § 59-829 requiring that Nebraska courts, in construing provisions of our Act using language similar to that of the federal antitrust laws, "shall follow the construction given to the federal law by the federal courts."

For these reasons, on rehearing, I would affirm the judgment of the district court.

HENDRY, C.J., and GERRARD, J., join in this dissent.

KATRINA LOUISE MATHEWS, APPELLEE AND CROSS-APPELLEE, V. MARK WINSLOW MATHEWS, APPELLEE AND CROSS-APPELLANT, AND DOUGLAS COUNTY, NEBRASKA, APPELLANT.

676 N.W.2d 42

Filed March 19, 2004. No. S-02-851.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Divorce: Child Custody: Appeal and Error.** In an original divorce action, determinations as to custody in dissolution proceedings are reviewed de novo on the record, but such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion.
3. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
4. **Property Division: Appeal and Error.** The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
5. **Divorce: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
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. **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.
8. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
9. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
10. **Right to Counsel: Minors: Words and Phrases.** Under Neb. Rev. Stat. § 42-358(1) (Cum. Supp. 2002), a person is indigent if he or she is unable to pay the guardian ad litem or attorney fees without prejudicing, in a meaningful way, his or her financial ability to provide the necessities of life, such as food, clothing, shelter, medical care, et cetera, for himself or herself or his or her legal dependents.
11. **Right to Counsel: Appeal and Error.** A finding of indigency under Neb. Rev. Stat. § 42-358(1) (Cum. Supp. 2002) is a matter within the initial discretion of the trial court, and such a finding will not be set aside on appeal in the absence of an abuse of discretion by the trial court.
12. **Attorneys at Law: Conflict of Interest: Appeal and Error.** An appellate action is an inadequate means of presenting attorney conflicts of interest for review.
13. **Attorneys at Law: Mandamus: Appeal and Error.** When an appeal from an order denying disqualification of an attorney involves issues collateral to the basic controversy and when an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, the party should seek mandamus.
14. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
15. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give great weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
16. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
17. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
18. **Evidence: Appeal and Error.** When evidence is in conflict, an 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.
19. **Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 1998), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and

marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.

20. ____. Marital debt includes only those obligations incurred during the marriage for the joint benefit of the parties.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed in part, and in part vacated and remanded.

James S. Jansen, Douglas County Attorney, and Bernard J. Monbouquette for appellant.

David B. Latenser, of Latenser & Johnson, P.C., for appellee Mark Winslow Mathews.

Annette Farnan of Nebraska Legal Services, Omaha, and David M. McManaman, of Nebraska Legal Services, Lincoln, for appellee Katrina Louise Mathews.

Thomas K. Harmon, of Respeliers & Harmon, P.C., for Lynnette Z. Boyle, guardian ad litem.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

I. NATURE OF CASE

In June 2002, the marriage between Katrina Louise Mathews and Mark Winslow Mathews was dissolved. Issues regarding various aspects of the divorce decree are raised in this appeal, including the trial court's determinations in regard to child custody, child support, and the division of the marital debts. In addition, we must determine whether Katrina and Mark were properly found to be indigent under Neb. Rev. Stat. § 42-358(1) (Cum. Supp. 2002), thereby making Douglas County responsible for the guardian ad litem fees.

II. BACKGROUND

On January 2, 1988, Katrina and Mark were married in Dallas, Texas. In the following years, four children were born to the marriage. The parties separated in December 1999.

On January 20, 2000, Katrina filed a petition for legal separation. On January 28, the parties entered into an agreement which provided for, inter alia, temporary custody, visitation, and child support. On February 18, the court granted Katrina's oral motion for the appointment of a guardian ad litem (GAL).

Trial began on the separation action on December 14, 2000. At the end of the day, the matter was recessed until February 26, 2001. Before the trial recommenced, on February 9, Katrina filed a second amended petition requesting, inter alia, dissolution of the marriage, custody of the children, and child support. Mark filed his answer and cross-petition on June 18. In his cross-petition, Mark requested, inter alia, custody of the children and child support.

On September 28, 2001, Mark filed a motion to require the GAL to withdraw. Essentially, Mark argued that the GAL was biased in favor of Katrina. On October 10, the court appointed counsel for the GAL. A hearing was held on the motion on November 8, and the court overruled Mark's motion at the end of the hearing.

The trial on the dissolution action began on January 22, 2002. On June 11, the court entered its decree. The court determined that the marriage was irretrievably broken and should be dissolved. In addition, the court determined that it was in the best interests of the four minor children to be in the custody of Katrina, subject to reasonable visitation with Mark. The court ordered Mark to pay child support in the amount of $1,142.56 per month. The court also divided the marital property and ordered each party to pay his or her own attorney fees and costs.

Thereafter, Mark moved for a new trial, asserting certain errors of law set forth below in the assignments of error. The court, after notice was given to Douglas County, received evidence and heard arguments on the GAL's application for fees and Mark's motion for a new trial. In its July 26, 2002, order, the court found that both parties were indigent and ordered Douglas County to pay the GAL fees. In addition, the court overruled Mark's motion for a new trial.

Douglas County filed a timely notice of appeal with respect to the district court's indigency determination, and Mark cross-appealed from the court's order overruling his motion for new trial regarding issues related to the divorce decree.

III. ASSIGNMENTS OF ERROR

Douglas County assigns, restated, that the trial court erred (1) in finding Katrina and Mark to be indigent for purposes of § 42-358 and (2) in ordering Douglas County to pay the GAL fees.

In his cross-appeal, Mark assigns, renumbered and restated, that the trial court erred (1) in failing to order Katrina's counsel, Nebraska Legal Services, to withdraw; (2) in failing to disqualify the GAL; (3) in awarding custody of the children to Katrina; (4) in its calculation of child support; (5) in its division of the marital debt; (6) in finding Katrina indigent for purposes of payment of her share of the GAL fees; and (7) in failing to award attorney fees to Mark.

IV. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn., ante* p. 158, 673 N.W.2d 15 (2004).

[2] In an original divorce action, determinations as to custody in dissolution proceedings are reviewed de novo on the record, but such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion. *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998).

[3] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Claborn v. Claborn, ante* p. 201, 673 N.W.2d 533 (2004).

[4] The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003).

[5] In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002).

[6] 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. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

V. ANALYSIS

1. Douglas County's Appeal: Indigency Determination

On February 18, 2000, a GAL, who is a practicing lawyer, was appointed to conduct an investigation to protect the interests of the parties' four children. The GAL did conduct an investigation and filed a written report with the court. On June 4, 2002, the GAL filed an application for payment of fees. After a hearing, the court determined that the GAL charges were fair and reasonable and that the GAL was entitled to fees totaling $3,089. In addition, the court determined that Katrina and Mark were indigent and ordered Douglas County to pay the GAL fees. On appeal, Douglas County argues that Katrina and Mark are not indigent for purposes of § 42-358.

Section 42-358(1) provides:

> The court may appoint an attorney to protect the interests of any minor children of the parties. Such attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify on matters pertinent to the welfare of the children. The court shall by order fix the fee, including disbursements, for such attorney, which amount shall be taxed as costs and paid by the parties as ordered. *If the court finds that the party responsible is indigent, the court may order the county to pay costs.*

(Emphasis supplied.)

As an initial matter, we note that although the GAL appointed in this case is an attorney, she was appointed as a GAL in the traditional sense of conducting an investigation and reporting to the court, rather than as the court-appointed legal advocate of the children. See *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998) (noting difference between GAL appointed under court's inherent equitable powers and attorney appointed as advocate for minor child). Therefore, we must decide if a GAL appointed by the court under these circumstances can be awarded his or her fees under § 42-358(1).

In 1992, § 42-358(1) was amended to add the last two sentences of the current version of the statute in order to provide courts with statutory authority to award fees to court-appointed attorneys in domestic relations cases. However, it was certainly understood at the time that both attorneys and GAL's were appointed pursuant to the authority of § 42-358(1), even though the section only references an "attorney." See, *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990) (noting § 42-358 provides authority to appoint GAL to protect interests of minor children); *Nye v. Nye*, 213 Neb. 364, 329 N.W.2d 346 (1983) (same); *Ford v. Ford*, 191 Neb. 548, 216 N.W.2d 176 (1974) (noting § 42-358 provides authority to appoint attorney to protect interests of minor children); *Pieck v. Pieck*, 190 Neb. 419, 209 N.W.2d 191 (1973) (same). Moreover, prior to 1992, the practice of awarding fees to both court-appointed GAL's and court-appointed attorneys was well established in domestic relations cases. See, *Nye, supra* (awarding fees to GAL); *Hermance v. Hermance*, 194 Neb. 720, 235 N.W.2d 231 (1975) (awarding fees to counsel appointed to represent minor children). It is, therefore, reasonable to conclude that the 1992 amendment to § 42-358(1) was intended to codify what was, in fact, occurring in practice at that time. In other words, by amending § 42-358(1), the Legislature granted courts statutory authority to award fees to court-appointed counsel, whether the attorney acted as a GAL or as a legal advocate for the minor children in a case.

A review of the legislative history relating to the amendment to § 42-358(1) supports this conclusion. The introducer of the amendment stated that the purpose of the amendment was to codify existing practice while making it clear to reluctant judges that they indeed had the authority to tax the fees of appointees as costs. Floor Debate, L.B. 1255, 92d Leg., 2d Sess. 13159 (Apr. 9, 1992). Moreover, in the statement of intent, and throughout the committee testimony and floor debate, the introducer used the terms "attorneys" and "GAL's" interchangeably when discussing the amendment to § 42-358(1). Statement of Intent, Judiciary Committee, 92d Leg., 2d Sess. (Feb. 13, 1992); Judiciary Committee Hearing, 92d Leg., 2d Sess. (Feb. 21, 1992); Floor Debate, 92d Leg., 2d Sess. 13159-60 (Apr. 9, 1992). The introducer was obviously cognizant of the then

understood interpretation of § 42-358(1), i.e., that it provided authority for courts to appoint attorneys to act as either a GAL or a legal advocate for children in domestic relations cases. The amendment to § 42-358(1) was offered to clarify the power of a court to fix fees in those circumstances.

In sum, our decision in *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998), did not address the question presented here; while the distinction announced in *Betz* properly denotes the duties and obligations of an appointee, it is not relevant for purposes of determining an appointee's entitlement to fees for services rendered. Whether an attorney is appointed as a GAL or as a legal advocate for the children under § 42-358(1), he or she is entitled to collect a reasonable fee under the provisions of § 42-358(1).

The issue in the present case arises, however, because the trial court found both parties to be indigent under § 42-358(1) and ordered Douglas County to pay the GAL fees. Because the statute does not provide the definition of indigency, we must determine when a party is "indigent" for purposes of § 42-358(1). To do so, we turn to the familiar rules of statutory interpretation.

[7] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn., ante* p. 158, 673 N.W.2d 15 (2004). Relevant here, 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.*

[8,9] Moreover, a court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *Brown v. Harbor Fin. Mortgage Corp., ante* p. 218, 673 N.W.2d 35 (2004). In other words, in construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999).

Although the term "indigent" is not defined in § 42-358(1), we conclude that it is unambiguous. Therefore, we give the word its plain and ordinary meaning. *Unisys Corp., supra.* Indigent is defined as "[l]acking the means of subsistence; impoverished; needy." The American Heritage Dictionary of the English Language 670 (1969). Similarly, in 7 The Oxford English Dictionary 868 (2d ed. 1989), the following definition of indigent is provided: "Lacking the necessaries of life; in needy circumstances; characterized by poverty; poor, needy."

Other courts that have examined the word indigent in the civil context have come to a similar definition. See, *Savoy v. Savoy*, 433 Pa. Super. 549, 555, 641 A.2d 596, 599-600 (1994), quoting *Verna v. Verna*, 288 Pa. Super. 511, 432 A.2d 630 (1981) (" '[i]ndigent persons are those who do not have sufficient means to pay for their own care and maintenance' "); *Destitute v. Putman Hospital*, 125 Vt. 289, 294, 215 A.2d 134, 138 (1965) ("[i]ndigent, in a general sense, ordinarily indicates one who lacks property or means of a comfortable subsistence, and for that reason is needy or in want"). Further, we note that although the text of § 42-358(1) makes it clear that its underlying purpose is to protect the best interests of minor children through the appointment of attorneys, its secondary purpose is to provide a statutory payment mechanism through which GAL's and attorneys can be appropriately compensated for their work. Statement of Intent, L.B. 1255, Judiciary Committee, 92d Leg., 2d Sess. (Feb. 13, 1992).

[10] With the foregoing in mind, we hold that, for purposes of § 42-358(1), a person is indigent if he or she is unable to pay the GAL or attorney fees without prejudicing, in a meaningful way, his or her financial ability to provide the necessities of life, such as food, clothing, shelter, and medical care for himself or herself or his or her legal dependents. See, e.g., *Jordan v. Jordan*, 983 P.2d 1258, 1263 (Alaska 1999), quoting Alaska Stat. § 18.85.170(4) (Lexis 2002) (indigent person is " 'a person who, at the time need is determined, does not have sufficient assets, credit, or other means to provide payment of an attorney and all other necessary expenses of representation without depriving the party or the party's dependents of food, clothing, or shelter' "); *In re Marriage of Kopp*, 320 N.W.2d 660, 662 (Iowa App. 1982) (indigent "is a person who would be

unable to employ counsel without prejudicing his financial ability to provide economic necessities for himself or his family"). Cf. Neb. Rev. Stat. §§ 29-3901(3) (Reissue 1995) and 83-1008 (Cum. Supp. 2002).

[11] We determine that, as in a criminal case, a finding of indigency under § 42-358(1) is a matter within the initial discretion of the trial court, and such a finding will not be set aside on appeal in the absence of an abuse of discretion by the trial court. See *State v. Richter*, 225 Neb. 837, 408 N.W.2d 717 (1987). The present case is complicated, however, by the fact that neither the trial court nor the parties had the benefit of a working definition of indigency, in the context of a civil case, at the time of the GAL fees hearing. We recognize that the trial court found that Katrina and Mark were indigent when it ordered Douglas County to pay the GAL fees. However, at the fees hearing, Katrina testified that she earned a monthly income of $3,200 ($38,000 annually) and Mark presented evidence that his gross monthly income was $3,500 ($42,000 annually). Under ordinary circumstances, it would appear that both Katrina and Mark have adequate resources to pay the GAL fees without prejudicing, in a meaningful way, their financial ability to provide necessities of life for themselves and their children. Both parties, however, have argued that current obligations, including taxes, debts, and costs associated with health care, along with normal living expenses, have left them with too little disposable income to pay the GAL fees. The record is not adequate for meaningful appellate review on this matter, and in fairness to the parties and the trial court, the litigants were dealing with a standard that had not previously been defined by the Legislature or an appellate court. Therefore, under these circumstances, we cannot determine whether the trial court abused its discretion in its indigency finding, and we remand this matter to the district court for a new indigency determination under the standard set forth herein.

2. Mark's Cross-Appeal

(a) Motion to Disqualify Nebraska Legal Services

On April 12, 2000, Mark filed a motion to show cause why counsel for Katrina, Nebraska Legal Services (hereinafter NLS), should not be forced to withdraw. On May 1, Katrina filed a

motion requesting sanctions against counsel for Mark. Essentially, Katrina argued that Mark's motion to require NLS to withdraw was frivolous and without a rational basis in law. By journal entry, dated May 2, the trial court overruled both motions.

On appeal, Mark argues that the trial court abused its discretion in overruling his motion to require NLS to withdraw. Mark's argument is not entirely clear as to why the trial court's ruling constitutes an abuse of discretion. As best we can determine, Mark is asserting that NLS had a conflict of interest in representing Katrina and that therefore, the trial court was required to order NLS to withdraw. Specifically, Mark appears to argue that Katrina was not indigent and, knowing Katrina's true financial status, NLS conspired with Katrina to allege that Mark committed acts of domestic violence in an effort to provide Katrina with free legal services and to obtain fee recoupment from government sources.

[12,13] Even if we assume for argument's sake that Mark's factual allegations properly assert a conflict of interest, this assignment is not proper for our review. We have often stated that an appellate action is an inadequate means of presenting attorney conflicts of interest for review. *Centra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995), citing *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990). Therefore, we have held that when an appeal from an order denying disqualification of an attorney involves issues collateral to the basic controversy and when an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, the party should seek mandamus. See, *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (2002); *Centra, Inc., supra*.

Here, the disqualification issue is collateral to the basic dissolution controversy, and Mark did not seek a peremptory writ of mandamus to review the trial court's denial of his motion to disqualify NLS. We decline to address his claim now. See, *Trainum, supra*; *Centra, Inc., supra*.

(b) Motion to Disqualify GAL

Mark also filed a motion to disqualify the GAL. Essentially, Mark alleged that the GAL should be forced to withdraw because

she was biased in favor of Katrina. The trial court ordered that the GAL be appointed counsel. A hearing was held on the motion, and at the end of the hearing, the motion was overruled. Subsequently, during a hearing on Mark's motion to hold the GAL in contempt, Mark orally requested the court to order the GAL to withdraw. Both motions were overruled. On appeal, Mark argues the trial court erred in overruling his motions to disqualify the GAL.

We have yet to address the appropriate standard to review a trial court's decision to overrule a party's motion to disqualify a GAL. Upon due consideration, we determine that a motion to disqualify a GAL for bias or partiality is similar to a motion to recuse a judge for bias or partiality. Therefore, such a decision is initially entrusted to the discretion of the trial court and we will not disturb that decision absent an abuse of discretion. See *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002) (on appeal, denial of motion to recuse trial judge for bias or partiality will be affirmed absent abuse of discretion). See, also, *Wrightson v. Wrightson*, 266 Ga. 493, 467 S.E.2d 578 (1996) (trial court did not abuse its discretion by failing to disqualify GAL); *State in Interest of Orgill*, 636 P.2d 1075 (Utah 1981) (juvenile court did not abuse its discretion in denying appellant's motion to disqualify GAL).

On appeal, Mark points to certain factors as evidence of bias, including statements by various affiants that they felt the GAL was biased in favor of Katrina, and Mark's own assertion that the GAL ignored evidence presented by a variety of people that was favorable to him.

We have reviewed the relevant evidence and conclude that the trial court did not abuse its discretion in overruling Mark's motion to disqualify the GAL. First, the affidavits upon which Mark relies merely state the affiants' opinions that the GAL seemed to be biased toward Katrina and uninterested in what the affiants had to say. Because the affiants were Mark's sisters and friend, it hardly constitutes an abuse of discretion for the trial court to attach appropriate weight to their opinions of bias. Moreover, Mark's assertion that the GAL ignored evidence favorable to his case is just that—an assertion. There is no evidence that the GAL purposely ignored evidence favorable to Mark's case.

Mark also asserted that the GAL's failure to submit a report at the time established by the court and the GAL's failure to report Katrina's conviction for driving under the influence (DUI) to the court were also evidence of bias. But after reviewing the relevant evidence, we conclude that the trial court did not abuse its discretion in overruling Mark's motion to disqualify the GAL. The GAL learned of the DUI because of Katrina's self-reporting, and the GAL then independently investigated the circumstances, including where the children were at the time of the event, and requested a chemical dependency evaluation of Katrina. There is no evidence that the GAL's omission of the DUI was done for any nefarious purpose or the hiding of evidence that was available to both parties. Likewise, Mark has pointed to no evidence which supports his contention that the GAL report was submitted late to prejudice his case and Mark did not assign as error the trial court's decision to overrule his motion to quash the report. This entire assignment of error is without merit.

(c) Custody of Children

In its final decree, the trial court determined that Katrina was a fit and proper person to be awarded custody of the children and that it would be in the children's best interests to be in the care, custody, and control of Katrina. On appeal, Mark argues that the court abused its discretion in awarding custody of the children to Katrina.

[14,15] A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998). Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give great weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

[16] When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Id.* See, also, Neb. Rev. Stat. § 42-364 (Reissue 1998); *Von Tersch v. Von Tersch*, 235 Neb. 263, 455 N.W.2d 130 (1990); *Beran v. Beran*, 234 Neb. 296, 450 N.W.2d 688 (1990). The record

demonstrates that Katrina and Mark are both fit parents. Therefore, the best interests of the minor children must determine this issue.

In determining a child's best interests in custody matters, courts may consider many factors, including:

> "[G]eneral considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child."

Ritter v. Ritter, 234 Neb. 203, 211-12, 450 N.W.2d 204, 211 (1990), quoting *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988). See, also, § 42-364(2).

In our de novo review, we conclude that the evidence supports the trial court's finding that the best interests of the children would be served by awarding custody to Katrina. Like the trial court, we give substantial weight to the evidence set forth by an evaluating psychiatrist and the GAL in the instant case. While the GAL determined that both parties were fit parents, the GAL noted that Katrina was better able to nurture and care for the children. This evidence was based on interviews with each member of the family and observation of the children at their home. As to Mark, the GAL expressed concerns that Mark was controlling and obsessive and that his behavior, among other things, hindered an ongoing, productive relationship between the children and Katrina.

In addition, during the course of the separation and prior to trial, both Katrina and Mark were evaluated by the same psychiatrist. In order to respect the privacy of both individuals, we will set forth only a summary description of the psychiatric evaluations—even though we considered the details of the evaluations in our de novo

review. The psychiatrist determined that Katrina had no current psychiatric disorder and noted that Katrina has the capacity to have a warm, positive relationship with her children and to place appropriate expectations on the children. On the basis of information obtained by clinical interviews of Katrina and Mark, as well as review of historical records, the psychiatrist concluded that Mark engaged in psychologically controlling behaviors and harassment, even though those behaviors might have in part been due to an underlying mental health disorder that may respond positively to treatment. In performing his evaluation, however, the psychiatrist found that Mark had a positive interest in his children, even though he had a strong need to be in control. Regarding custody of the children, the psychiatrist opined that the children's best interests would be served by being placed with Katrina.

On appeal, Mark argues that his psychiatric evaluation contains conclusions based upon guess and speculation and does not state an opinion to a reasonable degree of medical certainty. Therefore, Mark argues, the evaluation should not have been relied on by the trial court in making its custody determination. Mark, however, failed to object to the substance and basis of the evaluation during the hearing in which it was offered and received in evidence. Instead, Mark objected to the evaluations on the sole ground that they were incomplete, i.e., they did not contain all of the information he had requested through discovery. By failing to properly object, Mark has waived his right to assert prejudicial error on appeal. See, Neb. Rev. Stat. § 27-103 (Reissue 1995); *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003).

Mark also argues that the findings and recommendations of the GAL should be discounted or ignored because the GAL was biased in favor of Katrina. We have already determined that Mark's allegations of bias are without merit.

In sum, given our de novo review of the record and taking into consideration the best interests of the children, we cannot say that the trial court abused its discretion by granting custody of the children to Katrina.

(d) Child Support Calculation

In its decree, the trial court ordered Mark to pay $1,142.56 per month in child support for the four children. In addition,

Mark was ordered to pay any and all unpaid child support stemming from the court's temporary order of March 10, 2000. On appeal, Mark makes a number of assertions as to why the trial court erred in its child support calculation.

First, Mark argues that the trial court erred by not retroactively reducing his child support obligations—stemming from the court's temporary order of March 10, 2000—to reflect the significant amount of time that he had physical custody of the children in the period between the March 10 order and the June 11, 2002, decree. In support of his argument, Mark relies upon the September 2002 amended version of paragraph J of the Nebraska Child Support Guidelines. Paragraph J states, in relevant part: "An adjustment in child support may be made at the discretion of the court when visitation or parenting time substantially exceeds alternating weekends and holidays and 28 days or more in any 90-day period."

However, the current version of paragraph J, stated above, came into effect after the June 11, 2002, decree. The guideline in effect at the time of both the temporary order and the decree stated: "An adjustment in child support may be made at the discretion of the court when visitation substantially exceeds alternating weekends and holidays and 4 weeks in the summer." In other words, under the applicable version of paragraph J, the amount of "parenting time" was not a factor the trial court could use in determining whether to make an adjustment in child support.

The applicable version of the guidelines permitted an adjustment only when the *visitation* schedule deviated from the typical noncustodial visitation. In his brief before this court, Mark admits that his "non-custodial visitation rights establish a standard non-custodial parent schedule." Brief for cross-appellant at 24. In sum, although Mark produced several graphs and charts which purportedly demonstrate that he cared for the children nearly half of the time during 2000 and 2001, the guidelines in effect at that time only referenced visitation time and left any adjustment in child support up to the discretion of the court. On appeal, we see no reason to disturb the trial court's order.

Second, Mark argues that the record shows that he had exercised visitation equivalent to joint custody of the children between the March 10, 2000, temporary order and the June 11,

2002, decree. Therefore, according to Mark, the trial court erred by using the sole custody worksheet instead of the joint custody worksheet to calculate child support.

[17] Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002). For purposes of establishing child support, whether Mark exercised visitation roughly equivalent to joint custody would be relevant only if he shared joint physical custody of the children with Katrina. See, *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001); *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999). Here, Katrina was granted sole custody of the children in both the temporary order and the final decree, subject only to reasonable visitation by Mark. Because Katrina was granted sole custody of the children, it was proper for the trial court to use worksheet 1.

Third, Mark argues that the trial court erred by not fully completing the child support calculation worksheet. In its decree, the court based its order of child support on exhibit 26, Katrina's child support calculation. As Mark notes, the worksheet does not provide an estimate of Katrina's gross monthly income or the applicable deductions. The worksheet does, however, state Katrina's net monthly income and provides a calculation of child support therefrom. In addition, attached to the worksheet is a copy of federal income tax form 8453, which states Katrina's gross income in 2000. Exhibit 26, in its entirety, provides an adequate basis from which to perform a child support calculation.

We have also fully considered Mark's remaining complaints regarding the trial court's calculation of child support and find each of the complaints to be without merit.

(e) Division of Marital Debt

In its decree, the trial court determined that the marital debt of the parties, absent any indebtedness on vehicles, was $24,858. The court ordered each party to pay $12,429 of the debts. The court went on to give Katrina a credit of $7,250 for the amount of unpaid daycare that Mark owed to her. Similarly, the court gave Mark a credit of $9,968 for the amount of marital debt that he had paid prior to trial.

[18] Mark argues that the court erred by relying on Katrina's statement of the marital debt found in exhibit 25. According to Mark, exhibit 25 lacked foundation and should have been disregarded in favor of his testimony concerning the marital debt. Although Mark objected to Katrina's testimony which referenced exhibit 25, Mark failed to object to exhibit 25 when it was received in evidence, and his argument is without merit. Essentially, Mark is left to argue that the trial court should have credited his testimony instead of Katrina's statement of marital debt contained in exhibit 25. However, when evidence is in conflict, an 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. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). We do so here and conclude that the trial court did not abuse its discretion by choosing to rely on Katrina's statement of marital debt rather than Mark's in dividing the marital debts.

[19] Mark also argues that the court erred by failing to account for $20,000 that he testified to borrowing from his family. Under Neb. Rev. Stat. § 42-365 (Reissue 1998), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002); *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

[20] Mark testified that he borrowed $20,000 from his family because he has been "financially devastated by this process." As evidence of his devastation, Mark points to exhibit 33 which cataloged his average monthly living expenses. Such evidence, however, does not establish that the loan was marital debt. Marital debt includes only those obligations incurred during the marriage for the joint benefit of the parties. Cf. *Tyma*, 263 Neb. at 877, 644 N.W.2d at 144 ("[t]he marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties"). While these proceedings have no doubt adversely affected Mark's financial circumstances, the

loan from his family was taken out after his separation with Katrina and is not properly recognized as marital debt.

(f) Attorney Fees

On appeal, Mark claims that the trial court erred in ordering him to pay his own attorney fees. In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). Mark argues that Katrina should be ordered to pay his attorney fees because Katrina's allegation of domestic violence was frivolous. In actuality, the trial court found that "while the actions of [Mark] might have been controlling in nature," the evidence did not support a finding that Katrina was subjected to "domestic violence" by Mark. This finding is not tantamount to a determination that a claim is frivolous, and the trial court did not abuse its discretion in ordering Mark to pay his own attorney fees under the circumstances.

VI. CONCLUSION

For the foregoing reasons, we conclude that Mark's assignments of error on cross-appeal are without merit, the district court did not abuse its discretion in overruling his motion for new trial, and the court's divorce decree is affirmed in all respects. We, however, vacate that portion of the July 26, 2002, judgment of the district court which ordered Douglas County to pay the GAL fees, and remand this cause to the district court for the limited purpose of (1) making a new indigency determination based on the standard announced herein and (2) entering an order regarding the payment of the GAL fees pursuant to § 42-358(1).

AFFIRMED IN PART, AND IN PART
VACATED AND REMANDED.

TIM KRAJICEK, APPELLANT, V. JOHN A. GALE, NEBRASKA SECRETARY OF STATE, APPELLEE. STATE OF NEBRASKA, APPELLEE, V. TIM KRAJICEK, APPELLANT.

677 N.W.2d 488

Filed March 19, 2004. Nos. S-02-1067, S-02-1070.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Quo Warranto: Equity: Appeal and Error.** Quo warranto is an action in equity and is triable on appeal de novo.
3. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
4. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
5. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
6. **Natural Resources Districts: Public Officers and Employees: Domicile.** In a natural resources district that has subdistricts, a director is required to reside in the subdistrict he or she has been elected to represent, and a director's office becomes vacant if he or she moves from or ceases to be a resident of the subdistrict from which he or she was elected.
7. **Domicile: Proof.** Domicile must be determined from all the circumstances taken together in a particular case, and in order to establish a domicile, two essential facts must be present: (1) residence, or bodily presence, in the locality and (2) an intention to remain there.
8. **Quo Warranto: Proof.** In a quo warranto action, the burden of proof in the first instance is on the defendant whose right to the office is challenged.

Appeals from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Appeal in No. S-02-1067 dismissed. Judgment in No. S-02-1070 affirmed.

Gregory A. Pivovar, on brief, for appellant.

Tim Krajicek, pro se.

Jon Bruning, Attorney General, and Dale A. Comer for appellee John A. Gale.

James S. Jansen, Douglas County Attorney, and Timothy K. Dolan for appellee State of Nebraska.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Tim Krajicek appeals the order of the district court for Douglas County in two cases which were consolidated for trial and for appeal. In case No. S-02-1067, the Nebraska Secretary of State, John A. Gale, sustained an objection and determined that Krajicek's name should not appear on the primary election ballot as a candidate for reelection to the board of directors of the Papio Missouri River Natural Resources District (the NRD) because Krajicek no longer resided in the subdistrict he sought to represent. Krajicek filed a petition for writ of error requesting the court to order Gale to include Krajicek's name as a candidate from subdistrict No. 8 on the May 14, 2002, primary election ballot. The district court denied Krajicek's petition for writ of error. In case No. S-02-1070, the district court upheld the State's quo warranto petition against Krajicek and ordered Krajicek removed from the NRD board because Krajicek had ceased to be a resident and domiciliary of subdistrict No. 8. We dismiss the appeal in the writ of error case brought by Krajicek, case No. S-02-1067, and affirm the district court's order in the quo warranto case brought by the State, case No. S-02-1070.

STATEMENT OF FACTS

In 1998, Krajicek was elected to represent subdistrict No. 8 on the board of directors of the NRD for a term of 4 years beginning January 7, 1999. At the time of his election, Krajicek lived at 4104 Madison Street in Omaha, Nebraska, which was located within subdistrict No. 8 of the NRD.

On January 30, 2002, the Douglas County Attorney on behalf of the State filed a quo warranto petition seeking an order that Krajicek be removed from office because he no longer resided within subdistrict No. 8. The substance of the quo warranto petition in State v. Krajicek, Douglas County District Court, docket 1012, page 150, has become case No. S-02-1070. The State alleged that on or about May 12, 2001, Krajicek changed his residence to 7819 South 45th Avenue, which address was located in Sarpy County and outside the boundaries of subdistrict No. 8.

The State alleged that Krajicek had vacated his office under Neb. Rev. Stat. § 32-560(5) (Reissue 1998) of the Election Act, which statute provides that an elective office shall be vacant when, inter alia, the incumbent ceases to be "a resident of the state, district, county, township, or precinct in which the duties of his or her office are to be exercised or for which he or she may have been elected." Elsewhere in the Election Act, Neb. Rev. Stat. § 32-116 (Reissue 1998) defines "residence," inter alia, as follows:

> (1) that place in which a person is actually domiciled, which is the residence of an individual or family, with which a person has a settled connection for the determination of his or her civil status or other legal purposes because it is actually or legally his or her permanent and principal home, and to which, whenever he or she is absent, he or she has the intention of returning, (2) the place where a person has his or her family domiciled even if he or she does business in another place . . . .

Following a set of correspondence between Gale and Krajicek in which Gale sought answers from Krajicek regarding his actual domicile, Krajicek received a letter from Gale stating that Krajicek's name would not appear on the May 14, 2002, primary election ballot as a candidate for reelection to represent subdistrict No. 8 on the NRD board. The letter stated that Krajicek's name would be omitted because he no longer resided in subdistrict No. 8. On March 20, Krajicek filed a petition for writ of error requesting an order that his name continue to be listed on the ballot for the primary election set for May 14, 2002. The substance of the petition for writ of error in Krajicek v. Gale, Douglas County District Court, docket 1013, page 592, has become case No. S-02-1067. In connection with his petition for writ of error, Krajicek also filed an application for an ex parte stay of Gale's decision to omit Krajicek's name or a temporary injunction enjoining Gale from removing Krajicek's name from the ballot. The court overruled Krajicek's application for an ex parte stay or temporary injunction on March 22. On May 6, the court overruled Krajicek's amended application for an ex parte stay or temporary injunction.

By agreement of the parties, the State's quo warranto petition against Krajicek and Krajicek's petition for writ of error against

Gale were consolidated for purposes of trial. A bench trial was held August 8, 2002. Krajicek's general contention at trial was that for purposes of these two lawsuits, he resided at 4505 Jefferson Street, which address was located within subdistrict No. 8 of the NRD. Although Krajicek admitted that he and his family had a residence at 7819 South 45th Avenue, he asserted that he also had a residence at 4505 Jefferson Street, which at the time, was occupied by his aunt and uncle. Krajicek presented evidence that he registered to vote, received mail, stored personal items, filed tax returns, and registered his vehicle at the 4505 Jefferson Street address. Krajicek also testified that he intended to purchase the residence at 4505 Jefferson Street from his aunt and uncle at some point in the future.

The State and Gale presented evidence that Krajicek and his family had moved their personal belongings and household furniture to the 7819 South 45th Avenue address. Krajicek also filed a change of address form with the U.S. Postal Service to have mail forwarded from 4104 Madison Street to 7819 South 45th Avenue. Krajicek and his wife owned the house at 7819 South 45th Avenue and jointly paid the expenses for the home, including property taxes, utilities, insurance, and maintenance. Krajicek slept, showered, ate breakfast, left for work, and returned to the 7819 South 45th Avenue address on a daily basis, and his children attended a school nearby. Krajicek's wife registered her car at the 7819 South 45th Avenue address, and she listed the address as her address on the couple's tax return. The State and Gale also presented evidence that the house at 4505 Jefferson Street was built and paid for by Krajicek's aunt and uncle. Krajicek's aunt and uncle also paid insurance, utilities, and related expenses on the house. Although Krajicek testified that he intended to move into the house at 4505 Jefferson Street following his aunt and uncle's occupancy, he did not know when that would be.

The district court entered its consolidated order as to both cases on September 4, 2002. The court determined that both Krajicek's residence and his domicile were at 7819 South 45th Avenue and that therefore Krajicek had vacated his office as a director of the NRD because he had ceased to be a resident of the subdistrict that he represented. The court determined that Gale's

decision to omit Krajicek's name from the primary election ballot was proper and that, thus, the quo warranto petition had merit. The court concluded that Krajicek no longer properly held the office of director of the NRD and ordered that he be "immediately ousted, excluded, and removed from said office." The court also denied Krajicek's petition for writ of error. Krajicek appeals the order as to both cases.

ASSIGNMENTS OF ERROR

In case No. S-02-1067, the writ of error action, Krajicek asserts that the district court erred in (1) interpreting the meaning of "residency" under the relevant statutes, (2) placing the burden on him to establish his residence in the subdistrict rather than placing the burden on Gale to establish Krajicek's residence outside the subdistrict, and (3) denying him due process by refusing to order that his name be placed on the ballot. Gale asserts that the appeal in case No. S-02-1067 is moot because the relief Krajicek sought was limited to having his name placed on the May 14, 2002, primary election ballot and such relief cannot now be provided. Gale further asserts that under Neb. Rev. Stat. § 32-624 (Reissue 1998), the Secretary of State's decision on an objection to an individual's candidacy is final unless a court reverses the decision on or before the 55th day preceding the election and that Krajicek failed to achieve such a reversal 55 days prior to the May 14, 2002, primary election. Gale asserts that the district court was without authority to afford Krajicek relief thereafter and that this court is without jurisdiction to consider the appeal.

In case No. S-02-1070, the quo warranto action, Krajicek asserts that the district court erred in finding that he resided and was domiciled outside subdistrict No. 8 because the court misinterpreted "residence" for purposes of the relevant statutes and improperly placed the burden of proof on him.

In case No. S-02-1070, Krajicek also makes an assignment of error to the effect that the district court for Douglas County erred in considering the action because certain of the activities occurred in Sarpy County, not in Douglas County. We understand this assignment of error to relate to the proper venue of the action. On the record before us, Krajicek did not challenge venue

at the trial level. A claim of improper venue is a matter that may be waived by failure to make a timely objection. *Reiter v. Wimes*, 263 Neb. 277, 640 N.W.2d 19 (2002). In addition, Krajicek did not argue this assignment of error in his brief. Errors that are assigned but not argued and errors that are argued but not assigned will not be addressed by an appellate court. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003). Accordingly, we do not further consider this assignment of error.

STANDARDS OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Rath v. City of Sutton, ante* p. 265, 673 N.W.2d 869 (2004).

[2] Quo warranto is an action in equity and is triable on appeal de novo in this court. *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979).

ANALYSIS

Case No. S-02-1067: Writ of Error Action.

[3,4] In case No. S-02-1067, the sole relief sought by Krajicek was that his name be placed on the May 14, 2002, primary election ballot as a candidate for the NRD board of directors for subdistrict No. 8. Gale asserts that the case is moot because the May 14, 2002, primary date has passed. A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Rath v. City of Sutton, supra.* A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Id.* We conclude that case No. S-02-1067 is a moot case because Krajicek can no longer obtain the relief he sought.

[5] As a general rule, a moot case is subject to summary dismissal. *Id.* Nebraska, however, recognizes a public interest exception to the mootness doctrine, and Krajicek urges that issues of residence, domicile, and eligibility for office in case No. S-02-1067 are issues related to public interest. Indeed, we have previously determined that certain election issues qualified for review under the public interest exception despite assertions that

the case was moot because the election at issue had passed. See *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). However, in the instant case, we conclude that to the extent issues of public interest are present in case No. S-02-1067, these issues are also present in case No. S-02-1070 and are addressed in connection with our analysis of that appeal below. We therefore dismiss the appeal in case No. S-02-1067 as moot.

Case No. S-02-1070: Quo Warranto Action.

Krajicek generally argues that the district court erred in its determination that he no longer resided and was not domiciled in subdistrict No. 8 and in therefore ordering that he be removed from his position representing subdistrict No. 8 on the NRD board of directors. We have reviewed the record de novo in this case. The evidence established that Krajicek had ceased to be a resident of subdistrict No. 8, see § 32-560(5); that he was actually domiciled outside subdistrict No. 8, see § 32-116; and that a vacancy existed in subdistrict No. 8, see Neb. Rev. Stat. § 2-3215 (Reissue 1997). Therefore, the district court did not err in ordering Krajicek removed from office.

[6] In its quo warranto petition, the State alleged that Krajicek vacated his office as a director of the NRD when he moved from 4104 Madison Street to 7819 South 45th Avenue. With respect to the residence of a natural resources district director, the following statutes are relevant: Neb. Rev. Stat. § 2-3214(1) (Reissue 1997), found in the statutes pertaining to agriculture, sets requirements for a natural resources district director and provides, inter alia, that in those districts that have established subdistricts, registered voters are eligible "as candidates from the subdistrict within which they reside." Section 2-3215 provides that "a vacancy on the board shall exist in the event of the removal from the district or subdistrict of any director." Section 2-3215 also refers to the events listed in § 32-560 from the Election Act, the latter of which provides that "[e]very elective office shall be vacant" upon the happening of certain events, including the "[i]ncumbent ceasing to be a resident of the state, district, county, township, or precinct in which the duties of his or her office are to be exercised or for which he or she may have been elected." Under § 32-116(1) of the Election Act, "residence" shall mean "that place in which a

person is actually domiciled." We read these statutes in pari materia. See *Forgét v. State*, 265 Neb. 488, 658 N.W.2d 271 (2003). Reading these related statutes together, it is clear that in a natural resources district that has subdistricts, a director is required to reside in the subdistrict he or she has been elected to represent, § 2-3214(1), and that a director's office becomes vacant if he or she moves from or ceases to be a resident of the subdistrict from which he or she was elected, §§ 2-3215 and 32-560(5). Further, residence is understood to mean actual domicile. § 32-116(1).

[7] Our case law is consistent with these statutes. In *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979), we considered a quo warranto action in which the State asserted that a county commissioner vacated her office when she ceased to be a resident of the county. We stated that although a person may have two places of residence, "only one of them may be his [or her] domicile," and concluded that in order to continue to hold office as a county commissioner, the defendant in *Jones* was required to maintain her domicile within the original county from which she had been elected. *Id.* at 491, 275 N.W.2d at 853. We stated that domicile must be determined from all the circumstances taken together in a particular case and that in order to establish a domicile, two essential facts must be present: (1) residence, or bodily presence, in the locality and (2) an intention to remain there. Similar to the holding in *Jones*, the relevant statutes in the present case indicate that for purposes of election to an NRD board where subdistricts have been established, a person can be a domiciliary of only one subdistrict. Specifically, § 2-3214(1) provides that candidates are to be elected "from *the* subdistrict within which they reside" (emphasis supplied) and § 32-116(1) provides that residence must be where the individual is "actually domiciled."

The evidence in the present case shows that in May 2001, Krajicek moved his residence from an address within subdistrict No. 8 to an address outside subdistrict No. 8. Krajicek concedes that he has a residence outside subdistrict No. 8 at 7819 South 45th Avenue, but he argues that he also maintains a residence inside subdistrict No. 8 at 4505 Jefferson Street. He argues that the residence requirement for a member of the NRD board for a subdistrict is met so long as he retains one of his residences

within subdistrict No. 8 even though he has another residence outside subdistrict No. 8. We reject Krajicek's argument.

It is clear from the record that Krajicek ceased to be domiciled in subdistrict No. 8 when he moved to 7819 South 45th Avenue. Krajicek had "bodily presence," see *State v. Jones*, 202 Neb. at 492, 275 N.W.2d at 853, at the new address because the evidence shows that, inter alia, he spent his nights at that address, had his mail forwarded to that address, and significantly contributed to the upkeep and improvement of the home at that address. By contrast, there was no evidence that he resided at 4505 Jefferson Street in the sense of being bodily present at that address.

The evidence also demonstrated Krajicek's intention to remain at 7819 South 45th Avenue because he returned to that address at nights, his wife and children resided at that address, and he indicated that he planned to eventually send his children to a high school near that address. Although Krajicek stated that he hoped to purchase the residence at 4505 Jefferson Street at some time in the future, such statements were speculative and uncertain. As we observed in *Jones*, intent will be assessed from all the surrounding circumstances.

In sum, the evidence in this case was not sufficient to establish that Krajicek was domiciled at 4505 Jefferson Street, particularly in light of the much stronger evidence that he both resided and was domiciled at 7819 South 45th Avenue. As the district court correctly determined, the record establishes that Krajicek became a resident and domiciliary of 7819 South 45th Avenue and that because that address is outside subdistrict No. 8, he vacated his office representing subdistrict No. 8 on the NRD board.

[8] Krajicek also argues that the district court erred when it "placed the burden of proof" on him. We understand that Krajicek complains that he had the burden of proof regarding the issues of residence and domicile. As the district court correctly noted, this court has previously stated that in a quo warranto action, "it is clear that the burden of proof in the first instance is on the defendant whose right to the office is challenged." *Stasch v. Weber*, 188 Neb. 710, 711, 199 N.W.2d 391, 393 (1972). See, also, 65 Am. Jur. 2d *Quo Warranto* § 119 at 165 (2001) ("[w]here a quo warranto proceeding is brought to try title to a public

office, the burden rests on the defendant or respondent, as against the state at least, to show a right to the office from which he or she is sought to be ousted"). Furthermore, as noted above, our de novo review of the record in this case shows that the evidence presented by the State established that Krajicek had ceased to be domiciled in subdistrict No. 8, see §§ 32-560 and 32-116, and that the significance of the evidence presented by Krajicek was not to the contrary. We reject Krajicek's assignments of error. The district court did not err in finding in favor of the State on its quo warranto action.

CONCLUSION

We conclude that case No. S-02-1067 is moot, and we therefore dismiss the appeal in case No. S-02-1067. We conclude that in case No. S-02-1070, the evidence establishes that Krajicek moved his residence and domicile outside subdistrict No. 8 and that therefore, the district court did not err in removing him from the NRD board of directors. We affirm the district court's order in case No. S-02-1070.

APPEAL IN NO. S-02-1067 DISMISSED.
JUDGMENT IN NO. S-02-1070 AFFIRMED.

FIRST COLONY LIFE INSURANCE COMPANY, APPELLEE, V. MICHAEL GERDES AND LINDA GERDES, APPELLANTS, AND LAURA ALBERS (SMITH) ET AL., APPELLEES.

676 N.W.2d 58

Filed March 19, 2004. No. S-02-1385.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing 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 the 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.
3. **Principal and Agent.** A power of attorney authorizes another to act as one's agent.
4. ____. Under a durable power of attorney, the authority of an attorney in fact survives the principal's subsequent disability or incapacity.

5. **Agency: Words and Phrases.** An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent and, further, resulting from another's consent to so act.
6. **Principal and Agent.** 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, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest.
7. **Principal and Agent: Intent.** Absent express intention, an agent may not utilize his or her position for the agent's or a third party's benefit in a substantially gratuitous transfer.
8. **Principal and Agent: Insurance: Contracts: Intent.** An attorney in fact who is acting under a durable general power of attorney to change the beneficiary designation of a principal's life insurance policy does not effect a gratuitous transfer of the principal's assets when the attorney in fact, or any third party having a relationship with the attorney in fact, does not benefit from the change, and the uncontroverted evidence establishes that the change was made in accordance with the principal's express instructions.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Frederick S. Cassman, of Abrahams, Kaslow & Cassman, L.L.P., for appellants.

Christian R. Blunk, of Berkshire & Blunk, for appellees Laura Albers (Smith), Julie Smith, and Brian Behrens.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

HENDRY, C.J.

INTRODUCTION

This is an interpleader action brought by First Colony Life Insurance Company (First Colony) to determine the rightful beneficiary of a life insurance policy issued to Thomas A. Smith (Smith) in the amount of $100,000. The two groups of defendants that First Colony interpleaded were Smith's daughters from his first marriage and Smith's stepchildren from his second marriage.

FACTUAL BACKGROUND

Smith's first marriage produced two children, Laura Albers and Julie Smith. After his divorce from his first wife, Smith married

Rita Gerdes, who had two children from a previous marriage, Michael Gerdes and Linda Gerdes (the Gerdeses).

On September 3, 1996, First Colony issued a life insurance policy to Smith in which Smith named Rita as the beneficiary. Rita died shortly thereafter. On May 6, 1997, Smith changed the beneficiary on the policy to include both of his daughters as well as the Gerdeses.

On February 10, 1998, Smith, who was in poor health from diabetes, executed a document entitled "Durable General Power of Attorney," naming Bryan Behrens as his "attorney-in-fact and as [his] agent." On the same day, Smith executed a revocable trust, naming himself as trustee and Behrens as first alternate trustee. Behrens is also named as "executor" of Smith's will, but is not a devisee, nor is he a beneficiary of the revocable trust.

Behrens is a financial planner who handled Smith's financial affairs for approximately 10 years. It was at Behrens' recommendation that Smith retained an attorney to prepare the durable general power of attorney and revocable trust.

Behrens testified that he was present at the time Smith executed the durable general power of attorney and trust. Behrens further testified that on the same day, while in the office of Smith's attorney, a change of beneficiary form was completed and signed by Smith changing the beneficiary designation on the First Colony policy from his daughters and the Gerdeses to the trust. According to Behrens, the change of beneficiary form was sent that same day to First Colony's local agent. A photocopy of the change of beneficiary form, however, was not made.

Article 1, paragraph 1.3, of the power of attorney provided that the document "shall not be effective until I [Smith] am disabled," which was defined as being unable to "handle my [Smith's] own financial affairs." Paragraph 1.3 further provided that "[m]y disability may be proved by a report of two (2) physicians, psychiatrists or psychologists who have examined me" or "by any other method of proof permitted by law." Article 2, paragraphs 2.2 and 2.13, of the document provided:

> 2.2 Full Power of Attorney: I give to my agent the full power to act or to omit to act regarding my estate or my person, I intend to grant to my agent a Durable General Power of Attorney to act for me and not to grant only a limited or

special power. My agent can act for me with regard to my property or person to the extent that I could act if I were personally present.

. . . .

2.13 Signing Documents: My agent shall have full power to sign, acknowledge or deliver any contracts, deeds or other documents as may be necessary or advisable to carry out the purposes of this Power of Attorney.

After these documents were executed, Smith went to California on vacation. According to Behrens, while in California, Smith became ill after a dialysis treatment and was never able to return to Nebraska "because he [Smith] could not get in a car or get on a plane because he was hooked up to a dialysis machine." Behrens testified that he spoke to Smith on the telephone in late February 2001 and that Smith instructed him to make sure the life insurance policy and his other assets were put into the trust. Behrens stated that although Smith was coherent during the telephone conversation, Smith informed Behrens that "he [Smith] couldn't write his own name" and that "he [Smith] didn't think he was going to live 'til the next day."

Behrens went on to testify that after speaking with Smith on the telephone, he called First Colony and was informed the trust was not the named beneficiary despite the change of beneficiary form Behrens testified Smith signed and mailed on February 10, 1998, the same day that the power of attorney and trust were executed. Thereafter, on February 25, 2001, Behrens executed a change of beneficiary form with First Colony pursuant to the power of attorney, naming the trust as sole beneficiary. Behrens explained that because Smith did not believe he was going to live, Behrens did not forward the change of beneficiary form to Smith for his signature. Behrens acknowledged that he knew the change of beneficiary would eliminate any interest the Gerdeses had in the First Colony policy, because the Gerdeses were not beneficiaries under the trust. Smith died on March 5, 2001.

In an affidavit, Behrens averred that he had not received compensation from the trust and did not intend to charge trustee fees. He further averred that he had no interest in the trust other than to act in accordance with his duties as trustee.

PROCEDURAL BACKGROUND

First Colony filed this interpleader action after Smith died, naming the Gerdeses, Smith's daughters, and Behrens as defendants. The Gerdeses, in their answer, alleged that the net effect of Behrens' changing the beneficiary was to convey a gift to Smith's daughters amounting to 50 percent of the First Colony policy proceeds and that the power of attorney did not expressly authorize Behrens to make a "gratuitous transfer." The Gerdeses' answer does not allege that Behrens' conduct was fraudulent. Smith's daughters and Behrens alleged in their answers that Behrens was directed by Smith to change the beneficiary and that, therefore, Behrens' actions were proper.

The Gerdeses filed a motion for summary judgment contending the change of the beneficiary designation was invalid as a matter of law. Smith's daughters and Behrens filed a joint motion for summary judgment, contending the trust was entitled to the life insurance proceeds.

After a hearing on the motions for summary judgment, the district court found that the insurance policy reserved to Smith the right to change the beneficiary and that the power of attorney gave Behrens the authority to act. The court further found that Behrens' testimony and affidavit, which were both uncontroverted and received without objection, established that (1) Smith was incapable of acting on his own when the beneficiary change was made on February 25, 2001; (2) Behrens had no personal interest in the trust or life insurance policy, had not profited from making the change in beneficiary, and had not received compensation for his actions as attorney in fact; and (3) Behrens' telephone conversation with Smith in late February 2001, together with his conversation with Smith in 1998 when the trust was created, established that it was Smith's intent that the policy proceeds go to the trust.

The court then determined that the

> change in beneficiary did not have the effect of diminishing or reducing Smith's property or estate in any way. Smith still owned the life insurance policy through the Trust, which was revocable by him [Smith] at any time during his lifetime. . . . Thus . . . there was no gratuitous transfer of Smith's property from his control, no benefit to the attorney in fact,

and there is evidence of the clear intent of Thomas A. Smith that the change in beneficiary should occur.

The court then granted the motion for summary judgment filed by Smith's daughters and Behrens, and overruled the motion filed by the Gerdeses. The Gerdeses appeal.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003); *Dean v. Yahnke*, 266 Neb. 820, 670 N.W.2d 28 (2003). In reviewing a summary judgment, an appellate court views the evidence in the 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. *Lalley, supra.*

ASSIGNMENTS OF ERROR

The Gerdeses assign, restated and renumbered, that the district court erred in determining that (1) the durable power of attorney authorized Behrens to change the policy beneficiary, (2) Smith had expressed a clear intent to change the policy beneficiary, (3) Behrens did not make a gratuitous transfer because he did not profit from the beneficiary change, and (4) the trust is the beneficiary of the policy.

ANALYSIS

Despite their four assignments of error, the Gerdeses make only one argument in their brief: Absent an express provision in a durable general power of attorney, an agent may not utilize his or her position to make a substantially gratuitous transfer of insurance proceeds either to himself or for a third party's personal benefit. In their brief, the Gerdeses acknowledge that the "Durable General Power of Attorney . . . purports to grant plenary power to defendant Behrens to act on behalf of Thomas A. Smith in the event of his disability." Brief for appellants at 4. The Gerdeses, however, contend that absent an express provision

authorizing Behrens to effect a gratuitous transfer, the plenary power is ineffective.

Smith's daughters and Behrens contend that under these facts, changing the beneficiary of an insurance policy is not a gratuitous transfer. They argue that the power to change the beneficiary was given by the durable general power of attorney and that the evidence is uncontroverted that Smith instructed Behrens to make the change and that such change resulted in no benefit to Behrens.

[3,4] A power of attorney authorizes another to act as one's agent. *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003). An agent holding a power of attorney is termed an "attorney in fact" as distinguished from an attorney at law. *Id.* Under a durable power of attorney, the authority of an attorney in fact survives the principal's subsequent disability or incapacity. Neb. Rev. Stat. § 30-2665 (Reissue 1995).

Neb. Rev. Stat. § 30-2666 (Reissue 1995) provides:

> All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his or her successors in interest as if the principal were competent and not disabled.

The district court found that Behrens' uncontroverted testimony established Smith's disability for purposes of the durable power of attorney. Such finding is not assigned as error by the Gerdeses. We therefore focus our analysis on whether Behrens' act of changing the beneficiary constituted a gratuitous transfer to himself or a third party and, if so, whether the durable general power of attorney expressly authorized such act.

[5-7] An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent and, further, resulting from another's consent to so act. *Crosby, supra.* 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, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest. *Id.* Absent express intention, an agent

may not utilize his or her position for the agent's or a third party's benefit in a substantially gratuitous transfer. *Id.*

The Gerdeses rely on a number of gratuitous transfer cases previously decided by this court. Some of the cases involved the transfer of the principal's money into accounts which directly or indirectly benefited the agent. See, *Crosby, supra* (attorney in fact transferred principals' funds from certificate of deposit account with named payable-on-death beneficiary, thereby eliminating beneficiary and indirectly benefiting attorney in fact as devisee under principal's will); *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992) (attorney in fact deposited principal's $5,000 inheritance into certificate of deposit account in both principal's and attorney in fact's name based on purported authorization of gift); *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989) (attorney in fact transferred funds from principal's certificates of deposit to accounts in both principal's name and attorney in fact's name and into accounts solely in attorney in fact's name based on principal's purported oral authorization).

Other cases relied upon by the Gerdeses involve the purported oral authorization to convey the principal's real property or make gifts from the principal's money assets to the attorney in fact and close family members. See, *Townsend v. U.S.*, 889 F. Supp. 369 (D. Neb. 1995) (relying on Nebraska law that gift giving is not permitted absent express authorization to determine that checks written on principal's account to attorney in fact and other primarily close family members were revocable transfers for purposes of federal estate taxes); *In re Conservatorship of Anderson*, 262 Neb. 51, 628 N.W.2d 233 (2001) (holding that appointment of conservator was warranted when attorneys in fact made money gifts to themselves and their children out of principal's estate purportedly authorized by principal's gifting program to avoid federal taxes but not expressed in the power of attorney); *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998) (attorney in fact compensated himself for services based on his assertion of oral contract with principal and made gifts to his family members based on principal's purported oral authorization); *Mischke v. Mischke*, 247 Neb. 752, 530 N.W.2d 235 (1995) (attorney in fact conveyed his brother's property to himself and two other brothers while principal was in coma).

In all of these cases, we have held that the principal's purported oral authorization was ineffective as proof of the principal's intent to make a substantially gratuitous transfer. See, e.g., *Fletcher, supra*. This rule was enunciated out of concern for potential abuse and fraud with durable powers of attorney and has been limited in application to cases in which the attorney in fact, or someone in relationship to the attorney in fact, stood to benefit at the principal's expense.

[8] However, the cases upon which the Gerdeses rely are distinguishable because the Gerdeses do not allege that Behrens' action was fraudulent and the uncontroverted evidence in the record establishes that neither Behrens nor any third party having any relationship with Behrens benefited from changing the beneficiary to Smith's trust. Furthermore, under the terms of the First Colony policy, Smith had the right to change his beneficiary designation at any time, and the Gerdeses therefore had no vested interest as beneficiaries. See, Neb. Rev. Stat. § 44-370 (Reissue 1998) (providing policyholders shall have right to change beneficiary with consent of insurer unless appointment is irrevocable); *Goodrich v. Equitable Life Assurance Society*, 111 Neb. 616, 197 N.W. 380 (1924) (when owner reserves right to change beneficiary, beneficiary has no vested interest in policy proceeds that would prevent change before owner's death). Since neither Behrens nor any third party having any relationship with Behrens benefited from changing the beneficiary, Smith's oral authorization was properly considered by the district court as evidence of Smith's intent. The Gerdeses made no objection to Behrens' testimony that Smith intended to have all his assets go to his trust, nor did they offer any evidence to refute such testimony. Viewing this record in the light most favorable to the Gerdeses, we determine that the change of beneficiary was not a gratuitous transfer.

CONCLUSION

We conclude the trial court did not err in determining that the change of beneficiary was not a gratuitous transfer and that the trust is entitled to the policy proceeds.

AFFIRMED.

McCORMACK, J., not participating.

COLLEEN ADAM, APPELLEE, AND LOREN AND DONNA REIMERS, HUSBAND AND WIFE, ET AL., APPELLANTS, V. THE CITY OF HASTINGS, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

676 N.W.2d 710

Filed March 26, 2004. No. S-01-1014.

1. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
2. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.
3. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
4. **Actions: Parties: Standing.** The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
5. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. The litigant must have some legal or equitable right, title, or interest in the subject of the controversy.
6. **Actions: Municipal Corporations: Standing: Injunction: Annexation: Ordinances.** A person who owns or is a voter in the territory sought to be annexed has standing to maintain an action against a municipality to enjoin the enforcement of the ordinance providing for annexation or to have the attempted annexation declared void.
7. **Standing: Parties: Annexation: Ordinances.** When a person has a personal, pecuniary, and legal interest adversely affected by an annexation ordinance, he or she has standing to contest the validity of the ordinance.
8. **Municipal Corporations: Injunction: Annexation: Proof.** A party seeking to restrain an act of a municipal body relative to annexation must show some special injury peculiar to himself or herself aside from a general injury to the public.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Adams County, DANIEL BRYAN, JR., Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Arthur R. Langvardt, of Langvardt & Valle, P.C., and Mark A. Beck, of Beck Law Office, P.C., for appellants.

Randall L. Goyette and Andrew M. Loudon, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., and Daniel L. Lindstrom, of Jacobsen, Orr, Nelson, Wright & Lindstrom, for appellee City of Hastings.

HENDRY, C.J., WRIGHT, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Appellants are landowners and residents in the Lochland Sanitary and Improvement District, located north of Hastings, Nebraska (the Lochland property). The Lochland Sanitary and Improvement District is not a party to this case. In city ordinance No. 3718, the City of Hastings, Nebraska (the City), appellee, purported to annex the Lochland property. In city ordinance No. 3740, the City purported to annex land owned by Colleen Adam and others. U.S. Highway 281 runs north-south in the area in question. The land annexed under ordinance No. 3740 lies to the east of Highway 281. The Lochland property lies to the west of Highway 281. The Lochland property is generally located to the northwest of the land annexed under ordinance No. 3740. A small portion of the Lochland property lies due west of the land annexed under ordinance No. 3740, connected only by Highway 281.

Appellants challenged both ordinances, and Adam challenged ordinance No. 3740 in the district court for Adams County. The district court determined that ordinance No. 3718 was unlawful, void, and of no legal effect, thus rendering the annexation of the Lochland property under ordinance No. 3718 invalid. The district court concluded, however, that appellants lacked standing to challenge ordinance No. 3740.

Appellants appealed the district court's decision concerning ordinance No. 3740. In a published opinion, the Nebraska Court of Appeals determined that appellants had standing to challenge ordinance No. 3740 and reversed the district court's order. *Adam v. City of Hastings*, 12 Neb. App. 98, 668 N.W.2d 272 (2003). The City petitioned for further review, which we granted. We reverse the decision of the Court of Appeals and remand the cause with directions.

STATEMENT OF FACTS

According to the record, these facts are undisputed: The City is a city of the first class. The Lochland property was within the City's zoning authority throughout these proceedings. The land annexed under ordinance No. 3740 lies to the north and east of the City. Highway 281 runs in a north-south direction along the western edge of the land annexed under ordinance No. 3740. The Lochland property lies north of the City. According to the maps in the record, the land immediately to the south of the Lochland property is not part of the City. Highway 281 runs in a north-south direction along the eastern edge of the Lochland property. The southeasternmost corner of the Lochland property connects to Highway 281 which in turn connects to the northwesternmost corner of the land annexed under ordinance No. 3740. Appellants do not have an economic interest in the land annexed under ordinance No. 3740.

On May 8, 2000, the Hastings City Council passed ordinance No. 3740, by which it annexed within the corporate limits of the City certain property, including the land owned by Adam and others. Ordinance No. 3740 also annexed the highway right-of-way abutting to the west. On July 24, the city council passed ordinance No. 3718, by which it annexed within the corporate limits of the City certain property, including the Lochland property. Ordinance No. 3718 annexed the highway right-of-way abutting the Lochland property to the east. The City enacted these ordinances pursuant to Neb. Rev. Stat. § 16-117(1) (Reissue 1997), which provides, inter alia, as follows:

> The corporate limits of a city of the first class shall remain as before, and the mayor and council may by ordinance . . . at any time include within the corporate limits of such city any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character and in such direction as may be deemed proper. Such grant of power shall not be construed as conferring power upon the mayor and council to extend the limits of a city of the first class over any agricultural lands which are rural in character.

On August 3, 2000, appellants and Adam filed a declaratory action seeking, inter alia, to enjoin implementation of the ordinances. In the first cause of action (Count I) of the petition,

appellants and Adam sought to declare ordinance No. 3740 invalid and to enjoin its enforcement. In the second cause of action (Count II) of the petition, appellants sought to declare ordinance No. 3718 invalid and to enjoin its enforcement. Adam was not a party to Count II of the petition and, therefore, did not challenge ordinance No. 3718. Appellants were parties to both Counts I and II and therefore contested the City's adoption and enforcement of both ordinances Nos. 3740 and 3718.

Prior to trial, Adam and the City entered into a settlement agreement pursuant to which, inter alia, Adam withdrew from the present action and further agreed not to "challenge . . . the annexation of the Colleen Adam property by the City." Thereafter, on July 27, 2001, trial was held on appellants' challenges to ordinances Nos. 3740 and 3718. Three witnesses testified, and 30 exhibits were introduced into evidence.

In an order filed August 10, 2001, the district court granted appellants the relief they sought in Count II of the petition and declared ordinance No. 3718 invalid. The district court determined that the City had failed to comply with the statutory annexation procedures when it passed the ordinance, and the district court permanently enjoined the City from enforcing, implementing, or acting on ordinance No. 3718. The district court's decision concerning ordinance No. 3718 was not challenged by any party and is not at issue in the present appeal. Thus, contrary to the parties' urging on appeal, we need not comment on whether annexation of the Lochland property in the future, pursuant to an ordinance similar to No. 3718 and based on a shared border with land annexed under ordinance No. 3740, would satisfy the contiguity requirements of § 16-117. See *Johnson v. City of Hastings*, 241 Neb. 291, 295, 488 N.W.2d 20, 23 (1992) (discussing § 16-117 and noting that "the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation"). See, also, *Witham v. City of Lincoln*, 125 Neb. 366, 250 N.W. 247 (1933).

With regard to Count I of the petition, the district court determined that appellants did not have standing to challenge ordinance No. 3740 and dismissed Count I of the petition. The district court stated that because appellants were not residents, tenants, real owners, or electors of the land annexed under ordinance No.

3740, they had no direct interest in the annexation. The court further found that appellants had not shown a special injury resulting from the annexation of that land peculiar to themselves.

Appellants appealed the district court's order dismissing their challenge to ordinance No. 3740 to the Court of Appeals. In its published opinion, the Court of Appeals relied on certain remarks of this court found in *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), and concluded that appellants had standing to challenge the validity of ordinance No. 3740. *Adam v. City of Hastings*, 12 Neb. App. 98, 668 N.W.2d 272 (2003). The Court of Appeals reversed the district court's order and remanded the cause for further proceedings.

The City filed a petition for further review, which we granted. For the reasons stated below, we reverse the decision of the Court of Appeals and remand the cause with directions to affirm the district court's order dismissing appellants' first cause of action challenging ordinance No. 3740.

ASSIGNMENT OF ERROR

In its petition for further review, the City assigns numerous errors which derive essentially from the City's claim that the Court of Appeals erred in determining that appellants had standing to challenge ordinance No. 3740.

STANDARDS OF REVIEW

[1] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003).

ANALYSIS

In its petition for further review, the City asserts that the Court of Appeals erred when it concluded that appellants had standing to challenge ordinance No. 3740 and reversed the district court's decision which had dismissed Count I of appellants' petition. We agree with the City that appellants do not have standing to challenge ordinance No. 3740 and that the Court of Appeals erred when it concluded to the contrary. We reverse.

[2,3] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court. *Crosby v. Luehrs, supra*; *Hradecky v. State*, 264 Neb. 771, 652 N.W.2d 277 (2002). Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002); *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (2000). Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Governor's Policy Research Office v. KN Energy, supra*; *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000).

[4,5] The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Crosby v. Luehrs, supra*; *Hradecky v. State, supra*. In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *Id.* The litigant must have some legal or equitable right, title, or interest in the subject of the controversy. See, *Crosby v. Luehrs, supra*; *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[6-8] We have long held that a person who owned or was a voter in the territory sought to be annexed had standing to maintain an action against a municipality to enjoin the enforcement of the ordinance providing for annexation or to have the attempted annexation declared void. *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952). We have also held that when a person has a personal, pecuniary, and legal interest adversely affected by an annexation ordinance, he or she had standing to contest the validity of the ordinance. *Sullivan v. City of Omaha*, 183 Neb. 511, 162 N.W.2d 227 (1968). We have previously determined that persons who are not residents, property owners, taxpayers, or electors of an annexed area generally do not have standing to challenge the annexation and that "a party seeking to restrain an act of a municipal body [relative to annexation] must show some special injury peculiar to himself aside from a general injury to

the public." *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 495, 536 N.W.2d 56, 64 (1995). In this connection, we have recognized the standing of plaintiffs whose land was outside the annexed area but whose land would fall within the annexing city's zoning authority if the challenged annexation of nonplaintiff land was permitted. See, e.g., *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992) (involving city of first class where injunction sought); *Piester v. City of North Platte*, 198 Neb. 220, 252 N.W.2d 159 (1977) (involving city of first class); *Sullivan v. City of Omaha, supra* (involving city of metropolitan class where injunction sought).

In the instant case, appellants do not claim to be residents, property owners, taxpayers, or electors of the land annexed under ordinance No. 3740 and the Lochland property was within the City's zoning authority prior to passage of ordinance No. 3740. Further, as pertains to the annexation of the highway right-of-way under ordinance No. 3740 which may include some boundary of the Lochland Sanitary and Improvement District, we note that the Lochland Sanitary and Improvement District is not a party to these proceedings, and, therefore, as the district court observed, appellants cannot claim standing by virtue of some injury to the Lochland Sanitary and Improvement District.

Appellants assert that they have standing because the annexation of the land subject to ordinance No. 3740 could make possible the annexation of the Lochland property by the City at a future date. Appellants claim that because of the proximity of their property to the land annexed under ordinance No. 3740, they are affected directly by the City's annexation of the land subject to ordinance No. 3740.

We are not aware of, and appellants have not directed us to, any decisions of this court wherein this court has determined that owners of property near land subject to an annexation ordinance had standing to challenge that ordinance solely by virtue of their property's proximity to the annexed land and their property's future exposure to annexation. Appellants refer to language in *SID No. 57 v. City of Elkhorn*, 248 Neb. at 492, 536 N.W.2d at 62, in which this court commented that the plaintiff property owners who were challenging a current annexation of certain sanitary and improvement district property had "acquiesce[d]" in

a previous annexation, which annexation arguably caused the plaintiff property owners' land to become contiguous to the earlier annexation and thus exposed to annexation. It was language to this effect in *SID No. 57 v. City of Elkhorn* on which the Court of Appeals relied in concluding that appellants herein had an interest sufficient for standing to challenge ordinance No. 3740. See *Adam v. City of Hastings*, 12 Neb. App. 98, 668 N.W.2d 272 (2003). We observe, however, that on the facts of *SID No. 57 v. City of Elkhorn*, we determined that the plaintiff property owners lacked standing to contest the current annexation ordinance and, in so doing, we confirmed the general rules with regard to standing in annexation cases.

We reaffirm our previous decisions with regard to standing in annexation cases, and to the extent that language in *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), suggests that proximity to land subject to an annexation ordinance, alone, is sufficient to establish standing upon a plaintiff, that language is specifically disapproved. Accordingly, reliance on such language by the Court of Appeals was misplaced.

We have reviewed the record in the instant case which shows that appellants do not have a personal, pecuniary, and legal interest adversely affected by ordinance No. 3740. They are neither residents, property owners, taxpayers, nor electors of the land annexed under ordinance No. 3740. Appellants have not asserted a special injury. Accordingly, appellants do not have standing to contest ordinance No. 3740.

CONCLUSION

For the reasons stated above, we reverse the decision of the Court of Appeals and remand the cause with directions to affirm the district court's order dismissing appellants' first cause of action challenging ordinance No. 3740.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., not participating.

HEATHER KEYS AND CHARLES KEYS, INDIVIDUALLY AND AS WIFE AND HUSBAND, APPELLANTS, V. LANETTE GUTHMANN, M.D., AND PHYSICIANS CLINIC, INC., A NEBRASKA CORPORATION DOING BUSINESS AS PHYSICIANS CLINIC, APPELLEES.

676 N.W.2d 354

Filed March 26, 2004. No. S-02-471.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing 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.
3. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.
4. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden is on the plaintiff to show: (1) the generally recognized medical standard of care, (2) a deviation from that standard by the defendant, and (3) that the deviation was the proximate cause of the plaintiff's alleged injuries.
5. **Malpractice: Physicians and Surgeons: Expert Witnesses: Proof.** Ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony.
6. ____: ____: ____: ____. In medical malpractice cases brought under the res ipsa loquitur doctrine, negligence may be inferred in three situations without affirmative proof: (1) when the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, et cetera, in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.
7. **Malpractice: Physicians and Surgeons: Expert Witnesses.** Generally, the common knowledge exception to expert testimony is applicable in cases where a physician fails to remove a foreign object from a patient's body or where a patient enters the hospital for treatment on one part of the body and sustains injury to another part of the body.
8. ____: ____: ____. The common knowledge exception does not apply where the defendant physician's negligence is not obvious from the facts and circumstances of the case.
9. **Summary Judgment: Proof.** A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.

10. **Malpractice: Physicians and Surgeons: Affidavits: Negligence: Summary Judgment.** An affidavit of the defendant physician in a malpractice case, which affidavit states that the defendant did not breach the appropriate standard of care, presents a prima facie case of lack of negligence for the purposes of summary judgment.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Phillip G. Wright and David M. Handley, of Wright & Associates, for appellants.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., and, on brief, Patrick W. Meyer for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

This is a medical malpractice case brought by Heather Keys and Charles Keys (the plaintiffs) against Lanette Guthmann, M.D., and her employer, Physicians Clinic, Inc. (the defendants). The Douglas County District Court granted the defendants' motion for summary judgment, and the plaintiffs have appealed.

SCOPE OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003).

[2] 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. *K N Energy v. Village of Ansley*, 266 Neb. 164, 663 N.W.2d 119 (2003).

FACTS

At all times relevant to this case, Heather was a patient of Guthmann's and Guthmann was a licensed obstetrics and gynecology (OB/GYN) physician employed by Physicians Clinic,

Inc., in Omaha, Nebraska. In their petition, the plaintiffs alleged that on December 12, 1998, Guthmann performed an episiotomy on Heather to aid in the birth of her first child and that while performing the episiotomy, Guthmann cut through Heather's anal sphincter. Complications from this procedure were the basis of the plaintiffs' petition.

According to Guthmann's deposition testimony, the episiotomy did not originally extend to Heather's sphincter, but over the course of the delivery, the incision continued to tear until it reached the sphincter. Guthmann stated that in her experience, it was common for an episiotomy to continue to tear in this manner. In describing her subsequent repair of the torn sphincter, Guthmann said that it "pulled together nicely."

On December 22, 1998, Heather telephoned Guthmann's office and complained of having problems controlling her bowels. Guthmann's records indicate that Heather preferred not to come into the clinic for an examination and chose to allow the injured area time to heal.

At her 6-week postpartum visit, Heather complained of having problems with bowel movements and incontinence with gas. A rectal examination indicated a possible separation of the sphincter, which led Guthmann to believe that the sphincter had not healed well and that Heather might need surgery to correct the problem. Guthmann scheduled an appointment for Heather with Garnet Blatchford, M.D., a colon and rectal surgeon.

Blatchford's examination of Heather revealed that Heather had suffered a sphincter injury as the result of an obstetric delivery. In Blatchford's deposition, she stated that this type of trauma was fairly common. She stated that in most cases, it is not the episiotomy that causes the sphincter injury, but, rather, a tear that occurs in the line of the episiotomy. Blatchford opined that a doctor is unable to visually distinguish between an injury directly caused by an episiotomy and one caused by subsequent tearing. She described Heather's sphincter as healed, but in a gapped position. Blatchford further stated that she had no complaints with the way Guthmann had sutured the laceration.

On March 15, 1999, Blatchford performed a sphincteroplasty on Heather. A followup visit on April 7 showed the injury to be 98 percent healed. After this visit, Blatchford wrote to Guthmann and

stated that Heather was no longer having problems controlling her bowels but was still having some incontinence with gas. Blatchford suggested that Heather perform some Kegel exercises and that she schedule another appointment in 1 month. The last contact Blatchford had with Heather was a telephone call on April 19. Blatchford released Heather to return to work on April 26.

In their petition, the plaintiffs alleged that as a result of the injury to Heather's sphincter, she has suffered permanent injury and special damages due to the need to repair the sphincter. The plaintiffs claimed that Guthmann's negligence was the proximate cause of Heather's injuries. In particular, they asserted that Guthmann was negligent in (1) not properly performing the episiotomy, by failing to perform a posterolateral incision in a proper manner, and not properly repairing the damaged sphincter and (2) failing to perform proper postpartum followup with respect to the damaged sphincter.

The defendants' answer alleged that all of the procedures performed upon Heather were performed in compliance with the applicable standard of care for practicing OB/GYN physicians in Omaha or similar communities. The defendants denied that Guthmann caused any injury to Heather.

The defendants subsequently moved for summary judgment, which motion was sustained by the district court. The court found that the affidavits of Guthmann and Raymond Schulte, M.D., a board-certified OB/GYN physician, presented a prima facie case of lack of negligence. The court stated that the burden then shifted to the plaintiffs to show that an issue of material fact existed which prevented judgment as a matter of law. The court concluded that Heather's affidavit did not qualify as expert testimony and that because no expert testimony was presented by the plaintiffs with regard to the applicable standard of care and causation, the defendants were entitled to judgment as a matter of law. The plaintiffs filed a timely notice of appeal.

ASSIGNMENTS OF ERROR

The plaintiffs assign the following restated errors to the district court: (1) its failure to find that the injuries sustained by Heather were of a type wherein negligence may be implied and (2) its failure to recognize that material issues of fact precluded the entry of summary judgment.

ANALYSIS

[3-5] In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty. *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003). In *Casey v. Levine*, 261 Neb. 1, 621 N.W.2d 482 (2001), we stated that in a malpractice action involving professional negligence, the burden is on the plaintiff to show: (1) the generally recognized medical standard of care, (2) a deviation from that standard by the defendant, and (3) that the deviation was the proximate cause of the plaintiff's alleged injuries. Ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony. *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003).

[6] The plaintiffs argue that Heather's injury was of a type that did not require expert testimony concerning negligence, thus implicating the doctrine of res ipsa loquitur. In *Chism v. Campbell*, 250 Neb. 921, 553 N.W.2d 741 (1996), we stated that in medical malpractice cases brought under the res ipsa loquitur doctrine, negligence may be inferred in three situations without affirmative proof: (1) when the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, et cetera, in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries. The plaintiffs assert that the circumstances of this case fit into the second category, which is often referred to as the "common knowledge exception."

[7] Generally, the common knowledge exception is applicable in cases where a physician fails to remove a foreign object from a patient's body or where a patient enters the hospital for treatment on one part of the body and sustains injury to another part of the body. *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000). As we noted in *Swierczek v. Lynch*, 237 Neb. 469, 478, 466 N.W.2d 512, 518 (1991), "It is within the common knowledge and experience of a layperson to determine

that an individual does not enter the hospital for extraction of her teeth and come out with an injury to nerves in her arms and hands, without some type of negligence occurring."

In *Swierczek*, the plaintiff requested the extraction of all her teeth. After her oral surgery, the plaintiff discovered she had suffered injury to the nerves of her hands and fingers. As such, the plaintiff's injury was to a part of her body for which she had not sought medical treatment, and we held that the common knowledge exception applied.

[8] However, in *Fossett*, we stated that the common knowledge exception does not apply where the defendant physician's negligence is not obvious from the facts and circumstances of the case. In *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982), *disapproved on other grounds, Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992), the plaintiff sued her physician because her esophagus was perforated during a dilation procedure. The plaintiff developed pneumonia and required major surgery. We held that in such a situation, negligence could not be presumed by application of the common knowledge exception.

In the case at bar, the injury was related to the performance of an episiotomy during the delivery of a child. The facts presented do not support application of the common knowledge exception to the requirement of expert testimony to establish a physician's negligence. Giving Heather all reasonable inferences, negligence could not be inferred as a matter of law.

[9] Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003). A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003). At that point, the burden of producing evidence shifts to the party opposing the motion. *Id.*

[10] An affidavit of the defendant physician in a malpractice case, which affidavit states that the defendant did not breach the

appropriate standard of care, presents a prima facie case of lack of negligence for the purposes of summary judgment. *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995). The burden then shifts to the plaintiff to show that an issue of material fact exists and that that fact prevents judgment as a matter of law. *Id.*

Both Guthmann and Blatchford opined that continued tearing after the performance of an episiotomy was a common occurrence. Schulte stated that he was familiar with the requisite standard of care for OB/GYN physicians and that his review of the circumstances showed that Guthmann acted at or above this standard in her treatment of Heather. This evidence established a prima facie case for lack of negligence on the part of Guthmann. Accordingly, the burden of producing evidence shifted to the plaintiffs to show that an issue of material fact existed which prevented a judgment in favor of the defendants as a matter of law.

Since none of the res ipsa loquitur exceptions apply, the plaintiffs were then required to produce expert testimony establishing the negligence of Guthmann. This would include evidence as to the generally recognized standard of care, Guthmann's deviation from this standard, and that the deviation was a proximate cause of Heather's injuries.

Next, we must address whether the plaintiffs sustained their burden of proof. Heather's affidavit averred that Guthmann made two admissions to her during the course of her treatment. Heather alleged that Guthmann told her that she was being referred to Blatchford because " 'I didn't do the repair right.' " Heather also alleged that when referring to Heather's sphincter injury, Guthmann stated: " 'Once every ten years isn't too bad.' "

These statements are analogous to a statement made by a physician in *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000). There, when asked why he did not remove some fluid during a certain procedure, the physician replied, " 'I don't know why I left it there, I just left it there.' " *Id.* at 710-11, 605 N.W.2d at 470. We concluded that such statement did not create a reasonable inference of negligence and that a mistake is not synonymous with negligence.

We conclude that Guthmann's alleged admissions do not create a reasonable inference of negligence. The statements by Guthmann and all reasonable inferences therefrom do not sustain

the plaintiffs' burden to show the generally recognized standard of medical care and that the defendants deviated from that standard. Thus, the plaintiffs have not shown by expert testimony that the defendants were negligent.

The plaintiffs argue that even if Heather's injury is of the type that requires expert medical testimony, there are material questions of fact that preclude summary judgment for the defendants. We disagree. Guthmann set forth a prima facie case of lack of negligence. The burden then shifted to the plaintiffs to establish an issue of material fact that would prevent a judgment in favor of Guthmann as a matter of law. The plaintiffs failed to sustain this burden. As such, there is no genuine issue as to any material fact, and the defendants were entitled to judgment as a matter of law.

CONCLUSION

For the reasons set forth herein, the order of the Douglas County District Court granting summary judgment to the defendants is affirmed.

AFFIRMED.

THOMAS S. MITCHELL, JR., APPELLEE, V.
NIKKI A. FRENCH, APPELLEE, AND
COUNTY OF DOUGLAS, NEBRASKA, APPELLANT.
676 N.W.2d 361

Filed March 26, 2004. No. S-02-738.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. ____: ____. 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.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded with directions.

James S. Jansen, Douglas County Attorney, and Bernard J. Monbouquette for appellant.

Thomas K. Harmon, of Respeliers & Harmon, P.C., for guardian ad litem.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

The issue presented in this case is whether the district court erred under Neb. Rev. Stat. § 42-358(1) (Cum. Supp. 2002) when it ordered Douglas County to pay a portion of the guardian ad litem fees on behalf of one of the parties to the action without finding that the party was indigent. We hold that it was error and reverse, and remand with directions.

BACKGROUND

On December 28, 2000, Thomas S. Mitchell, Jr., initiated this action in the district court for Douglas County against Nikki A. French. Mitchell's operative petition alleged that he was the father of two minor children born to French and sought a judgment of paternity and custody of the children. French filed a cross-petition in which she also alleged that Mitchell was the father of the two children. French sought custody of the children and child support from Mitchell.

During the course of the action, a guardian ad litem (GAL) was appointed for the children. At the conclusion of the action, the GAL applied for an award of her fees. The district court awarded the GAL $1,536, to be assessed equally between Mitchell and French. The court also found that French was indigent and ordered the county to pay French's half of the GAL fees. The county does not take exception to this order.

The court later held a hearing with regard to Mitchell's half of the GAL fees. No evidence was received at the hearing. Mitchell did not appear personally at the hearing, but was represented by his attorney. His attorney told the court that he had been told by Mitchell's parents that Mitchell had been unemployed for several months, lived with his parents, was struggling with alcohol and drug issues, and was receiving counseling for those problems. Mitchell's attorney also told the court "with a certain degree of confidence that the original affidavit

on file in this case regarding [Mitchell's] income is no longer correct." That affidavit, filed approximately 16 months prior to the GAL fees hearing, indicated Mitchell's monthly net income was $1,859.17.

At the conclusion of the hearing, the court stated, "I won't find that [Mitchell is] indigent." Nonetheless, the court ordered the county to pay Mitchell's half of the GAL fees because Mitchell "is unable to make payments towards the Guardian ad Litem's fee at this time." The court further ordered Mitchell to reimburse the county the same amount. The county appeals, and we moved the case to our docket.

ASSIGNMENT OF ERROR

The county assigns that the district court erred in ordering it to pay Mitchell's half of the GAL fees without finding that Mitchell was indigent.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn., ante* p. 158, 673 N.W.2d 15 (2004).

ANALYSIS

In their arguments to this court, the county and the GAL assume that § 42-358(1) is the controlling statute in this case. It authorizes a court to appoint an attorney or a GAL to protect the interests of minor children. See, *id.*; *Mathews v. Mathews, ante* p. 604, 676 N.W.2d 42 (2004). It further allows the attorney or GAL to recover his or her fees, specifically providing in part: "The court shall by order fix the fee, including disbursements, for such attorney, which amount shall be taxed as costs and paid by the parties as ordered. If the court finds that the party responsible is indigent, the court may order the county to pay the costs." § 42-358(1); *Mathews v. Mathews, supra.*

We agree that § 42-358(1) controls. Mitchell's operative petition was filed pursuant to Nebraska's paternity statutes at Neb. Rev. Stat. ch. 43, art. 14 (Reissue 1998 & Cum. Supp. 2002). None of those statutes expressly authorize the appointment of a

GAL. However, this action also involved child custody and child support issues. In fact, the pleadings in this case indicate that paternity was not disputed and that custody and child support were the only controverted issues. Therefore, the provisions commonly applied in dissolution actions were applicable here as well. See, *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981) (standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) were applicable in custody dispute that began as paternity action); *State ex rel. Ross v. Jacobs*, 222 Neb. 380, 383 N.W.2d 791 (1986); *Riederer v. Siciunas*, 193 Neb. 580, 228 N.W.2d 283 (1975). Included among them was § 42-358.

The issue presented in this case was decided by the Nebraska Court of Appeals in *Brackhan v. Brackhan*, 3 Neb. App. 143, 524 N.W.2d 74 (1994). In that case, York County was ordered to pay GAL fees in a dissolution action despite the fact that neither party was found to be indigent. The Court of Appeals reversed the order of the district court for two reasons. First, the court determined that York County did not have notice of any hearing on the GAL's application for fees and had no notice that the indigence of either party was at issue. In this case, the county does not contend that it was deprived of such notice.

The second reason for the Court of Appeals' reversal, a reason "of equal import" to the first, was that "a finding of indigence is a prerequisite to an order entered pursuant to § 42-358 requiring the County to pay the costs which have been fixed, taxed, and ordered to be paid by the parties." *Brackhan v. Brackhan*, 3 Neb. App. at 147, 524 N.W.2d at 77.

[2] 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. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, *ante* p. 158, 673 N.W.2d 15 (2004). As the Court of Appeals recognized in *Brackhan*, § 42-358 requires no interpretation. It plainly allows for payment of GAL fees by a county only if a court finds that the party responsible is indigent. In this case, the district court expressly declined to find that Mitchell was indigent. Thus, the court erred in ordering the county to pay Mitchell's half of the GAL fees.

The GAL argues that the district court effectively found Mitchell was indigent when it stated that Mitchell "is unable to make payments towards the Guardian ad Litem's fee at this time." The GAL interprets this language to be the equivalent of a finding of indigency. We disagree without even needing to resort to the definition of indigency announced in a recent Supreme Court opinion. See *Mathews v. Mathews, ante* p. 604, 676 N.W.2d 42 (2004) (holding that person is indigent under § 42-358 if he or she is unable to pay GAL or attorney fees without prejudicing, in meaningful way, his or her financial ability to provide necessities of life). The district court's statement not only contradicts its explicit refusal to find Mitchell indigent, it is also unsupported by any evidence in the record. Mitchell's attorney, in unsworn statements to the court, shared his view of Mitchell's situation as related to him by Mitchell's parents. He told the court that Mitchell was unemployed and no longer had a monthly net income of $1,859.17, as an affidavit filed earlier in the action indicated. Even if we were to accept the GAL's interpretation of the district court's statement and conclude that the court effectively found Mitchell was indigent, the unsworn statements by Mitchell's attorney are insufficient to support such a finding.

CONCLUSION

The district court erred in ordering the county to pay Mitchell's half of the GAL fees because it did not first find that Mitchell was indigent. We reverse the order of the district court and remand the cause with directions to vacate its order requiring the county to pay Mitchell's half of the GAL fees.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF MARIE J. TROBOUGH, AN INCAPACITATED AND PROTECTED PERSON. LORI BAIN, INTERESTED PARTY, APPELLANT, V. GLORIA TROBOUGH CLIPPINGER, GUARDIAN AND CONSERVATOR, APPELLEE.

676 N.W.2d 364

Filed March 26, 2004. No. S-03-668.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews conservatorship proceedings for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Estates: Guardians and Conservators: Accounting.** Any person interested in an estate may ask the conservator to file an accounting or may object to the accounting.

Appeal from the County Court for Douglas County: JEFFREY MARCUZZO, Judge. Order vacated, and cause remanded with directions.

Susan J. Spahn, Christopher S. Wallace, and Gerald L. Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellant.

Robert J. Murray and Angela M. Pelan, of Lamson, Dugan & Murray, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

This appeal arises out of a conservatorship proceeding in the Douglas County Court. The appellant objected to the final accounting of the conservator and requested that the conservator be surcharged and relieved of her duties as to administration of the conservatorship. The county court denied the appellant's request, approved the final accounting, terminated the conservatorship, and discharged the conservator. The court also directed that issues raised by the appellant with respect to certain personal property be transferred to the probate court to be considered as part of the probate proceedings.

SCOPE OF REVIEW

[1] An appellate court reviews conservatorship proceedings for error appearing on the record made in the county court. See *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996).

[2] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 311, 664 N.W.2d 456 (2003).

FACTS

On January 27, 2000, Gloria Trobough Clippinger (Clippinger) filed a petition requesting that she be appointed the guardian and conservator for her mother, Marie J. Trobough. At the time, Trobough was 89 years old and residing in an assisted living facility in Omaha, Nebraska. The petition alleged that Trobough was incapacitated and unable to manage her property and affairs because she suffered from dementia and disorientation. It was alleged that Trobough's net worth was between $400,000 and $500,000. The Douglas County Court subsequently appointed Clippinger to act as Trobough's guardian and conservator. Clippinger filed annual reports and accountings on March 23, 2001, and March 28, 2002.

After Trobough's death on January 10, 2003, her granddaughter, Lori Bain, filed several pleadings with regard to the conservatorship. In her petition to void the transfer of personal property and for an accounting, Bain alleged that Trobough had collected many valuable antiques and was regarded as one of the premier collectors of dolls in the Omaha area. The petition alleged that Clippinger had moved certain property of Trobough's to Tennessee and purchased such property for $5,000. Bain alleged that the payment was grossly inadequate to compensate for the value of the personal property, which she estimated exceeded $100,000. The petition claimed that the transfer of this personal property was tainted by a substantial conflict of interest and should, therefore, be voided. Bain requested that the county court require Clippinger to account for all of Trobough's personal property that was moved to Tennessee.

In support of her petition, Bain filed an affidavit from Greg Ford, an auctioneer, who averred that he was involved in a 2-day

auction of Trobough's dolls and personal property and that the gross sales from the auction were $109,456.50, including $93,073 for the doll auction. Ford stated that the items sent to Tennessee were higher quality antiques than those sold at auction. He averred that the value of these items was between $100,000 and $150,000.

Clippinger requested that the county court consolidate the conservatorship proceedings with the probate proceedings that were pending in county court. On March 7, 2003, the court held a hearing regarding the motion to consolidate and ordered Clippinger to file her final accounting.

On March 24, 2003, Clippinger filed her final accounting and a petition requesting that the conservatorship be terminated and that she be discharged from her duties as guardian and conservator. Bain subsequently traveled to Tennessee to inventory the disputed property, and she then filed objections to the final accounting.

Bain also petitioned for removal and surcharge of the conservator and appointment of a successor conservator. She asserted that Clippinger had failed to account for personal property which Clippinger had transferred to herself without court approval and asked that the county court void the transfer. Bain also alleged that Clippinger had failed to account for certificates of deposit totaling in excess of $80,000. In a supplemental petition for approval of the final accounting, Clippinger included the certificates of deposit, which were valued at more than $90,000.

The record indicates that a hearing was scheduled for May 13, 2003; however, this proceeding evolved into a mere discussion among the parties and the county court regarding the problems created by the simultaneous conservatorship and probate proceedings. At that time, the court indicated that it approved the accounting as to the monetary assets and then stated: "The objections as to the personal property, these dolls and figurines in those arguments, are transferred to the probate case. I am ordering them transferred now."

In an order dated May 14, 2003, the county court approved the final accounting as to the monetary assets, terminated the conservatorship, discharged Clippinger of her responsibilities as conservator, and released the surety. The court denied Bain's

petition seeking to remove Clippinger as conservator, to surcharge the conservator, and to appoint a successor conservator. The court also directed that the dolls, figurines, and other personal property be transferred to the personal representative of Trobough's estate in a manner so as to preserve the issues raised by Bain until the court could consider them as a part of the probate proceedings.

Pursuant to the county court's order, Clippinger, as personal representative of Trobough's estate, filed a receipt for all of the assets listed on the final accounting in the conservatorship. Included with this receipt was an inventory of personal property indicating a transfer of dolls valued at $39,375; furniture valued at $16,367; figurines, jewelry, and "whatnot" valued at $7,175; a list of missing items valued at $19,040; a list of Hummel figurines valued at $64,725; another 5 pages of inventory of dolls; and 16 pages of inventoried items with no value listed. Bain timely filed this appeal from the May 14, 2003, order of the county court.

ASSIGNMENTS OF ERROR

Bain's assignments of error can be summarized as follows: The county court erred (1) in discharging Clippinger from her responsibilities as conservator; (2) in approving the final accounting in the conservatorship, even though it did not account for all of Trobough's assets; (3) in transferring conservatorship assets to the probate estate without addressing the issues surrounding those assets; (4) in not voiding Clippinger's purchase of estate assets; (5) in not appointing a successor conservator; (6) in failing to surcharge Clippinger for the value of the estate assets she unlawfully purchased or failed to account for; and (7) in failing to award attorney fees to an interested person whose actions preserved assets of the estate.

ANALYSIS

The record in this case consists of the pleadings and responses thereto and a document entitled "bill of exceptions," which is a transcription of the proceedings held on March 7, April 23, and May 13, 2003. No evidentiary hearing was held, and no exhibits were offered into evidence. Because the county court failed to conduct an evidentiary hearing, we vacate the judgment and remand the cause with directions.

We first note that the duties of a conservator are defined in Neb. Rev. Stat. ch. 30, art. 26 (Reissue 1995, Cum. Supp. 2002 & Supp. 2003). Pursuant to § 30-2648, Clippinger, as conservator, was required to account to the county court for her administration of the estate. The law also allows any person interested in the welfare of the person for whom a conservator has been appointed to file a petition asking for an accounting of the administration of the estate. See § 30-2645. In this case, Bain sought the accounting as an interested person. "*Upon notice and hearing*," the court may give appropriate instructions or may make any appropriate order in response to the interested person's petition. (Emphasis supplied.) See § 30-2645(c).

Our concern is the failure of the county court to conduct an evidentiary hearing to consider Bain's petitions. Instead, the court engaged in discussions with the parties without receiving any evidence to support or refute the issues raised in the pleadings. Without an evidentiary hearing, the court had no basis upon which to enter its orders in the conservatorship proceedings.

An appellate court reviews conservatorship proceedings for error appearing on the record made in the county court. See *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 311, 664 N.W.2d 456 (2003). We conclude that the county court erred as a matter of law in failing to hold an evidentiary hearing and in failing to resolve the disputed issues in the conservatorship proceedings. The orders which the court entered are not supported by competent evidence.

In this case, the record shows that at a proceeding on March 7, 2003, the county court ordered Clippinger to file a final accounting and to close the conservatorship estate by April 23. At the March 7 proceeding, Bain's counsel asked the court to address how it planned to handle the petition to void the transfer of certain personal property by Clippinger. The court responded that the property issues should be considered in the probate proceedings.

The following dialog then occurred:

> [Counsel for Bain]: So when he files a final accounting at that time we can object. If we don't see the personal property in there we can come and object on the final accounting?
>
> THE COURT: Sure, you can object to it.
>
> [Counsel]: Okay.
>
> THE COURT: But like I say, since the party is deceased - - -
>
> . . . .
>
> THE COURT: - - - you know, we're going to go ahead and close this out. You know, and I'm not going to destroy any claims that you may have or that you may wish to contest.
>
> . . . .
>
> [Counsel]: But I guess in my own mind I'm thinking that the conservatorship is the place to object to a transfer of personal [property] to conservator.
>
> THE COURT: Yeah, you will be able to make your objections.
>
> [Counsel]: Okay.

On April 23, 2003, the matter was continued until May 13 to give Bain an opportunity to inventory the personal property that had been moved to Tennessee. At the hearing on May 13, the parties appeared before the court and essentially entered into another dialog with regard to their respective positions concerning the conservatorship.

Clippinger's attorney argued that the issues regarding the final accounting in the conservatorship should be transferred to the probate proceedings and that Clippinger should be discharged as conservator and the conservatorship proceedings terminated. Clippinger's attorney agreed to void the transfer of the assets which Bain alleged had been improperly transferred to Clippinger as conservator. Counsel admitted that it had become apparent that the property had somewhat greater value than Clippinger's original estimate.

Bain's attorney alleged that Clippinger had not fully accounted for all of the personal property and argued that property could not

be transferred to the probate estate when it had not been accounted for in the conservatorship.

The county court then stated that based on a review of the records by auditors, it would approve the accounting as to the monetary assets. The court recognized the parties' disagreement as to the dolls and figurines and directed transfer of this dispute to the probate proceedings. The court terminated the conservatorship and awarded attorney fees to Clippinger in the amount of $793.

Bain has properly preserved her objection to the alleged wrongful transfer of personal property to Clippinger, but we are unable to reach the merits of that issue because the county court did not conduct an evidentiary hearing.

Although conservatorship proceedings and probate proceedings may contain similar issues, the actions exist independently of each other. Issues which arise in a conservatorship should be resolved in that venue, and under the facts alleged in this case, the county court should have resolved those issues in the conservatorship proceedings as requested by Bain.

A party who disagrees with a county court's approval of a final accounting and the discharge of a conservator must appeal at that time because the county court's action is a final order. See *In re Guardianship & Conservatorship of Borowiak*, 10 Neb. App. 22, 624 N.W.2d 72 (2001); § 30-2648 ("[e]very conservator must account to the court for his administration of the trust upon his resignation or removal . . . . [A]n order, made upon notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected person or his successors relating to the conservatorship").

Upon the death of the person for whom a conservatorship has been established, any issues relating to the conservatorship should be finally resolved in that proceeding. Issues relating to a final accounting and discharge of a conservator should not be carried over into the probate proceedings. The death of a person for whom a conservatorship has been established terminates the conservator's authority and responsibility as conservator. See *In re Guardianship & Conservatorship of Borowiak, supra*. However, the termination does not affect the conservator's liability for prior

acts or his obligation to account for funds and assets of the protected person. *Id.* See, also, §§ 30-2622 and 30-2648.

Rather than determining the propriety of Clippinger's actions, the county court attempted to transfer the questions to the probate proceedings. The court erred in not deciding all the issues presented.

[3] Any person interested in an estate may ask the conservator to file an accounting or may object to the accounting. § 30-2645. The conservator may, in a proper proceeding, be surcharged with any losses that occurred because of a breach of trust. See § 30-2658. Thus, Bain was within her rights to seek an accounting of the conservatorship.

A conservator should not be discharged prior to a complete accounting of the conservatorship's assets. If a conservator were to be discharged without properly accounting for the assets of the estate, the personal representative would have no recourse available to recover such assets. There would be no remedy to surcharge the conservator who failed to account for certain assets under his or her charge. That result would make the judicial process fundamentally unfair and cause damage to conservatorship proceedings. The issues involving the accounting were properly before the county court in the conservatorship proceedings and should have been decided there.

CONCLUSION

The May 14, 2003, order of the county court is vacated, and the cause is remanded with directions that the county court is to hold an evidentiary hearing to address the unresolved matters raised in the conservatorship proceedings.

ORDER VACATED, AND CAUSE
REMANDED WITH DIRECTIONS.

RYAN BIXENMANN, APPELLANT, V. H. KEHM CONSTRUCTION AND OHIO CASUALTY INSURANCE CO., APPELLEES.

676 N.W.2d 370

Filed March 26, 2004. No. S-03-817.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2002), 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. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation.** Under Neb. Rev. Stat. § 48-121(5) (Cum. Supp. 2002), an injured employee may not undertake rehabilitation on his or her own and receive temporary total disability benefits without approval from either the court or his or her former employer.
6. ____. Neb. Rev. Stat. § 48-121(5) (Cum. Supp. 2002) requires that an employer must first offer, and the employee accept, vocational rehabilitation, or such rehabilitation must be court ordered before an employee becomes eligible for temporary total disability benefits.
7. **Workers' Compensation: Statutes.** While the compensation court is entitled to adopt and promulgate rules necessary for carrying out the intent of the Nebraska Workers' Compensation Act, the rules cannot modify, alter, or enlarge provisions of a statute entrusted to its administration.
8. **Workers' Compensation: Attorney Fees.** Where there is no reasonable controversy, Neb. Rev. Stat. § 48-125 (Cum. Supp. 2002) authorizes the award of attorney fees.
9. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Words and Phrases: Appeal and Error.** A reasonable controversy under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2002) may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Richard K. Watts, of Watts Law Office, P.C., and, on brief, Stephanie A. Payne for appellant.

William D. Gilner, of Nolan, Olson, Hansen, Fieber & Lautenbaugh, L.L.P., for appellees.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

This appeal arises from an order of affirmance on review by the Nebraska Workers' Compensation Court review panel. The review panel affirmed the decision of the trial court which denied Ryan Bixenmann temporary total disability (TTD) benefits during vocational rehabilitation and also denied waiting-time penalties, attorney fees, and interest. In this appeal, we must resolve an apparent inconsistency between Workers' Comp. Ct. R. of Proc. 36 (2002) and the Nebraska Workers' Compensation Act as to whether Bixenmann is entitled to an award of TTD benefits retroactive to commencement of his vocational rehabilitation plan.

BACKGROUND

Bixenmann injured his right wrist on October 8, 1996, during and in the course of his employment with H. Kehm Construction (H. Kehm). He reached maximum medical improvement on January 24, 2000, a date to which all parties stipulated. Thereafter, a vocational rehabilitation counselor was appointed. Before the rehabilitation counselor completed a vocational rehabilitation plan, she received a letter from H. Kehm's workers' compensation insurer, Ohio Casualty Insurance Co. (Ohio Casualty), on April 24, 2000. This letter informed the counselor that "Ohio Casualty Group will no longer authorize any vocational rehabilitation services for Mr. Bixenmann." Ohio Casualty stated that it had a videotape showing Bixenmann engaging in full-contact karate. Thus, Ohio Casualty concluded in its letter that Bixenmann had full use of his hands and was not in need of vocational rehabilitation. The rehabilitation counselor responded to Ohio Casualty's letter, stating that she would put the file on hold for 60 days.

Thereafter, for reasons not relevant to this appeal, a new vocational rehabilitation counselor was appointed. The counselor met with Bixenmann and prepared a vocational rehabilitation plan wherein Bixenmann would obtain a degree as a computer programming technician. Bixenmann and the counselor agreed to the plan, and it was sent to the compensation court's vocational rehabilitation specialist as required by rule 36. The specialist approved the plan and sent a copy to Ohio Casualty. Ohio Casualty did not respond within 14 days. Pursuant to rule 36, the vocational rehabilitation specialist advised Bixenmann that H. Kehm and Ohio Casualty were presumed to have accepted the plan and to have agreed to pay temporary benefits while Bixenmann was undergoing vocational rehabilitation. The vocational rehabilitation plan called for Bixenmann to start school on January 7, 2002, which he did. Bixenmann was still attending classes at the time of trial on July 22.

At trial, Bixenmann sought the compensation court's approval of the vocational rehabilitation plan currently underway and requested that TTD benefits be awarded retroactively to January 7, 2002, the date the vocational rehabilitation plan commenced.

The trial court found that based on the evidence at trial, Bixenmann was entitled to vocational rehabilitation benefits and that the plan was appropriate. The trial court declined, however, to award TTD benefits retroactive to January 7, 2002. The trial court, citing *Thach v. Quality Pork International*, 253 Neb. 544, 570 N.W.2d 830 (1997), stated that an employer must first offer, and the employee accept, vocational rehabilitation, or such rehabilitation must be court ordered before an employee becomes eligible for TTD benefits. The trial court noted that the holding in *Thach* was premised on the language of Neb. Rev. Stat. § 48-121(5) (Reissue 1988) and that, therefore, it was statutorily powerless to award TTD benefits to Bixenmann retroactively. The trial court concluded that where it was prohibited by statute to issue a retroactive award, "it is difficult to imagine how the Court's own rules (Rule 36) can somehow confer such power." Thus, the trial court awarded TTD benefits from the date of the court's order forward. The trial court denied Bixenmann's request for waiting-time penalties and attorney fees. Bixenmann appealed the trial court's decision to the review panel, which affirmed.

ASSIGNMENTS OF ERROR

Bixenmann assigns, restated, that the trial court erred in (1) failing to award TTD benefits retroactive to January 7, 2002, the date he commenced his vocational rehabilitation plan, and (2) failing to award waiting-time penalties, attorney fees, and interest.

STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2002), 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. *Swanson v. Park Place Automotive, ante* p. 133, 672 N.W.2d 405 (2003); *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Brown v. Harbor Fin. Mortgage Corp., ante* p. 218, 673 N.W.2d 35 (2004); *Morris v. Nebraska Health System, supra.*

[3,4] Statutory interpretation presents a question of law. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*; *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001).

ANALYSIS

Bixenmann contends on appeal that he is entitled to an award of TTD benefits retroactive to the commencement of his vocational rehabilitation plan. Bixenmann maintains that rule 36 creates an irrebutable presumption that H. Kehm and Ohio Casualty accepted the vocational rehabilitation plan and agreed to pay Bixenmann TTD benefits for the duration of his rehabilitation. Specifically, Bixenmann contends that neither H. Kehm nor Ohio Casualty notified the compensation court that it was rejecting the rehabilitation plan within 14 days of the date it received notice of the plan approved by the compensation court's vocational rehabilitation specialist. As such, Bixenmann contends

that he is entitled to TTD benefits retroactive to commencement of his plan of rehabilitation pursuant to § 48-121(5) (Cum. Supp. 2002).

Section 48-121(5) provides:

> The employee shall be entitled to compensation from his or her employer for temporary disability while undergoing physical or medical rehabilitation and while undergoing vocational rehabilitation whether such vocational rehabilitation is voluntarily offered by the employer and accepted by the employee or is ordered by the Nebraska Workers' Compensation Court or any judge of the compensation court.

Rule 36, entitled "Eligibility and Approval of Vocational Rehabilitation Services," provides, in its entirety:

> **A.** Vocational rehabilitation services shall be made available as soon as it has been medically determined that the employee is capable of undertaking such activity and that he or she is unable to perform suitable work for which he or she has had previous training or experience.
>
> **B.** All voluntary vocational rehabilitation plans including on-the-job training, job placement, and formal retraining, must have prior approval of the court's vocational rehabilitation specialists.
>
> 1. Notice of all approved or disapproved plans shall be sent to the employee, and either the employer, its insurer or risk management pool, and the vocational rehabilitation counselor.
>
> 2. Such employer or insurer or risk management pool shall inform the court within 14 days of the date such notice is sent whether or not it will accept an approved plan and shall concurrently with such acceptance agree to the payment of temporary disability to the employee while he or she is undergoing vocational rehabilitation and making satisfactory progress.
>
> 3. If the employer, its insurer or risk management pool does not respond, it will be presumed that the employer, its insurer or risk management pool has accepted the plan and has agreed to the payment of temporary disability benefits to the employee while he or she is undergoing vocational rehabilitation and making satisfactory progress.

4. The fee for the evaluation and for the development and implementation of the vocational rehabilitation plan shall be paid by the employer or his or her insurer or risk management pool.

[5,6] In *Thach v. Quality Pork International*, 253 Neb. 544, 570 N.W.2d 830 (1997), we held that under § 48-121(5), an injured employee may not undertake rehabilitation on his or her own and receive TTD benefits without approval from either the court or his or her former employer. In so holding, we determined that a plain reading of § 48-121(5) requires that an employer must first offer, and the employee accept, vocational rehabilitation, or such rehabilitation must be court ordered before an employee becomes eligible for TTD benefits. As such, we reversed the judgment of the trial court which awarded TTD benefits from a point prior to the court's approval of the rehabilitation plan. Because the rehabilitation plan in this case was not court ordered as of the date Bixenmann began classes on January 7, 2002, we conclude, based on *Thach*, that a retroactive award in this case is proper only if we find that H. Kehm offered the plan and Bixenmann accepted.

Bixenmann maintains that under rule 36, H. Kehm and Ohio Casualty both failed to reject the vocational rehabilitation plan within 14 days of receiving notice from the vocational rehabilitation specialist. H. Kehm and Ohio Casualty both contend, however, that the April 24, 2000, letter sent by Ohio Casualty to the rehabilitation counselor prior to issuance of the rule 36 notice constitutes their refusal to authorize or otherwise agree to the rehabilitation plan. We need not address whether the April 24 letter complies with the terms of rule 36 because we agree with the review panel and find that rule 36 is an incorrect statement of the law.

The review panel concluded that the Nebraska Workers' Compensation Act does not include a provision similar to rule 36 wherein the rehabilitation plan is presumed accepted by the employer if the employer fails to respond within 14 days of notice of approval of the plan by a vocational rehabilitation specialist.

[7] While the compensation court is entitled to adopt and promulgate rules necessary for carrying out the intent of the Nebraska Workers' Compensation Act, see Neb. Rev. Stat. § 48-163 (Cum. Supp. 2002), the rules cannot modify, alter, or

enlarge provisions of a statute entrusted to its administration. *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995).

We conclude that rule 36 is an incorrect statement of the law and that neither H. Kehm nor Ohio Casualty are deemed to have accepted the vocational rehabilitation plan by reason of their failure to respond within 14 days. There is no evidence in the record indicating H. Kehm offered vocational rehabilitation, and the April 24, 2000, letter sent by Ohio Casualty to the rehabilitation counselor warrants a finding to the contrary. Because H. Kehm did not offer vocational rehabilitation, and such rehabilitation was not court ordered prior to trial, a retroactive award would be unfounded. As such, Bixenmann's TTD benefits should begin as of the date they were ordered by the trial court.

[8,9] For his second assignment of error, Bixenmann contends he is entitled to waiting-time penalties, attorney fees, and interest pursuant to Neb. Rev. Stat. § 48-125 (Cum. Supp. 2002). Where there is no reasonable controversy, § 48-125 authorizes the award of attorney fees. *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996). A reasonable controversy under § 48-125 may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003).

We agree with the review panel and conclude that the matters at issue in this appeal were heretofore unanswered by this court and that, accordingly, there was a reasonable controversy. We, therefore, deny Bixenmann's request for waiting-time penalties, attorney fees, and interest.

CONCLUSION

We hold that Bixenmann is not entitled to an award of TTD benefits retroactive to the date his vocational rehabilitation plan commenced on January 7, 2002. We further hold that Bixenmann

is not entitled to waiting-time penalties, attorney fees, or interest. Accordingly, we affirm the judgment of the trial court as affirmed by the review panel.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. VALLI JO WILLIAMS, RESPONDENT.

676 N.W.2d 376

Filed March 26, 2004. No. S-04-259.

Original action. Judgment of disbarment.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

On February 26, 2004, relator, the Counsel for Discipline of the Nebraska Supreme Court, filed a motion for reciprocal discipline pursuant to Neb. Ct. R. of Discipline 21 (rev. 2001) against respondent, Valli Jo Williams. The motion sought to impose an appropriate disciplinary sanction against respondent in Nebraska as a result of the revocation of respondent's license to practice law in the State of Iowa by the Iowa Supreme Court. On March 3, 2004, respondent filed a voluntary surrender of her license to practice law in the State of Nebraska.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on March 30, 1983. She was also admitted to practice law in the State of Iowa. On July 2, 2003, the Iowa Supreme Court Board of Professional Ethics and Conduct (Board) filed a complaint against respondent after she pled guilty in federal court to charges of interstate transportation of stolen property and wire fraud. The charges stemmed from respondent's employment in the claims departments of two employers and her submission to

those employers of fictitious accident claims, resulting in respondent's receipt of $1,062,339.68 in insurance payments for those fictitious claims. As a result of her guilty pleas, respondent was sentenced to two 30-month terms of imprisonment, to be served concurrently, and ordered to pay restitution.

The Board's complaint charged respondent with multiple violations of the Iowa Code of Professional Responsibility. In *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Williams*, No. 03-1702, 2004 WL 345595 (Iowa Feb. 25, 2004), the Iowa Supreme Court determined that respondent took advantage of positions of trust, defrauded two separate employers in excess of $1 million, and misappropriated such amounts to her personal use. The court further determined that respondent's actions were not an isolated instance of misconduct, but a carefully planned scheme involving wire fraud and interstate transportation of stolen property taking place over a 7-year period. The court concluded, inter alia, that based upon her actions, respondent violated numerous disciplinary rules by engaging in illegal conduct involving moral turpitude; engaging in illegal conduct involving dishonesty, fraud, deceit, or misrepresentation; and engaging in conduct that adversely reflected upon her fitness to practice law. On February 25, 2004, the Iowa Supreme Court revoked respondent's license to practice law in Iowa.

On February 26, 2004, relator filed a motion for reciprocal discipline pursuant to rule 21, seeking an order of appropriate discipline, which discipline could include disbarment. The motion recited, inter alia, respondent's federal indictment and guilty pleas to interstate transportation of stolen property and wire fraud, the sentences that were entered upon those guilty pleas, and the Iowa Supreme Court's revocation of respondent's license to practice law in Iowa. Attached to the motion was a copy of the *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Williams* opinion, which was incorporated into the motion by reference.

On March 3, 2004, respondent filed with this court a voluntary surrender of license, voluntarily surrendering her license to practice law in the State of Nebraska. In her voluntary surrender, respondent stated that she "knowingly" did not contest the truth of the allegations set forth in the motion for reciprocal discipline

and effectively waived all proceedings against her. In addition to surrendering her license, respondent consented to the entry of an order of disbarment.

ANALYSIS

Neb. Ct. R. of Discipline 15 (rev. 2001) provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to rule 15, we find that respondent has voluntarily surrendered her license to practice law, admitted in writing that she knowingly does not challenge or contest the truth of the allegations set forth in the motion for reciprocal discipline, waived all proceedings against her in connection therewith, and consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the pleadings in this matter, the court finds that respondent knowingly did not challenge or contest the truth of the allegations set forth in the motion for reciprocal discipline and that her waiver was knowingly made. The court accepts respondent's surrender of her license to practice law, finds that respondent should be disbarred, and hereby orders her disbarred from the practice of law in the State of Nebraska effective immediately. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V. GREGORY LAMMERS, APPELLANT.

676 N.W.2d 716

Filed April 2, 2004. No. S-02-1206.

1. **Motions to Suppress: Search Warrants: Affidavits: Appeal and Error.** A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a search warrant, will be upheld unless its findings are clearly erroneous.
2. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
3. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
4. **Motions to Suppress: Search Warrants: Appeal and Error.** In connection with a challenge to the execution of a search warrant, in reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
5. **Search Warrants: Affidavits: Probable Cause: Words and Phrases.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.
6. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity.
7. ____: ____. The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
8. **Criminal Law: Eyewitnesses: Search Warrants: Affidavits: Words and Phrases.** A citizen informant is a citizen who purports to have been the witness to a crime who is motivated by good citizenship and acts openly in aid of law enforcement. The status of a citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth circumstances from which the informant's status as a citizen informant can reasonably be inferred. Unlike the police tipster who acts for

money, leniency, or some other selfish purpose, the citizen informant's only motive is to help law officers in the suppression of crime. Unlike the professional informant, the citizen informant is without motive to exaggerate, falsify, or distort the facts to serve his or her own ends.

9. **Eyewitnesses.** Once an individual is considered to be a citizen informant, reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known.
10. **Search and Seizure: Search Warrants: Probable Cause: Police Officers and Sheriffs: Proof.** Searches conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable; consequently, if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable.
11. **Constitutional Law: Search Warrants.** The reasonableness of the execution of a search warrant under the Fourth Amendment must be evaluated by examining the totality of the circumstances.

Appeal from the District Court for Dodge County: F.A. GOSSETT III, Judge. Affirmed.

Bradley E. Nick, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Gregory Lammers was convicted in the district court for Dodge County, Nebraska, of possession of methamphetamine with intent to deliver and was sentenced to 4 to 5 years' imprisonment. Lammers appeals his conviction and assigns error to the denial of his motion to suppress evidence obtained from a search of his residence. He argues that the search warrant was improperly issued because the supporting affidavit did not establish probable cause and that the search was unreasonable because police officers conducted an improper "knock-and-announce" search pursuant to the warrant. We affirm.

STATEMENT OF FACTS

On April 12, 2002, the State filed an information charging Lammers with one count of possession of methamphetamine

with intent to deliver. The charge against Lammers was based on evidence seized in a search of Lammers' residence, which search was conducted on March 22 pursuant to a search warrant. That evidence included approximately 80 grams of methamphetamine and $8,507 in cash.

On June 7, 2002, Lammers filed a motion to suppress all evidence seized as a result of the March 22 search. Lammers made two arguments in support of suppression: (1) the search warrant was issued on the basis of an affidavit that failed to establish probable cause and (2) the police officers executing the search warrant failed to conduct a proper "knock and announce" prior to forcibly entering his residence.

The search warrant for Lammers' residence was issued by the Dodge County Court on March 21, 2002. The county court concluded that the affidavit of Shane Wimer, a Fremont, Nebraska, police officer, established probable cause to support issuance of the warrant. In the affidavit, Wimer stated his belief that controlled substances and evidence of the use, sale, or distribution of controlled substances would be found in a search of Lammers' residence. Wimer made the following assertions to support his conclusion: On March 4, 2002, a police officer identified as "K Pafford" was called to a bank in Fremont to investigate a report of possible drugs found in the bank. At the bank, Pafford was given a corner of a plastic baggie containing approximately 3.2 grams of a yellow powdery substance which later tested positive for methamphetamine. A bank employee told Pafford that Lammers had been in the bank to make a deposit and that while at a teller window, Lammers removed some items from his pocket. Shortly after Lammers left the bank, the plastic baggie corner containing the yellow-powdered substance was located on the floor "in nearly the same spot" where Lammers had been standing.

Wimer also stated in the affidavit that a house located on North Madison Street in Fremont was under the control or custody of Lammers. Wimer stated that on March 7, 2002, he performed a sanitation check at that location and found 19 enumerated items that he asserted would support his conclusions that the location was Lammers' residence and that the use of controlled substances had occurred there. These items included various

pieces of correspondence addressed to Lammers, notes and correspondence to others, various pieces of paper with names and telephone numbers written on them, a glass beer bottle with burn residue that appeared to have been turned into a homemade glass pipe, one plastic baggie with the corner missing, one plastic baggie with the bottom missing and heat sealed, plastic baggie corners, and various pieces of aluminum foil both with and without burn residue.

Wimer also stated in the affidavit that he performed another sanitation check on March 14, 2002, and found 13 enumerated items including additional pieces of paper with names and telephone numbers, additional pieces of aluminum foil with multiple folds both with and without burn residue, and a piece of wire. The affidavit further stated that another police officer performed a sanitation check on March 21 and found 14 enumerated items including additional items similar to those found in the earlier checks and, in particular, 8 plastic baggies with corners missing and 28 pieces of aluminum foil of which 12 had burn residue.

Wimer stated in the affidavit that he had knowledge that aluminum foil with folds and burn residue of the type found in the sanitation checks indicated the use of such foil for ingestion of powdered controlled substances. Wimer indicated that his training and experience with methods of ingestion indicated that the glass beer bottle found in the sanitation check could have been used as a pipe to smoke a powdered controlled substance. Wimer knew that baggie corners and baggies with corners torn indicated the packaging and resale of controlled substances. Wimer also stated that the wire found in the March 14, 2002, sanitation check was of the same type and size as a wire found with the plastic baggie from the bank.

Wimer also stated in the affidavit that in the summer of 2001, he witnessed at least two occasions where a car pulled up to the North Madison Street residence and a passenger exited the vehicle and entered the residence while the driver and other passengers stayed in the vehicle. The passenger who exited remained inside the residence less than 10 to 15 minutes.

Wimer further stated that he had conducted a criminal history check of Lammers. The check revealed that Lammers' criminal history included a 1984 arrest in South Dakota for possession of

a controlled substance and a 1985 arrest in Nebraska for using an explosive device to damage property. The check also revealed that on January 7, 2002, 2 months prior to the bank episode of March 4, Lammers had been arrested in Washington County, Nebraska, for possession of methamphetamine and possession of drug paraphernalia. The Washington County case had not yet gone to trial; however, Wimer spoke to the investigating officer who indicated that Lammers had been visiting a residence in Washington County when officers executed a search warrant and found Lammers to be in possession of methamphetamine and a glass pipe.

Wimer also stated that a woman whose name showed up on various pieces of paper and correspondence found in the sanitation checks of Lammers' residence was known to be involved in the drug culture.

At the hearing on Lammers' motion to suppress, Wimer testified regarding the execution of the search warrant. Wimer had presented his affidavit and request for a search warrant to the Dodge County Court on March 21, 2002, and the county court issued the daytime knock-and-announce warrant that day.

On March 22, 2002, Wimer and several other police officers executed the search warrant. They arrived at Lammers' residence at approximately 10 minutes after 7 a.m. Wimer testified that the residence was a small, two-bedroom residence with a bathroom, kitchen, living room, and a basement and that the residence had both a front door and a back door. Upon their arrival, Wimer instructed another officer, Stuart Nadgwick, who was first in line, to knock and announce. Nadgwick knocked and yelled, "Police department, search warrant." Nadgwick waited 8 seconds and knocked and announced the presence of police a second time. Wimer heard no activity inside the house. Following the second knock and announce and having received no response, Nadgwick called up another officer to use a ram to force entry. The officers used the ram to open the door and entered the residence. Wimer estimated that 10 to 12 seconds passed between the first knock and announce and the use of the ram to force entry. Wimer testified that he believed 10 to 12 seconds to be sufficient for someone to answer the door in a house the size of Lammers' residence and that he was generally

concerned that to wait longer could have resulted in the destruction of evidence.

Nadgwick also testified at the hearing. He testified that Wimer informed him prior to the police officers' arrival at the door that he should wait 8 seconds after the first knock and announce. After the first knock and announce, Nadgwick waited 8 seconds by counting "one thousand one, one thousand two, one thousand three, et cetera, until eight one thousand." Nadgwick did not hear any activity inside the house while waiting the 8 seconds. A second knock and announce was made. Nadgwick agreed with Wimer's estimate that 10 to 12 seconds elapsed between the first knock and announce and the time the door was rammed. When Nadgwick entered the residence, he observed Lammers standing in street clothes approximately 7 to 8 feet from the door.

In a written journal entry filed on June 26, 2002, the district court overruled both parts of Lammers' motion to suppress. Although the district court did not articulate its findings as indicated in *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996), the parties agree that there is no factual dispute that there were 10 to 12 seconds between the first knock and announce and the ramming of the door. We consider the merits of the motion to suppress on this basis.

A bench trial on stipulated facts was held on August 27, 2002. On August 30, the district court entered an order finding Lammers guilty of possession of methamphetamine with intent to deliver. On October 1, the district court sentenced Lammers to 4 to 5 years' imprisonment. Lammers appeals.

ASSIGNMENTS OF ERROR

Lammers asserts that the district court erred in denying his motion to suppress evidence and in admitting such evidence at trial because (1) there was no probable cause to support issuance of the search warrant and (2) the search warrant was improperly executed when police officers failed to properly knock and announce prior to forcibly entering his residence.

STANDARDS OF REVIEW

[1-3] A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting issuance of a

search warrant, will be upheld unless its findings are clearly erroneous. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003). In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *Id.*

[4] In connection with a challenge to the execution of a search warrant, in reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003).

ANALYSIS

Sufficiency of Affidavit in Support of Issuance of Search Warrant.

Lammers first argues that the search warrant was improperly issued because the affidavit supporting the warrant did not establish probable cause. Lammers tends to focus on the fact that the bank employee was not identified by name in the affidavit and asserts that without the information imparted by the bank employee and the methamphetamine from the bank, the remainder of the affidavit does not establish probable cause. We determine that the affidavit was sufficient to support issuance of the search warrant.

[5] A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. *March, supra.* Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *Id.*

One of the key pieces of information in the affidavit supporting probable cause in the present case was the bank employee's report to police that possible drugs were found in the bank and that the drugs were located near where Lammers had been standing shortly before their discovery. The bank employee's report was significant because it identified Lammers as having been in possession of a controlled substance and it prompted the investigation that lead to the discovery of much of the other evidence recited in the affidavit. Lammers argues that the information provided by the bank employee could not be used to support a finding of probable cause because the affidavit does not identify the bank employee by name and therefore the information was not sufficiently reliable. We do not agree.

[6,7] Although information provided by an informant must be found to be reliable to support a finding of probable cause, a finding of reliability does not necessarily require that the informant be identified by name. In the context of a search warrant, we have said that when the warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity. *State v. Marcus*, 265 Neb. 910, 660 N.W.2d 837 (2003). Further, the affiant must establish the informant's credibility or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *Id.* The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *Id.*

[8] In the present case, the State asserts that the bank employee was a citizen informant. We agree. A citizen informant is a citizen who purports to have been the witness to a crime who is motivated by good citizenship and acts openly in aid of law enforcement. *Id.* The status of a citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth circumstances from which the informant's status as a citizen informant

can reasonably be inferred. *Id.* Unlike the police tipster who acts for money, leniency, or some other selfish purpose, the citizen informant's only motive is to help law officers in the suppression of crime. *Id.* Unlike the informant who acts out of self-interest, the citizen informant is without motive to exaggerate, falsify, or distort the facts to serve his or her own ends. *Id.* The bank employee in the present case was a witness to certain facts recited in the affidavit and acted openly to assist law enforcement. Nothing in the affidavit suggests that the bank employee had a motive to exaggerate, falsify, or distort the facts to serve his or her own ends, and it is reasonable to infer that the bank employee was motivated solely by good citizenship.

Lammers notes that the bank employee was not identified by name in the affidavit and therefore challenges the bank employee's status as a citizen informant. We reject the inference in Lammers' argument that the bank employee should be considered an anonymous informant whose reliability must be separately established, and instead, we determine that given the facts, the bank employee is not an anonymous source and that the information supplied by the bank employee is presumptively reliable. In this regard, we note that it has been observed that "[c]ourts have been lenient in their assessment of the type and amount of information needed to identify a particular informant. Many courts have found, for instance, that identification of the informant's occupation alone is sufficient [to negate a claim that the informant was anonymous]." *City of Maumee v. Weisner*, 87 Ohio St. 3d 295, 301, 720 N.E.2d 507, 514 (1999). Thus, for example, in *U.S. v. Pasquarille*, 20 F.3d 682 (6th Cir. 1994), the Court of Appeals for the Sixth Circuit concluded that although the informant's name was unknown, information that he was a transporter of prisoners was enough to identify him. In the instant case, the informant was identified in the affidavit as a bank employee who witnessed certain facts and it is apparent that the informant's identity, although not recited in the affidavit, was known to police. We consider the bank employee in this case to be a citizen informant and not an anonymous informant.

[9] Once an individual is considered to be a citizen informant, reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information

became known. *State v. Marcus*, 265 Neb. 910, 660 N.W.2d 837 (2003). Thus, we have said that an informant's detailed eyewitness report of a crime may be self-corroborating because it supplies its own indicia of reliability. *Id.* We have also said that an untested citizen informant who has personally observed the commission of a crime is presumptively reliable. *Id.*

It is clear from the affidavit that the bank employee personally observed the presence of drugs in circumstances which indicated that the drugs had been in Lammers' possession. Because the bank employee had no apparent motive other than good citizenship in reporting these observations, the bank employee's information is presumptively reliable and was properly used to support a finding of probable cause to issue the search warrant in this case. The information provided by the bank employee was combined with the other information detailed in the affidavit indicating that controlled substances were being used, sold, or distributed at Lammers' residence in Fremont. The information in the affidavit indicated a fair probability that contraband or evidence of a crime would be found in a search of the residence, and the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. See *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003). The district court did not err in denying Lammers' motion to suppress on this basis. We reject Lammers' first assignment of error.

Execution of Search Warrant.

Lammers next argues generally that because the police officers conducted an improper knock-and-announce search pursuant to the warrant, the search was unreasonable. Lammers specifically claims that the police were not refused admittance and improperly forced their way into his residence 10 to 12 seconds after the first knock and announce. The State counters that the police were constructively refused admittance and were therefore entitled to forcibly enter Lammers' residence. Based on the recent authority in *United States. v. Banks*, 540 U.S. 31, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003), the propriety of the execution of the warrant does not turn on refusal, and viewing the record under a totality of the circumstances analysis, after the second knock and announce in this case, an exigency justifying entry had matured and the search warrant was properly executed.

[10] In Nebraska, freedom from unreasonable searches and seizures is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, § 7. *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003). Searches conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable; consequently, if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable. *Id.* Because the police in this case conducted the search of Lammers' residence pursuant to a warrant that was supported by probable cause, Lammers bore the burden to demonstrate that the search was unreasonable.

In a drug case involving execution of a search warrant, the U.S. Supreme Court recently considered whether a 15- to 20-second wait before a forcible entry at midday following a single knock and announce satisfied the Fourth Amendment. The Court concluded under a totality of the circumstances analysis that a reasonable suspicion of exigency existed and that the forcible entry was reasonable. In *Banks*, the police had information that Lashawn Banks was selling cocaine at his home, and the police obtained a warrant to search his two-bedroom apartment. Upon arriving at Banks' door, the officers knocked and announced their presence. There was no response and no indication that anyone was home. Fifteen to twenty seconds after the single knock and announce, the officers broke open Banks' door with a battering ram. The subsequent search of Banks' residence produced evidence of drug dealing. Banks' motion to suppress evidence obtained from the search was denied in federal district court. A divided panel of the Court of Appeals for the Ninth Circuit reversed, and ordered suppression. The U.S. Supreme Court reversed the Ninth Circuit's decision after concluding that the search satisfied the Fourth Amendment.

We note that the Court in *Banks* recognized at the outset that the officers therein "were obliged to knock and announce their intentions when executing the search warrant." 540 U.S. at 35. However, the Court thereafter stated that "when executing a [knock-and-announce] warrant . . . if circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in." 540 U.S. at 36-37. The Court in *Banks* observed that the case "turn[ed] on the significance of exigency

revealed by circumstances known to the officers." 540 U.S. at 37. In *Banks*, the Court found that an exigency, namely, the imminent disposal of drugs, had "matured," 540 U.S. at 40, 15 to 20 seconds after the officers knocked and announced their purpose a single time. The Court stated that "after 15 or 20 seconds without a response, police could fairly suspect that cocaine would be gone if they were reticent any longer." 540 U.S. at 38. The Court also stated that "15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine." 540 U.S. at 40.

In *United States. v. Banks*, 540 U.S. 31, 40, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003), the Court noted that "the crucial fact in examining [the reasonableness of the forced entry of police] is not time to reach the door but the particular exigency claimed . . . what matters is the opportunity to get rid of cocaine." That is, when the exigency claimed is disposal of drugs as evidence,

> it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter; since the bathroom and kitchen are usually in the interior of a dwelling, not the front hall, there is no reason generally to peg the travel time to the location of the door, and no reliable basis for giving the proprietor of a mansion a longer wait than the resident of a bungalow, or an apartment like Banks'.

540 U.S. at 40.

[11] In *Banks*, the Court reemphasized that the reasonableness of the execution of a warrant under the Fourth Amendment must be evaluated by examining the totality of the circumstances. 540 U.S. at 36 ("we have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case"). The Court declined to set forth bright-line rules with respect to the analysis of the proper execution of warrants and instead emphasized the fact-specific nature of the reasonableness inquiry. Although the Court stated in *Banks* that the "call is a close one" as to whether the 15 to 20 seconds the officers waited prior to forcing their way in was sufficient, the Court determined that under the facts, which established a reasonable suspicion of exigency, the time was reasonable under the Fourth Amendment, "even without refusal of admittance." 540 U.S. at

38, 43. In footnote 5 of *Banks*, the Court cited, with apparent approval, other cases in which courts found similar or shorter waiting times to be reasonable in drug cases involving easily disposable evidence. E.g., *U.S. v. Markling*, 7 F.3d 1309 (7th Cir. 1993) (holding 7-second wait at small motel room reasonable when officers acted on specific tip that suspect was likely to dispose of drugs); *U.S. v. Garcia*, 983 F.2d 1160 (1st Cir. 1993) (holding 10-second wait after loud announcement reasonable).

We therefore review the district court's rejection of Lammers' challenge to the execution of the warrant by reference to the totality of the circumstances in the present case. At the outset, we note that the warrant at issue was a knock-and-announce warrant as contrasted with a "no-knock" warrant. See Neb. Rev. Stat. § 29-411 (Reissue 1995). The State argues, inter alia, that the police officers were justified in forcing their way into the residence after their first knock and announce because they were searching for evidence of drugs and such evidence was easily disposable. Wimer, one of the officers executing the warrant, testified about his concern that drugs could be readily flushed down the toilet. The State thus claims that the facts known to the officers and reflected in the record led to a reasonable suspicion of exigency which justified a forcible entry. See *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003).

In the instant case, the search was commenced at approximately 10 minutes after 7 a.m. The Legislature has determined that for purposes of search warrants, the hours from 7 a.m. to 8 p.m. are considered "daytime." See Neb. Rev. Stat. § 29-814.04 (Reissue 1995). The evidence showed that the residence was a small house, and therefore a person could move reasonably quickly within the residence to attempt to destroy drug evidence. The testimony indicates that destruction of evidence was a concern of the police. We also note that the officers in this case made a second knock and announce prior to calling up the ram and received no response.

In connection with the execution of a warrant, whether or not exigent circumstances exist is subject to a reasonable suspicion analysis, *United States v. Banks*, 540 U.S. 31, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003), and the existence of reasonable suspicion is subject to a de novo review on appeal, *Kelley, supra*. Our

review of the record shows that the totality of the circumstances in this case supports a reasonable suspicion of exigency, namely the imminent destruction of drug evidence which justified a forcible entry, even absent a refusal of admittance. Under the facts of this case, the exigency developed subsequent to the knock and announce. The execution of the search warrant was not improper. The district court did not err in rejecting Lammers' claim regarding the execution of the search warrant. The district court did not err in denying Lammers' motion to suppress on this basis. We reject Lammers' second assignment of error.

CONCLUSION

The affidavit in support of the search warrant established probable cause justifying its issuance, and the execution of the search warrant was not improper. We, therefore, conclude that the district court did not err in denying Lammers' motion to suppress and in admitting the evidence obtained from the search of Lammers' residence pursuant to the warrant. We therefore affirm Lammers' conviction.

AFFIRMED.

GERRARD, J., dissenting.

I agree with the majority's conclusion that the affidavit in this case was sufficient to establish probable cause to issue a search warrant. I also agree with the majority's exposition of the legal principles governing the court's "knock-and-announce" analysis, but I disagree with the conclusion that the majority reaches. This case does not involve a dispute about the historical facts; thus, as the majority notes, the ultimate determination of reasonable suspicion is reviewed de novo by this court. I would conclude, based on the circumstances presented here, that a reasonable suspicion of an exigent circumstance had not yet matured and that the district court should have sustained Lammers' motion to suppress the evidence obtained from the search of his residence. Thus, I respectfully dissent.

I begin by noting the reasoning with which the U.S. Supreme Court approved the reasonableness of the search conducted in *United States v. Banks*, 540 U.S. 31, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003). In *Banks*, as the majority notes, the court concluded it was reasonable to suspect an imminent loss of evidence 15 or 20

seconds after the police had knocked and announced their presence. The Court stated that on the record in that case,

> what matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink. The significant circumstances include the arrival of the police during the day, when anyone inside would probably have been up and around, and the sufficiency of 15 to 20 seconds for getting to the bathroom or the kitchen to start flushing cocaine down the drain. That is, when circumstances are exigent because a pusher may be near the point of putting his drugs beyond reach, it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter; since the bathroom and kitchen are usually in the interior of a dwelling, not the front hall, there is no reason generally to peg the travel time to the location of the door, and no reliable basis for giving the proprietor of a mansion a longer wait than the resident of a bungalow, or an apartment like Banks's. And 15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine.

540 U.S. at 40.

The Court's analysis in *Banks* must be read in light of the Court's earlier holdings in *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995), and *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997). In *Wilson*, the police officers executing the search warrant announced their presence at the same time that they entered the residence. The Court reversed the Arkansas Supreme Court's affirmance of the resulting conviction, explaining that the knock-and-announce principle formed a part of the Fourth Amendment inquiry into the reasonableness of a search. At the same time, the Court cautioned that the flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignored countervailing law enforcement interests. See *Wilson, supra*.

In *Richards, supra*, the Wisconsin Supreme Court had concluded that police were *never* required to knock and announce their presence when executing a search warrant in a felony drug investigation. The U.S. Supreme Court rejected the Wisconsin

court's conclusion that the Fourth Amendment permitted a per se exception in drug cases to what the Court now characterized as the "knock-and-announce requirement." 520 U.S. at 388. The Court held that in order to justify a no-knock entry, police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. See *id.* But the Court refused to create a per se exception for felony drug investigations, stating that if it created such an exception, even for a category of offenses with a considerable risk of destruction of evidence, "the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." 520 U.S. at 394.

Obviously, under *Wilson, supra*, police cannot satisfy the knock-and-announce requirement by simultaneously announcing their presence and entering a residence, and *Richards, supra*, makes clear that the fact that drugs are easily disposable does not change the requirement of *Wilson*. But it is equally obvious that pursuant to *United States v. Banks*, 540 U.S. 31, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003), officers are permitted to force entry if they wait long enough, under the circumstances, to have a reasonable suspicion that waiting longer would permit the destruction of evidence. The instant case falls somewhere in the middle. The Court in *Banks* cautioned against distorting the "totality of the circumstances" principle by resorting to categorical schemes, and I recognize that the line in these cases can be difficult to draw. But, as Justice Holmes wrote, "the constant business of the law is to draw such lines." *Dominion Hotel v. Arizona*, 249 U.S. 265, 269, 39 S. Ct. 273, 63 L. Ed. 597 (1919).

In a rare concession, the Court stated in *Banks* that the "call," in that case, was "a close one." 540 U.S. at 38. This case, in my opinion, crosses the line, and the district court should have concluded that the search was unreasonable under the Fourth Amendment. In *Banks*, police entered the residence of a suspected drug dealer after 15 to 20 seconds. The Court specifically noted that the exigency of possible destruction of evidence was heightened because the "prudent dealer" will be prepared to quickly dispose of evidence. See 540 U.S. at 40.

In this case, on the other hand, police entered the residence after only 10 to 12 seconds, and had apparently determined to do so before they even reached Lammers' residence a few minutes after 7 a.m. The facts known to the police prior to executing the search warrant, as summarized in the majority opinion, do not particularly suggest that Lammers was a sophisticated drug dealer; the police did not seek a no-knock warrant. Rather, the record just as easily suggests that Lammers was certainly a consumer, and not a very prudent consumer at that. The fact that Lammers dropped his drugs at the bank indicates that he was not particularly cautious or discreet. I would conclude, considering the totality of the circumstances in this case, that the exigent circumstance claimed by the police—reasonable suspicion of the possible destruction of evidence—had not yet matured at the time that the police forced entry into Lammers' residence.

Nebraska law requires that in the absence of judicial direction, an officer executing a search warrant effectively give "notice of his office and purpose" before breaking into a building. See Neb. Rev. Stat. § 29-411 (Reissue 1995). Both the U.S. Constitution and § 29-411, however, permit the issuance of a no-knock search warrant when proof is presented that evidence may be easily disposed of or destroyed, or that danger to the executing officer may result. See *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997). While *Richards* cautioned against the overgeneralization associated with a per se rule permitting no-knock warrants in felony drug cases, the Court certainly did not preclude a no-knock search warrant when circumstances justify one. "[W]hen the officers know, before searching, of circumstances that they believe justify a no-knock entry, it seems more consistent with the Fourth Amendment to ask a neutral judge for approval before intruding upon a citizen's privacy." *U.S. v. Scroggins*, No. 03-2279, 2004 WL 574495 at *4 (8th Cir. Mar. 24, 2004). The majority's determination in this case, however, comes perilously close to permitting police to sidestep the procedure established by § 29-411 for obtaining a no-knock warrant. The police could obtain an ordinary search warrant, and then satisfy the knock-and-announce requirement with what is, in my opinion, a perfunctory announcement of their presence before a nearly immediate forced entry.

In order for *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995); *Richards, supra*; and § 29-411 to have continued vitality, the knock-and-announce requirement must be meaningfully implemented. I do not believe that, at 7:10 in the morning, waiting 10 to 12 seconds before breaking down Lammers' door was a meaningful announcement of police presence, and I conclude, after a de novo review, that the search was unreasonable under the Fourth Amendment. I would hold that the district court erred in denying Lammers' motion to suppress on that basis.

HENDRY, C.J., joins in this dissent.

IN RE WENDLAND-REINER TRUST.
JOHN M. MCHENRY, SUCCESSOR TRUSTEE, APPELLEE, V.
ROSELLA L. REINER, APPELLEE, AND
JOHN R. WENDLAND, APPELLANT.

677 N.W.2d 117

Filed April 2, 2004. No. S-02-1395.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
3. **Trusts.** The settlor of a trust may reserve the power of revocation or amendment, and such a power is consistent with a valid trust.
4. **Trusts: Intent.** The rules of construction for interpreting a trust are applied when the language of the trust is not clear; but if the language clearly expresses the settlor's intent, the rules do not apply.
5. **Trusts.** The law does not require that a settlor expressly recite that he or she is amending a trust agreement in order to make an amendment effective.
6. **Trusts: Intent.** The primary rule of construction for trusts is that a court must, if possible, ascertain the intention of the testator or creator.
7. ____: ____. When there are two or more instruments relating to a trust, they should be construed together to carry out the settlor's intent.
8. **Trusts: Notice: Waiver.** Provisions in a trust agreement requiring the settlor to provide written notice of amendments to the trustee are for the benefit of the trustee. Thus, compliance may be waived by the trustee.

Appeal from the County Court for Lancaster County: MARY L. DOYLE, Judge. Affirmed.

Patrick D. Timmer, of Pierson, Fitchett, Hunzeker, Blake & Katt, for appellant.

Jeanette Stull, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee Rosella L. Reiner.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

This appeal involves a revocable trust created by Charles W. Phillips. The trust agreement granted Phillips, as settlor, the right to amend the terms of the trust agreement "by instrument in writing delivered to the Trustee." Phillips named himself as the trustee and funded the trust with an annuity issued by Hartford Life Insurance Company (Hartford). Before his death, Phillips sent a letter to Hartford directing Hartford to alter the amount to be paid to one of the beneficiaries of the trust. The issue is whether the letter amended the trust agreement. We conclude that Phillips' letter amended the trust agreement and affirm the trial court's decision.

BACKGROUND

Phillips created the trust on June 25, 1993. The trust agreement provided that the trustee would make monthly payments of $1,000 to Rosella L. Reiner until her death. After her death, the trust was to be liquidated and the proceeds paid in equal shares to Phillips' grandsons, Robert J. Wendland and John R. Wendland, as remainder beneficiaries. In addition, the trust agreement provided: "So long as he lives (except during any period of adjudicated incompetency) the Grantor [i.e., Phillips] shall have the right, by instrument in writing delivered to the Trustee: . . . B. Amendment of Agreement: To amend this Agreement in any and every particular." Phillips named himself as the trustee. He deposited $181,876.38 into the trust and used those funds to purchase an annuity issued by Hartford.

On March 10, 1995, Phillips sent a letter to Hartford. The body of the letter provided:

> I am the trustee of the Wendland-Reiner Trust [d]ated 06-25-93. The annuitant is Rosella L. Reiner.

> Effective immediately, I want to have systematic monthly withdrawals in the amount of $500.00. . . . Please send these monthly payments to the annuitant, Rosella L. Reiner. . . .
>
> Please make the first payment on March 1, 1995 and subsequent payments on the first of each following month.
>
> I understand that the taxes on these withdrawals will [be] paid by the trust . . . . I further understand that I reserve the right to change the amount of the systematic withdrawals at any time. Please note that my signature has been guaranteed.

The signature block of the letter read "Charles W. Phillips, Trustee," and the letter was signed by Phillips. Hartford complied with the letter and lowered the amount of monthly payments to Reiner to $500.

Phillips sent three more letters to Hartford, each of which directed Hartford to change the amount of the monthly payments that were to be made to Reiner. Hartford complied with the letters. For our purposes, the final letter, dated May 22, 1997, is the most important. It directed Hartford to increase the amount of the monthly payments to $2,000. Like the other two letters, it was substantially similar in all other respects to the March 10, 1995, letter.

In addition to the letters directing Hartford to increase the amount of Reiner's monthly payments, Phillips sent two letters directing Hartford to make one-time lump-sum withdrawals and to pay the money to Reiner. The first letter, sent in October 1997, requested a $5,000 withdrawal, and the second, sent in December 1997, requested a $6,000 withdrawal; Hartford complied with both letters.

Phillips died in January 1999. After Phillips' death, Reiner continued to receive $2,000 monthly payments until March 1, 2002. At that time, the first successor trustee, Harry L. Wendland, reduced the amount of the monthly payments to $1,000, the amount originally specified in the trust agreement.

Harry Wendland subsequently resigned as successor trustee, and the Lancaster County Court appointed John M. McHenry as the second successor trustee. McHenry then filed a petition for trust administration proceedings. In it, he asked the court to

determine whether the May 22, 1997, letter amended the trust agreement by increasing the amount of Reiner's monthly payments to $2,000. In Reiner's answer, she alleged that the letter amended the terms of the trust agreement and that she was therefore entitled to receive $2,000 per month. In the remainder beneficiaries' answer, they alleged that the letter failed to meet the trust agreement's requirements for amendment and that therefore, the original language of the trust agreement setting the amount to be paid to Reiner at $1,000 per month controlled.

The county court concluded that the May 22, 1997, letter amended the trust agreement. It ordered McHenry to reimburse Reiner for all shortages in payments since March 1, 2001, and to increase the amount of all future payments to $2,000.

ASSIGNMENTS OF ERROR

John Wendland, one of the remainder beneficiaries, assigns, restated and consolidated, that the court erred in (1) finding that the May 22, 1997, letter was a valid amendment to the trust agreement; (2) ordering the successor trustee, McHenry, to reimburse Reiner for all shortages in payments since March 1, 2001; and (3) ordering McHenry to increase the future payments to Reiner to $2,000 per month.

STANDARD OF REVIEW

[1,2] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re R.B. Plummer Memorial Loan Fund Trust*, 266 Neb. 1, 661 N.W.2d 307 (2003). In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *In re Guardianship & Conservatorship of Garcia*, 262 Neb. 205, 631 N.W.2d 464 (2001).

ANALYSIS

[3] The settlor of a trust may reserve the power of revocation or amendment, and such a power is consistent with a valid trust. *Whalen v. Swircin*, 141 Neb. 650, 4 N.W.2d 737 (1942). Phillips expressly reserved the power to amend the trust agreement. The issue is whether by sending the letter to Hartford, Phillips exercised the power to amend the trust agreement. The remainder

beneficiary makes two arguments for why the letter did not amend the trust agreement. First, he argues that Phillips did not express the intent to modify the trust agreement in the letter. Second, he argues that even if Phillips intended to amend the trust agreement with the letter, sending the letter to Hartford did not comply with the procedure for amendment set out in the trust agreement.

Intent to Modify Trust Agreement

We must first determine whether Phillips expressed the intent to modify the trust agreement in the letter to Hartford. The parties agree that to do this, we must interpret the letter. We treat this as a question of law on which we have an obligation to reach a conclusion independent of that of the trial court. Accord *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994) (interpretation of language of trust is matter of law).

[4,5] The rules of construction for interpreting a trust are applied when the language of the trust is not clear; but if the language clearly expresses the settlor's intent, the rules do not apply. *Wahrman v. Wahrman*, 243 Neb. 673, 502 N.W.2d 95 (1993). The remainder beneficiary points out that in the letter, Phillips did not expressly state that he was amending the trust agreement. The remainder beneficiary argues that this clearly shows that Phillips did not intend to amend the trust agreement. We are not persuaded by this reasoning. Neither the express terms of the trust agreement nor the law required Phillips to expressly recite that he was amending the trust agreement in order to make an amendment effective. See *In re Estate of Davis*, 775 A.2d 1127 (Me. 2001). Further, the letter refers to the trust, suggesting that Phillips contemplated that the letter would affect the trust. At best, the language of the letter is unclear, and we thus turn to the rules of construction.

[6,7] The primary rule of construction for trusts is that a court must, if possible, ascertain the intention of the testator or creator. *Smith v. Smith, supra*. When there are two or more instruments relating to a trust, they should be construed together to carry out the settlor's intent. *Estate of Taylor*, 361 Pa. Super. 395, 522 A.2d 641 (1987). Here, the letter makes reference to the trust. Thus, in deciphering what Phillips intended with the letter, we consider both the original trust agreement and the letter.

We conclude that Phillips' intent can be determined because the letter is inherently inconsistent with the original terms of the trust agreement. The letter ordered Hartford to increase the amount of the distributions Reiner was receiving from the annuity. The annuity formed the corpus of the trust. Thus, altering the amount of the distribution which Hartford was paying to Reiner fundamentally modified the relationship between the parties to the trust by increasing the amount Reiner was receiving at the expense of the remainder beneficiaries' interests. This shows that Phillips intended to amend the trust agreement. Cf. *In re Estate of Davis, supra* (holding that when second trust was inconsistent with terms of first trust, inconsistency indicated that second trust was intended to modify first trust).

Procedural Requirements for Amendment

Next, the remainder beneficiary argues that even if Phillips intended to amend the trust agreement with the letter, sending it to Hartford did not comply with the procedure for amendment set out in the trust agreement.

We have never addressed whether a settlor's failure to strictly follow the procedures for amendment set out in a trust agreement renders an attempted amendment invalid. Courts in other jurisdictions require varying levels of compliance with the amendment procedures set out in a trust agreement. Some courts adhere to a strict compliance standard which requires that "[i]f a particular mode is specified, that method must be strictly complied with in order for the modification to be effective." *Lourdes College of Sylvania, Ohio v. Bishop*, 94 Ohio Misc. 2d 51, 57, 703 N.E.2d 362, 366 (1997). See, also, 90 C.J.S. *Trusts* § 115 (2002). The modern trend, however, backs away from strict compliance. Both the Restatement (Third) of Trusts and the Uniform Trust Code provide that a settlor may amend a trust by substantially complying with a method set out in the terms of the trust. See, Restatement (Third) of Trusts § 63, comment *i.* (2003); Unif. Trust Code § 602(c)(1), 7C U.L.A. 183 (Cum. Supp. 2000). Accord *Williams v. Bank of California*, 96 Wash. 2d 860, 639 P.2d 1339 (1982). In addition, under both the Restatement and the Uniform Trust Code, if the trust does not provide a method for amendment or the method provided is not expressly made

exclusive, the settlor's power to amend the trust can be "exercised in any way that provides clear and convincing evidence of the settlor's intention to do so." Restatement, *supra*, § 63(3) at 443. Accord Unif. Trust Code § 602 (c)(2)(B). We note that the Legislature has adopted a *modified* version of Uniform Trust Code § 602. See Neb. Rev. Stat. § 30-3854 (Supp. 2003). However, the operative date of § 30-3854 is January 1, 2005, and thus it does not govern the resolution of this case.

[8] Here, it is unnecessary for us to choose between the strict compliance rule and the more modern rule endorsed by the Restatement, *supra*, and the Uniform Trust Code. The trust agreement provided that Phillips could amend the trust agreement "by instrument in writing delivered to the Trustee." The remainder beneficiary argues that the letter to Hartford was not an instrument and was not delivered to the trustee. However, even those jurisdictions that follow the strict compliance rule recognize that provisions requiring the settlor to provide written notice of amendments to the trustee are for the benefit of the trustee. Thus, compliance concerning written notice requirements may be waived by the trustee. See *Merchants National Bank of Mobile v. Cowley*, 265 Ala. 125, 89 So. 2d 616 (1956); *St. Louis Union Trust Co. v. Dudley*, 162 S.W.2d 290 (Mo. App. 1942); 90 C.J.S. *Trusts* § 115 (2002). Here, Phillips was both the trustee and the settlor. As a result, he was in a position to waive the unnecessary formality of giving himself written notification of his intent to amend the trust agreement. See *Argo v. Moncus*, 721 So. 2d 218 (Ala. Civ. App. 1998).

CONCLUSION

We conclude that Phillips expressed the intent to amend the trust agreement in the May 22, 1997, letter and that any failure to comply with the amendment procedure in the trust agreement was waived. We have considered Reiner's claim that she is entitled to attorney fees under Neb. Rev. Stat. § 30-1601(6) (Cum. Supp. 2002) and find it to be without merit.

AFFIRMED.

HENDRY, C.J., not participating.

KAREN M. KVAMME AND BERNARD N. KVAMME, WIFE AND HUSBAND, APPELLEES, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLANT.

677 N.W.2d 122

Filed April 2, 2004. No. S-03-005.

1. **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.
2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
3. **Trial: Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy and unfair prejudice, and the trial court's decision will not be reversed absent an abuse of discretion.
4. ____: ____: ____. If a trial court erroneously admits evidence that unfairly prejudices a substantial right of the complaining litigant, such admission is an abuse of discretion and constitutes reversible error.
5. **Insurance: Contracts: Motor Vehicles: Evidence: Proximate Cause: Damages.** Evidence concerning the amount of uninsured motorist coverage an insurance policy provides is irrelevant to the issue of the amount of damages proximately caused by an uninsured motorist.
6. **Jury Instructions: Presumptions.** It is presumed a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded.
7. **Insurance: Contracts: Juries: Evidence.** Generally, Nebraska does not allow evidence of liability insurance or policy limits to be admitted because it may inject prejudice into the jury's decisionmaking process, thereby distorting the jury's verdict.
8. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the wrongful admission of evidence must unfairly prejudice a substantial right of a litigant complaining about the evidence admitted.
9. **Trial: Evidence: Presumptions: Appeal and Error.** Error in the admission of evidence is presumed to be prejudicial where the evidence admitted may have influenced the verdict or affected unfavorably the party against whom it was admitted.
10. **Trial: Evidence: Appeal and Error.** Where it cannot be gleaned from the record that evidence wrongfully admitted did not affect the result of the trial unfavorably to the party against whom such evidence was admitted, reception of that evidence must be considered prejudicial error.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for a new trial.

Danene J. Tushar and Timothy J. Thalken, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

Tim J. Kielty for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Karen M. Kvamme was injured when her vehicle was struck by an uninsured motorist. After an insurance coverage dispute arose, Karen sued her insurer, State Farm Mutual Automobile Insurance Company (State Farm). At trial, over State Farm's objection, the trial court allowed Karen to present evidence to the jury that the policy limit of her uninsured motorist coverage was $100,000. The main issue on appeal is whether the court committed reversible error by allowing this information to go before the jury.

FACTUAL AND PROCEDURAL BACKGROUND

On September 29, 1996, Karen was involved in a motor vehicle accident with an uninsured motorist. At the time of the accident, Karen and Bernard N. Kvamme (the Kvammes) were insured under an insurance policy issued by State Farm (the Policy). Seeking compensation for, inter alia, her injuries and expenses, Karen filed suit against State Farm on September 27, 2000. Karen's husband, Bernard, joined in the lawsuit, alleging that he suffered a loss of consortium as a result of the accident.

Prior to trial, the parties agreed to stipulate to a number of facts, which were memorialized in the court's pretrial order. Relevant here, the parties agreed that the person who struck Karen's vehicle was an uninsured motorist, that he was negligent in the operation of his vehicle, and that his negligence was the proximate cause of the accident with Karen. In addition, the parties agreed that the Policy provided coverage for an automobile collision caused by the negligence of an uninsured motorist and that such coverage extended to the vehicle driven by Karen. The parties also agreed that only two issues needed to be resolved at trial: (1) whether the Kvammes' damages, if any, were proximately caused by the accident and (2) the merit of Bernard's claim for loss of consortium.

Thereafter, in an attempt to prevent potentially prejudicial information from reaching the jury, State Farm filed a motion in limine requesting the court to order the Kvammes, and witnesses testifying in support of the Kvammes, to refrain from making any

reference to, inter alia, the Policy's $100,000 coverage limitation. State Farm argued that any reference to the Policy's coverage limitation would be irrelevant to the issues of liability and damages and that the probative value of such evidence would be substantially outweighed by the danger of unfair prejudice to State Farm. Believing the submission of the Policy's limit would prevent the jury from speculating about the amount of available insurance coverage, the court denied State Farm's request.

Trial began on October 7, 2002. During his opening statement, counsel for the Kvammes informed the jury of the Policy's $100,000 coverage limitation and explained that Karen had paid a higher premium for this coverage. Later, over State Farm's objection, the insurance policy was admitted into evidence. Immediately thereafter, and again after State Farm's objections were overruled, the parties stipulated that the Policy contained a $100,000 coverage limitation.

On October 9, 2002, the jury returned a verdict in favor of the Kvammes in the amount of $50,202. State Farm moved for a new trial and a setoff or credit for payments already rendered to the Kvammes. After a hearing on these motions, the court overruled State Farm's motion for a new trial and ordered that the jury verdict be reduced by $8,728.27 to account for payments already made to the Kvammes. State Farm appealed.

ASSIGNMENTS OF ERROR

State Farm assigns four errors, summarized and restated as two: The trial court erred in (1) allowing the amount of coverage available under the Policy to be admitted into evidence and (2) ruling that the evidence was sufficient to support a jury instruction on Bernard's claim for loss of consortium.

STANDARD OF REVIEW

[1] 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. *Olson v. Sherrerd*, 266 Neb. 207, 663 N.W.2d 617 (2003).

ANALYSIS

On appeal, State Farm argues that evidence concerning the amount of coverage available under the Policy was irrelevant

under Neb. Rev. Stat. § 27-401 (Reissue 1995) and unfairly prejudicial under Neb. Rev. Stat. § 27-403 (Reissue 1995) and that the trial court abused its discretion by allowing this information to be admitted into evidence. Before we examine the merits of State Farm's argument, however, we consider the Kvammes' argument that State Farm waived its objections by stipulating to the amount of available coverage under the policy during trial. Although State Farm agrees it entered into a stipulation concerning the amount of available coverage, it contends that it merely stipulated to the foundation of the testimony regarding the Policy's limit, while simultaneously renewing its objection to the introduction of the Policy's limit into evidence. The record supports State Farm's contention. Read in context, it is clear that State Farm renewed its objection to the introduction of the Policy's limit into evidence. Thus, State Farm properly preserved its objections for appellate review.

[2-4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Kinney v. H.P. Smith Ford*, 266 Neb. 591, 667 N.W.2d 529 (2003). The exercise of judicial discretion is implicit in determinations of relevancy and unfair prejudice, and the trial court's decision will not be reversed absent an abuse of discretion. *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000). If a trial court erroneously admits evidence that unfairly prejudices a substantial right of the complaining litigant, such admission is an abuse of discretion and constitutes reversible error. *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999).

Our first step is to determine whether it was error to allow the jury to hear evidence of the Policy's coverage limit; if so, we then must decide if the error was prejudicial and reversible. In Nebraska, all relevant evidence is admissible unless there is some specific constitutional or statutory reason to exclude such evidence. Neb. Rev. Stat. § 27-402 (Reissue 1995). Relevant evidence is that which tends to make the existence of any fact of consequence more or less probable than it would be without the evidence. § 27-401.

Prior to trial, the parties stipulated to a number of facts. Relevant here, the parties agreed that the person who struck

Karen's vehicle was an uninsured motorist, that he was negligent in the operation of his vehicle, and that his negligence was the proximate cause of the accident with Karen. In addition, the parties agreed that the Policy provided coverage for an automobile collision caused by the negligence of an uninsured motorist and that such coverage extended to the vehicle driven by Karen. Because State Farm admitted that coverage existed and that the uninsured motorist was the proximate cause of the accident, the only issue to be resolved at trial was the amount of damages, if any, that the Kvammes suffered as a direct and proximate result of the accident.

[5] Therefore, we must determine if evidence of the Policy's limit made the existence or cause of the Kvammes' damages more or less probable. We conclude that it did not and hold that evidence concerning the amount of uninsured motorist coverage an insurance policy provides is irrelevant to the issue of the amount of damages proximately caused by an uninsured motorist. See, e.g., *Allstate Ins. Co. v. Ramos*, 782 A.2d 280 (D.C. 2001); *Alfa Mut. Ins. Co. v. Moreland*, 589 So. 2d 169 (Ala. 1991); *Allstate Ins. v. Miller*, 315 Md. 182, 553 A.2d 1268 (1989); *Fahey v. Safeco Ins. Co. of America*, 49 Conn. App. 306, 714 A.2d 686 (1998). Cf. *Schaffer v. Bolz*, 181 Neb. 509, 149 N.W.2d 334 (1967).

Simply stated, the amount of coverage provided by State Farm under the Policy has no bearing on the amount of damages the Kvammes incurred as a result of the accident. Moreover, to allow evidence of the amount of uninsured motorist coverage would only serve to confuse the jury and distort the jury verdict. See, *Farley v. Allstate*, 355 Md. 34, 43, 733 A.2d 1014, 1018 (1999) ("if the jury were provided with a definitive amount of available policy limits the likely result would be a distorted jury verdict"); *Miller*, 315 Md. at 192, 553 A.2d at 1272 ("establishing the availability of a sum certain is likely to distort a jury verdict").

The Kvammes argue that the amount of available coverage was relevant because such evidence prevented the jury from assuming that only the mandatory minimum of coverage existed and basing its award on that amount. Stated otherwise, the Kvammes assert that because Nebraska requires an insured motorist to carry $25,000 in uninsured motorist coverage, see

Neb. Rev. Stat. § 44-6408(1)(a) (Reissue 1998), jurors will assume a policy's limit is $25,000 absent evidence to the contrary. We do not agree. If the parties or the court are convinced that this type of assumption regarding minimum coverage is somehow a legitimate concern, the court could draft a narrow jury instruction to allay that concern.

[6] In the instant case, the jurors were not instructed to base their damage determination on the amount of coverage that was available under the Policy. Instead, the jury was properly instructed to calculate the amount of damage proximately caused by the uninsured motorist. It is presumed a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded. *Myers v. Platte Valley Public Power & Irr. Dist.*, 159 Neb. 493, 67 N.W.2d 739 (1954); *Webber v. City of Scottsbluff*, 150 Neb. 446, 35 N.W.2d 110 (1948). Thus, absent evidence to the contrary, we assume the jury followed the instructions it was given.

The Kvammes also argue that the Policy's limit was relevant because they brought an action in contract and that therefore, the jury should be entitled to have an understanding of the terms and provisions of that contract so as not to have to guess or assume facts to which they have not been informed. This argument is without merit. Although this action is based on the contractual relationship between the Kvammes and State Farm, it is analogous to an action in tort because the jury's only charge was to determine the amount of damages proximately caused by the uninsured motorist's negligence. See, *Preferred Risk Mut. Ins. Co. v. Ryan*, 589 So. 2d 165 (Ala. 1991); *Allstate Ins. v. Miller*, 315 Md. 182, 553 A.2d 1268 (1989); *Auto-Owners Ins. Co. v. Dewberry*, 383 So. 2d 1109 (Fla. App. 1980).

As the Maryland Court of Appeals correctly observed:

> [T]his case is "functionally . . . a tort case," the purpose of which is to establish the damages that [the defendant insurer] is required to pay under the underinsured motorist portion of the [plaintiffs'] policy. . . . Therefore, this action is not, as the [plaintiffs] suggest, a contract action in the sense that any provisions of the insurance policy were at issue or that coverage was being denied based

> upon language in the insurance contract. The jury was not required to interpret any provisions of the contract in accordance with any principles of contract law: its sole responsibility was to listen to the evidence and determine what amount, if any, [the defendant insurer] should be obligated to pay based on the testimony of the [plaintiffs] and their doctors.

Farley v. Allstate, 355 Md. 34, 45-46, 733 A.2d 1014, 1020 (1999). Thus, the amount of available coverage provided under the Policy was irrelevant to the issue of damages and should not have been presented to the jury.

[7] Furthermore, we note that our ruling comports with established Nebraska law. Generally, Nebraska does not allow evidence of liability insurance or policy limits to be admitted because it may inject prejudice into the jury's decisionmaking process, thereby distorting the jury's verdict. See, Neb. Rev. Stat. § 27-411 (Reissue 1995); *Reimer v. Surgical Servs. of the Great Plains*, 258 Neb. 671, 605 N.W.2d 777 (2000); *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993); *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984); *Schaffer v. Bolz*, 181 Neb. 509, 149 N.W.2d 334 (1967) (introduction of policy limits in tort action was erroneous and prejudicial and may have improperly influenced jury). Our ruling today simply extends this rule, long accepted in tort cases, to an insured's suit against his or her insurer for the damages proximately caused by the negligence of an uninsured motorist, which we have determined is the functional equivalent of an action in tort.

In sum, the amount of uninsured motorist coverage a policy provides is irrelevant to the issue of damages and should not be disclosed unless the amount itself is in controversy. Accordingly, in the ordinary case, such limits should not be considered by the jury. In cases where the verdict exceeds the coverage amount, the trial court may then reduce the verdict, upon proper post-trial motion, to comply with the limits of the policy. See, e.g., *Alfa Mut. Ins. Co. v. Moreland*, 589 So. 2d 169 (Ala. 1991); *Miller, supra.*

Because we have concluded that evidence concerning the amount of available coverage under the Policy was irrelevant under § 27-401, such evidence was inadmissible under § 27-402.

See *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999). Consequently, the trial court abused its discretion by admitting the Policy's limit into evidence.

[8] Our inquiry is not at an end, however, because we must also determine whether the error in admitting this irrelevant evidence was prejudicial and requires reversal. See *id.* To constitute reversible error in a civil case, the wrongful admission of evidence must unfairly prejudice a substantial right of a litigant complaining about the evidence admitted. See *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

[9] The Kvammes contend that because the jury's verdict was approximately one-half of the coverage limit, no prejudice has befallen State Farm. However, their argument is not in keeping with our longstanding rules regarding the prejudicial effect of wrongfully admitted evidence. Error in the admission of evidence is presumed to be prejudicial where the evidence admitted may have influenced the verdict or affected unfavorably the party against whom it was admitted. *Lienemann v. City of Omaha*, 191 Neb. 442, 215 N.W.2d 893 (1974); *Witte v. Lisle*, 184 Neb. 742, 171 N.W.2d 781 (1969); *Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co.*, 177 Neb. 287, 128 N.W.2d 773 (1964). Here, by merely contending that the record contains evidence to support the jury's verdict of $50,202, the Kvammes have mistaken the sufficiency of the evidence with the prejudicial effect that the admission of the irrelevant evidence may have had on the jury.

[10] It has long been our rule that where it cannot be gleaned from the record that evidence wrongfully admitted did not affect the result of the trial unfavorably to the party against whom such evidence was admitted, reception of that evidence must be considered prejudicial error. *Blue Valley Co-op, supra.* See, also, *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003); *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996); *First Baptist Church v. State*, 178 Neb. 831, 135 N.W.2d 756 (1965); *Singles v. Union P. R.R. Co.*, 174 Neb. 816, 119 N.W.2d 680 (1963); *Grantham v. Farmers Mutual Ins. Co.*, 174 Neb. 790, 119 N.W.2d 519 (1963); *Borden v. General Insurance Co.*, 157 Neb. 98, 59 N.W.2d 141 (1953). Our review of the record does not disclose what effect the

submission of the Policy's limit might have had on the jury's verdict. We, therefore, necessarily conclude that the Kvammes have not overcome the presumption that State Farm was prejudiced by the admission of the Policy's coverage limitation into evidence.

CONCLUSION

For the foregoing reasons, we determine that the trial court abused its discretion by admitting the amount of coverage provided under the Policy into evidence and that such error was unfairly prejudicial to State Farm. The judgment of the district court is reversed, and the cause is remanded for a new trial. Because we reverse for a new trial on the basis of admitting irrelevant evidence, we need not and do not decide whether there was sufficient evidence to support a jury instruction on Bernard's claim for loss of consortium.

REVERSED AND REMANDED FOR A NEW TRIAL.

MICHAEL VEATCH, APPELLEE, V.
AMERICAN TOOL, APPELLANT.
676 N.W.2d 730

Filed April 2, 2004. No. S-03-889.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Cum. Supp. 2002), 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 trial judge who conducted the original hearing.
3. **Workers' Compensation: Evidence: Due Process: Appeal and Error.** Subject to the limits of constitutional due process, the admission of evidence is within the discretion of the Nebraska Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
4. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation: Rules of Evidence.** As a general rule, the Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence.

6. **Workers' Compensation: Rules of Evidence: Legislature: Due Process.** Subject to the limits of constitutional due process, the Legislature has granted the Nebraska Workers' Compensation Court the power to prescribe its own rules of evidence and related procedure.
7. **Workers' Compensation: Rules of Evidence: Expert Witnesses.** Because the application of standards under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), in Nebraska is limited to cases in which the Nebraska rules of evidence apply, and those rules do not apply in Workers' Compensation Court, *Daubert* standards do not apply in a workers' compensation case.
8. **Workers' Compensation: Evidence: Expert Witnesses: Testimony.** In a workers' compensation case, the witness must qualify as an expert and the testimony must assist the trier of fact to understand the evidence or determine a fact in issue. The witness must have a factual basis for the opinion, and the testimony must be relevant.
9. **Workers' Compensation: Expert Witnesses.** Expert testimony in a workers' compensation case must be based on a reasonable degree of medical certainty or a reasonable probability.
10. ____: ____. An expert opinion in a workers' compensation case based on a mere possibility is insufficient, but the standard also does not require absolute certainty.
11. **Workers' Compensation: Words and Phrases.** While cases involving repetitive trauma injuries have some characteristics of both an accidental injury and an occupational disease, the compensability of a condition resulting from the cumulative effects of work-related trauma is to be tested under the statutory definition of accident.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Bryan S. Hatch, of Stinson, Morrison & Hecker, L.L.P., for appellant.

Roger D. Moore, of Rehm Bennett Law Firm, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

The primary issue is whether we will apply *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), to workers' compensation cases. A Workers' Compensation Court review panel held that *Daubert* did not apply to the proceedings. Because the Nebraska rules of evidence do not apply in workers' compensation cases, we hold that *Daubert* principles do not apply. We affirm.

ASSIGNMENTS OF ERROR

American Tool assigns that the district court erred by (1) determining that the receipt of expert testimony in a workers' compensation proceeding is not governed by *Daubert*, (2) determining that the expert testimony had foundation and was relevant, and (3) analyzing the injury as an accident instead of an occupational disease.

BACKGROUND

In November 1997, the appellee, Michael Veatch, complained of left wrist discomfort while performing duties raking a furnace at American Tool. He was diagnosed with tendonitis and, after some improvement, was released from medical care. In February 1998, Veatch returned to his physician and was diagnosed with recurrent tendonitis. Veatch received workers' compensation benefits for the injury, was placed on light duty, and attended occupational therapy. He returned to his physician in June 1999 with flareups in the left wrist and pain upon flexion, extension, or rotation. X rays showed no evidence of fracture, and Veatch's range of motion was excellent.

In September 1999, following a motor vehicle accident, Veatch was referred to Dr. David P. Heiser. Heiser noted various injuries, including left wrist pain. Veatch later returned to Heiser, complaining of wrist pain that he had experienced for 2 years.

After ordering an MRI, Heiser suspected that Veatch had avascular necrosis instead of tendonitis and referred Veatch to Dr. Richard P. Murphy. Murphy diagnosed the condition as avascular necrosis and performed surgery on Veatch's wrist. Murphy issued an early report stating in one part that in his opinion, the injury was work related, and stating in another that the injury "may be work related." He later issued a report stating: "More likely than not, the diagnosed condition was caused by, significantly contributed or aggravated by [Veatch's] repetitive use of his left wrist in his employment with American Tool." Murphy testified that his opinion had been consistent and that he had changed the wording to make it legally clear. Heiser, however, issued a report stating that he could not state with a reasonable degree of medical certainty that the injury was solely related to Veatch's job at American Tool.

Veatch filed a petition seeking workers' compensation benefits. At trial, American Tool offered evidence that the injury was not work related. This evidence included early x rays that did not show an injury and a bone scan taken after Veatch was injured in the 1999 motor vehicle accident that showed injury. Murphy's deposition testimony, among other things, set out (1) his qualifications as an orthopedic surgeon; (2) his familiarity with avascular necrosis; (3) his opinion that repetitive motion could cause avascular necrosis; and (4) his opinion that based on a reasonable degree of medical certainty, Veatch's injury was work related. He testified that there were different views on the issue, but pointed to an article that stated microtrauma could lead to avascular necrosis and that explained repetitive stress could cause microtrauma. Murphy also did not believe that a 1996 dirt bike accident caused the injury and that he did not need to view notes about Veatch's history to determine the cause of the avascular necrosis. Murphy also explained why the absence of an injury on early x rays did not mean that the injury was not work related.

American Tool objected to Murphy's testimony, pointing to deposition testimony about which Murphy was not fully informed, details of Veatch's employment and medical history, and a lack of studies or information about the role of repetitive motion in causing avascular necrosis. American Tool argued that the testimony lacked foundation, was irrelevant, and was inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The trial court overruled the motion. The court found for Veatch and concluded that the injury was work related and caused by repetitive trauma. The court concluded that the injury was an accident instead of an occupational disease. American Tool appealed to a review panel of the Workers' Compensation Court, which affirmed. American Tool appeals.

STANDARD OF REVIEW

[1] Under Neb. Rev. Stat. § 48-185 (Cum. Supp. 2002), 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. *Swanson v. Park Place Automotive, ante* p. 133, 672 N.W.2d 405 (2003).

[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 trial judge who conducted the original hearing. *Brown v. Harbor Fin. Mortgage Corp., ante* p. 218, 673 N.W.2d 35 (2004).

[3] Subject to the limits of constitutional due process, the admission of evidence is within the discretion of the Nebraska Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997).

[4] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Brown v. Harbor Fin. Mortgage Corp., supra.*

ANALYSIS

Foundation and Relevancy of Expert's Opinion

American Tool contends that the Workers' Compensation Court should have applied *Daubert* to determine the admissibility of expert testimony. It argues that due process requires the use of *Daubert* to determine whether expert testimony is admissible even if the rules of evidence do not apply in a workers' compensation case.

[5,6] As a general rule, the Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence. Neb. Rev. Stat. §§ 48-168(1) (Reissue 1998) and 27-1101(4)(d) (Reissue 1995); *Sheridan v. Catering Mgmt., Inc., supra.* Subject to the limits of constitutional due process, the Legislature has granted the compensation court the power to prescribe its own rules of evidence and related procedure. § 48-168; *Sheridan v. Catering Mgmt., Inc., supra.*

Before we adopted the *Daubert* standards in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), we held that due process, not the *Frye* standard, provided the standard for

admitting expert testimony in a workers' compensation case. *Sheridan v. Catering Mgmt., Inc., supra*, citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In *Schafersman*, we specifically limited our ruling to those cases where the question was "the admissibility of expert opinion testimony under the Nebraska rules of evidence." 262 Neb. at 232, 631 N.W.2d at 876.

Recently, we determined that *Daubert* does not apply to cases involving the termination of parental rights where the Nebraska rules of evidence do not apply. *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003). In reaching that decision, we specifically cited to cases from other jurisdictions holding that *Daubert* does not apply in a workers' compensation case where the rules of evidence do not apply. *In re Interest of Rebecka P., supra*, citing *Mulroy v. Becton Dickinson Co.*, 48 Conn. App. 774, 712 A.2d 436 (1998), and *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[7] Because the application of *Daubert* standards in Nebraska is limited to cases in which the Nebraska rules of evidence apply, and those rules do not apply in Workers' Compensation Court, we conclude that the *Daubert* standards do not apply in a workers' compensation case. Thus, rather than the formal rules of evidence, admissibility of Murphy's testimony is analyzed under due process.

[8-10] We have stated that in a workers' compensation case, the witness must qualify as an expert and the testimony must assist the trier of fact to understand the evidence or determine a fact in issue. The witness must have a factual basis for the opinion, and the testimony must be relevant. *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997). Expert testimony in a workers' compensation case must be based on a reasonable degree of medical certainty or a reasonable probability. *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996). An expert opinion in a workers' compensation case based on a mere possibility is insufficient, but the standard also does not require absolute certainty. See *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). In addressing the admissibility of an expert's opinion in a workers' compensation case, we have stated:

> "A qualified expert may not testify without adequate basis for his or her opinions concerning the facts of the case

> on which the expert is testifying. Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. [Citation omitted.] The opinion must have a sufficient factual basis so that the opinion is not mere conjecture or guess. [Citation omitted.] Thus, a trial court may exclude an expert opinion because the expert is not qualified, because there is no proper foundation or factual basis for the opinion, because the testimony would not assist the trier of fact to understand the factual issue, or because the testimony is not relevant."

Sheridan v. Catering Mgmt., Inc., 252 Neb. at 832, 566 N.W.2d at 114-15. Despite the foundational and relevancy requirements, due process does not require that the *Daubert* standards be applied. See *id.*

Here, Murphy admitted, and the record shows, that some disagreement exists whether repetitive stress can cause avascular necrosis. Murphy, however, presented medical evidence that microtrauma caused by repetitive motion can cause the condition. Murphy also explained his reasoning for his opinion why other injuries Veatch sustained were not the cause of the avascular necrosis. He further explained why he did not need to review Veatch's medical records and history to reach his determination. After sufficient explanation of his qualifications and reasoning, Murphy stated that it was his opinion to a reasonable degree of medical certainty that the avascular necrosis was caused by Veatch's employment at American Tool. There is some dispute in the record about the role of repetitive trauma in causing avascular necrosis. American Tool disputes that Murphy could give his opinion without reviewing Veatch's medical records. From our review of the record, however, we determine that the court did not abuse its discretion when it determined that Murphy's testimony was relevant and based on proper foundation.

Treatment of Repetitive Trauma as Accident

American Tool next argues that the workers' compensation court should have treated the injury as an occupational disease instead of an accident.

[11] We recently refused to overrule precedent holding that repetitive trauma injuries are "accidents" and not "occupational diseases." *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). We have held that while such cases have some characteristics of both an accidental injury and an occupational disease, the compensability of a condition resulting from the cumulative effects of work-related trauma is to be tested under the statutory definition of accident. *Id.*

We have reviewed American Tool's argument on this issue and determine it is without merit.

CONCLUSION

We conclude that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), does not apply in a workers' compensation case because the Nebraska rules of evidence do not apply. We further determine that the trial court did not abuse its discretion when it determined that Murphy's testimony was relevant and was made with sufficient foundation. Finally, we conclude that the trial court was correct when it analyzed the injury as an accident instead of an occupational disease.

AFFIRMED.

MILLER-LERMAN, J., not participating.

TODD D. SIMON ET AL., APPELLANTS, V.
CITY OF OMAHA, APPELLEE.
677 N.W.2d 129

Filed April 9, 2004. No. S-02-1061.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
3. **Attorney Fees.** Attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
4. **Federal Acts: Civil Rights: Attorney Fees.** Under The Civil Rights Attorney's Fees Awards Act of 1976, courts may award reasonable attorney fees to a prevailing party in a civil rights action brought pursuant to 42 U.S.C. § 1983 (2000).

5. **Constitutional Law: Judgments: Costs: Attorney Fees.** In the absence of a judgment on the merits or a court-ordered consent decree, appellants are not entitled to an award of costs and attorney fees under 42 U.S.C. § 1988 (2000).
6. **Statutes: Legislature: Intent.** In discerning the meaning of 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.
7. **Statutes.** A court must attempt to give effect to all parts of a statute, 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.
8. **Eminent Domain: Costs: Attorney Fees.** Under Neb. Rev. Stat. § 76-726(1) (Reissue 2003), a court-ordered award of costs, expenses, and attorney fees is appropriate only in connection with a proceeding initiated by an agency seeking to acquire property by condemnation.
9. **Attorney Fees: Appeal and Error.** The determination of whether the common fund doctrine applies is a question of law, with respect to which an appellate court must reach a conclusion independent of the trial court's ruling.
10. **Attorney Fees.** Absent the existence of a fund, created, preserved, or protected by a litigant, the common fund doctrine is inapplicable.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

James D. Sherrets, Theodore R. Boecker, Jr., and Kimberly K. Carbullido, of Sherrets & Boecker, L.L.C., for appellants.

Paul D. Kratz, Omaha City Attorney, and Bernard J. in den Bosch for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Appellants, Todd D. Simon, Frank A. Pane, and Jamaica Partnership, filed a petition in the district court for Douglas County against appellee, City of Omaha, seeking injunctive and declaratory relief, after the Omaha City Council adopted a resolution that approved the "Omaha Performing Arts Society Douglas Street Heritage Development Project Redevelopment Plan" (redevelopment plan) for downtown Omaha. A portion of the resolution declared real property located within the proposed redevelopment plan, including properties owned by appellants, as "blighted" and

"substandard." In their petition, appellants claimed appellee was "target[ing their properties] for eminent domain acquisition." In an amended resolution, appellants' properties were deleted from the area included within the redevelopment plan.

Appellants moved for costs and attorney fees. The district court denied the motion. The parties stipulated to the dismissal of the petition. Appellants appeal the order of the district court denying their motion for costs and attorney fees. We affirm.

STATEMENT OF FACTS

The pertinent facts, which are essentially undisputed, are as follows:

Appellants are the owners of real property located at 112 South 11th Street, 1110 Douglas Street, and 1112 Douglas Street in Omaha. On February 5, 2002, the Omaha City Council adopted resolution No. 137-280. The resolution approved the redevelopment plan, which anticipated the development of a performing arts complex in a region of downtown Omaha. Although the resolution adopted the redevelopment plan and declared the downtown area covered by the redevelopment plan as "blighted" and "substandard," nothing within the resolution itself authorized the acquisition of real property in the area covered by the redevelopment plan.

Appellants' properties are located within the downtown area covered by the redevelopment plan. As such, appellants' properties were declared "blighted" and "substandard" by resolution No. 137-280.

On February 19, 2002, appellants filed a "Petition for Temporary Restraining Order, Temporary and Permanent Injunction and Declaratory Judgment," in the district court for Douglas County. In their 11-count petition, appellants alleged that the resolution's declaration of their properties as "blighted" and "substandard" was appellee's first step in a redevelopment plan that contemplated appellee taking appellants' properties by eminent domain. In their petition, appellants raised several legal challenges to the city council's adoption of resolution No. 137-280, including allegations that such action violated state statute, denied appellants due process and equal protection, and was induced through misrepresentation. Appellants sought, inter

alia, injunctive relief enjoining "the effectiveness of any declaration that their properties . . . are blighted or substandard," and "a declaratory judgment that the declaration [of their] properties [as] blighted and substandard is arbitrary, capricious and invalid under law."

On February 20, 2002, the district court entered an order temporarily restraining the city council's "action of February 5, 2002 labeling [appellants'] properties [as] 'blighted and substandard' . . . from becoming effective." The temporary restraining order specifically provided, however, that the order was "without prejudice to [appellee] proceeding with work on its redevelopment agreement."

On February 26, 2002, the parties appeared before the district court on appellee's motion to quash and to continue proceedings, which motion sought, in part, a continuance of any further proceedings while appellee sought to amend resolution No. 137-280 to remove appellants' properties from the redevelopment plan. The district court granted the continuance, and by agreement of the parties, the temporary restraining order was continued "until further order of the Court." On March 26, the city council amended resolution No. 137-280. Although appellants' properties remained designated as "blighted" and "substandard," the amendment removed appellants' properties from the redevelopment plan. Thereafter, the parties informed the district court that all issues in the dispute had been resolved.

On April 9, 2002, appellants' counsel informed the court that appellants intended to voluntarily dismiss their action. Also on April 9, the district court heard argument and received evidence on appellants' motion for costs and attorney fees which had been filed April 8. In their motion, appellants alleged they were due costs and attorney fees based on essentially three different theories: (1) federal civil rights statutes, 42 U.S.C. §§ 1983 and 1988 (2000); (2) the Nebraska eminent domain statutes, see Neb. Rev. Stat. § 76-701 et seq. (Reissue 2003); and (3) the common fund doctrine.

With respect to the federal civil rights statutes, appellants alleged that they had terminated and/or avoided an infringement of their federal constitutional rights encompassed in § 1983 and were therefore entitled to attorney fees under § 1988. With respect

to the eminent domain statutes, appellants alleged that they had successfully terminated a taking by eminent domain and were therefore entitled to attorney fees pursuant to § 76-726(1). Finally, with respect to the common fund doctrine, appellants alleged that they were entitled to an award of costs and attorney fees, because they had "avoided an unnecessary and illegal land-banking and permanent taking of their property and saved substantial amounts of public funds as a result of this litigation."

On August 28, 2002, the district court entered an order denying appellants' motion for costs and attorney fees. The court rejected the theories advanced by appellants by noting that in the instant case, "there was no verdict, no *prevailing* party, no admission of error, [no] deprivation of procedural rights, nor was there an illegal or improper contract that was addressed so as to benefit taxpayers and the public in general." (Emphasis in original.) The court noted that its involvement had been de minimis and remarked that an award of fees would "arguably be a punishment to [appellee] for contributing to the amicable resolution of the parties' dispute" and "could have a chilling effect on future settlements."

On September 17, 2002, the district court dismissed appellants' lawsuit based upon the stipulation of the parties that the action was moot. Thereafter, appellants filed the instant appeal, challenging the district court's order denying their motion for costs and attorney fees.

ASSIGNMENT OF ERROR

Appellants assign various errors. These various assignments of error can be restated as one: The district court erred in denying appellants' motion for costs and attorney fees.

STANDARDS OF REVIEW

[1,2] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Interest of Tamantha S., ante* p. 78, 672 N.W.2d 24 (2003). On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003);

Koehler v. Farmers Alliance Mut. Ins. Co., 252 Neb. 712, 566 N.W.2d 750 (1997).

ANALYSIS

[3] Initially, we note that as a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *In re Trust Created by Martin, supra.* In support of appellants' claim that they are entitled to an award of costs and attorney fees, in their brief on appeal, appellants raise various legal theories, none of which we determine to have merit. In particular, we address appellants' claims that as a consequence of their having filed this action, they are entitled to an award of costs and attorney fees under §§ 1983 and 1988, § 76-726(1), and the common fund doctrine. We conclude that appellants are not entitled to an award of costs and attorney fees under any of the theories they have advanced. We affirm the district court's order denying appellants' motion for costs and attorney fees.

Attorney Fees Under §§ 1983 and 1988.

[4] Appellants seek costs and attorney fees under the provisions of §§ 1983 and 1988. Under The Civil Rights Attorney's Fees Awards Act of 1976, courts may award reasonable attorney fees to a prevailing party in a civil rights action brought pursuant to § 1983. See § 1988(b) ("[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs"). In support of their claim for costs and attorney fees under § 1988, appellants assert that while their properties have " 'not . . .' been illegally taken [by appellee]," brief for appellants at 20, they have averted a denial of their due process rights caused by appellee's declaration that their properties were "blighted" and "substandard." We interpret appellants' argument on appeal as asserting that the filing of the present litigation by appellants acted as the catalyst in prompting the city counsel to amend resolution No. 137-280, and that therefore, appellants are entitled to § 1988 prevailing party status under the "catalyst theory," which

posits that a plaintiff is deemed a "prevailing party" if a lawsuit acted as a catalyst in prompting a defendant to take action to meet plaintiffs' claims despite the lack of judicial involvement in the result. See, e.g., *Little Rock School Dist. v. Special School Dist. 1*, 17 F.3d 260 (8th Cir. 1994). We reject appellants' argument.

Although not in the context of § 1988, the U.S. Supreme Court has interpreted the meaning of " 'prevailing party' " and rejected the catalyst theory. In *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 600, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001), the plaintiffs had filed a lawsuit claiming that language within a state statute violated the Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C. § 3601 et seq. (2000), and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. (2000). After the lawsuit was filed, the state legislature amended the statute to remove the allegedly offending language. Although the lawsuit was subsequently dismissed as moot, the plaintiffs filed a motion for attorney fees under the FHAA and the ADA, both of which permit an award of attorney fees to the "prevailing party." See, § 3613(c)(2) ("the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs"); § 12205 ("the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs"). Although no judgment had been entered in favor of the plaintiffs, the plaintiffs in *Buckhannon Board & Care Home, Inc.* claimed that they were entitled to an award of attorney fees under the "catalyst theory." The district court denied the plaintiffs' motion for attorney fees, and that decision was affirmed by the court of appeals. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, No. 99-1424, 2000 WL 42250 (4th Cir. Jan. 20, 2000) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 203 F.3d 819 (4th Cir. 2000)).

On appeal to the U.S. Supreme Court, the Court noted that "[n]umerous federal statutes allow courts to award attorney's fees and costs to the 'prevailing party.' " *Buckhannon Board & Care Home, Inc.*, 532 U.S. at 600 (citing Civil Rights Act of 1964, Voting Rights Act Amendments of 1975, and The Civil Rights Attorney's Fees Awards Act of 1976). In *Buckhannon*

Board & Care Home, Inc., the Court rejected the catalyst theory as applied to the FHAA and the ADA, stating that

> [t]he question presented here is whether this term [prevailing party] includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not.

532 U.S. at 600.

In reaching this conclusion, the U.S. Supreme Court noted that when Congress used the term "prevailing party" to designate those parties eligible for an award of litigation fees and costs, it was using a "legal term of art." *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 603, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). The Court reviewed its prior decisions applying "prevailing party" and concluded that it had awarded attorney fees only when the plaintiff had received a judgment on the merits or obtained a court-ordered consent decree. "These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." 532 U.S. at 604 (quoting *Texas Teachers Assn. v. Garland School Dist.*, 489 U.S. 782, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989)). The Court observed that "[n]ever have we awarded attorney's fees for nonjudicial 'alteration of actual circumstances.'" 532 U.S. at 606 (quoting Justice Ginsburg's dissent to majority opinion). After analyzing its prior cases, the Court concluded, "We cannot agree that the term 'prevailing party' authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining judicial relief." *Id.* Accordingly, the Court held that "the 'catalyst theory' is not a permissible basis for the award of attorney's fees under the FHAA . . . and ADA." 532 U.S. at 610.

The *Buckhannon Board & Care Home, Inc.* analysis of "prevailing party" has been extended and applied to attorney fees claims under § 1988. In *Richardson v. Miller*, 279 F.3d 1 (1st Cir.

2002), the plaintiff filed suit under § 1983, claiming the City of Boston and other defendants illegally seized documents belonging to the plaintiff. The city voluntarily returned most of the documents, and the plaintiff dismissed his lawsuit. Thereafter, relying upon the catalyst theory, the plaintiff moved for attorney fees under § 1988.

On appeal, the U.S. Court of Appeals for the First Circuit concluded that the U.S. Supreme Court had "expressly rejected the catalyst theory." 279 F.3d at 4. Although acknowledging that the holding in *Buckhannon Board & Care Home, Inc.* was limited to the FHAA and the ADA context, the court of appeals observed that "the Court specifically noted that the fee-shifting provisions of several statutes, including [§ 1988], should be interpreted consistently." 279 F.3d at 4. The *Richardson* court rejected the plaintiff's claim for attorney fees under § 1988, concluding "we are constrained to follow the Court's broad directive and join several of our sister circuits in concluding that the catalyst theory may no longer be used to award attorney's fees under [§ 1988]." *Id.* (citing, inter alia, *Chambers v. Ohio Dept. of Human Services*, 273 F.3d 690 (6th Cir. 2001); *Johnson v. ITT Aerospace/Communications*, 272 F.3d 498 (7th Cir. 2001); *New York Taxi Drivers v. Westchester County Taxi*, 272 F.3d 154 (2d Cir. 2001); *Johnson v. Rodriguez*, 260 F.3d 493 (5th Cir. 2001); *Bennett v. Yoshina*, 259 F.3d 1097 (9th Cir. 2001)).

[5] In the instant case, appellants dismissed their lawsuit after the city council voluntarily amended resolution No. 137-280 to remove appellants' properties from the proposed redevelopment plan. As noted by the district court in its order denying appellants' motion for costs and attorney fees, the court's involvement was de minimis. Specifically, the district court did not enter a judgment on the merits and there was no court-ordered consent decree creating a " 'material alteration of the legal relationship of the parties.' " See *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 604, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) (quoting *Texas Teachers Assn. v. Garland School Dist.*, 489 U.S. 782, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989)). Based upon the U.S. Supreme Court's decision in *Buckhannon Board & Care Home, Inc.* and the extension of the reasoning in that case by the federal courts of appeals to cases

involving claims for attorney fees under § 1988, we conclude that in the absence of a judgment on the merits or a court-ordered consent decree, appellants are not entitled to an award of costs and attorney fees under § 1988. To the extent that language in *Preister v. Madison County*, 258 Neb. 775, 606 N.W.2d 756 (2000), and *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999), could be interpreted as approving the "catalyst theory" in the context of a claim for attorney fees under § 1988, that language is disapproved. Accordingly, we determine that appellants' claim for attorney fees under § 1988 is without merit.

Attorney Fees Under § 76-726(1).

Appellants assert that the district court erred in failing to award them costs and attorney fees pursuant to § 76-726(1). While essentially conceding that no condemnation action had been filed against their properties, appellants nonetheless argue that their lawsuit was, in effect, a preemptive action which forestalled the filing of a condemnation proceeding. As such, appellants claim that they are entitled to an award of costs and attorney fees under § 76-726(1). We disagree.

Section 76-726 is located in chapter 76, Real Property, article 7, Eminent Domain, of the Nebraska Revised Statutes. Section 76-726(1) provides, in pertinent part, as follows:

> The court having jurisdiction of a proceeding instituted by an agency . . . to acquire real property by condemnation shall award the owner of . . . such real property such sum as will, in the opinion of the court, reimburse such owner for his or her reasonable . . . expenses, including reasonable attorney's . . . fees, actually incurred because of the condemnation proceedings if (a) the final judgment is that the agency cannot acquire the real property by condemnation or (b) the proceeding is abandoned by the agency. If a settlement is effected, the court may award to the plaintiff reasonable expenses, fees, and costs.

[6,7] Resolution of appellants' claim for attorney fees under § 76-726(1) involves statutory construction. The meaning of a statute is a question of law, and an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. See *In re Interest of Tamantha S.*,

ante p. 78, 672 N.W.2d 24 (2003). We have previously stated that in discerning the meaning of 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. *Id.* Further, a court must attempt to give effect to all parts of a statute, 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. *Id.*; *Wilder v. Grant Cty. Sch. Dist. No. 0001*, 265 Neb. 742, 658 N.W.2d 923 (2003).

[8] In accordance with these precepts, giving effect to the entire statute and applying the statute's plain language, it is apparent that under § 76-726(1), a court-ordered award of costs, expenses, and attorney fees is appropriate only in connection with a proceeding initiated by an agency seeking to acquire real property by condemnation. Given the introductory expression in § 76-726(1) to "[t]he court having jurisdiction," we read "proceeding" in § 76-726(1) as referring to an action filed in court, and therefore, proceedings before the Omaha City Council even if "instituted by an agency" are not the types of proceedings which give rise to attorney fees under § 76-726(1).

In the instant case, the "proceeding" was filed by appellants, not an agency, and the purpose of the proceeding was to obtain declaratory and injunctive relief, not condemnation. There is nothing in the plain language of § 76-726(1) which authorizes the trial court to award costs and attorney fees in the type of lawsuit filed by appellants. We conclude that appellants' claim for costs and attorney fees under § 76-726(1) is without merit.

Attorney Fees Under Common Fund Doctrine.

[9] Finally, appellants claim the district court erred in failing to award them costs and attorney fees under the common fund doctrine. The determination of whether the common fund doctrine applies is a question of law, with respect to which this court must reach a conclusion independent of the trial court's ruling. *Kindred v. City of Omaha Emp. Ret. Sys.*, 252 Neb. 658, 564 N.W.2d 592 (1997); *In re Estate of Stull*, 8 Neb. App. 301, 593 N.W.2d 18 (1999).

An explanation of the common fund doctrine is found in *Summerville v. North Platte Valley Weather Control Dist.*, 171 Neb. 695, 696-97, 107 N.W.2d 425, 427 (1961), wherein we stated:

> [W]here one has gone into a court of equity and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to the litigant's counsel.

We have also stated:

> "'An attorney who renders services in recovering or preserving a fund, in which a number of persons are interested, may in equity be allowed his compensation out of the whole fund, only where his services are rendered on behalf of, and are a benefit to, the common fund.'"

Kindred v. City of Omaha Emp. Ret. Sys., 252 Neb. at 662, 564 N.W.2d at 595 (quoting *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961)).

Our prior rulings make it clear that the common fund doctrine "presupposes the existence of a fund." *Dennis v. State*, 234 Neb. 427, 445, 451 N.W.2d 676, 687 (1990) (quoting *United Nursing Homes v. McNutt*, 35 Wash. App. 632, 669 P.2d 476 (1983)), *reversed on other grounds sub nom. Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991). In *Dennis*, we determined that an attorney whose efforts resulted in a finding that a taxation statute was unconstitutional could not recover a fee payable out of all tax refunds which were due as a result of the ruling, because no "common fund" existed.

[10] Similarly, there is no evidence establishing the existence of a fund in the present litigation. Appellants' mere reference to a saving of tax dollars will not suffice. We have reviewed the record in the instant case, and nothing in the record on appeal demonstrates that appellants created, preserved, or protected a fund of money. Absent a fund, the common fund doctrine is inapplicable. Accordingly, we conclude that appellants' claim for costs and attorney fees under the common fund doctrine is without merit.

CONCLUSION

For the reasons stated above, we conclude that the district court did not abuse its discretion when it denied appellants' claim for costs and attorney fees. Accordingly, we affirm the order of the district court that denied appellants' motion for costs and attorney fees.

AFFIRMED.

DANNY HOUSTON, APPELLEE AND CROSS-APPELLANT, V. METROVISION, INC., DOING BUSINESS AS LINCOLN CABLEVISION, AND TELECOMMUNICATION SERVICES, INC., ALSO KNOWN AS T.S.I., APPELLANTS AND CROSS-APPELLEES, AND LIBERTY MUTUAL INSURANCE CO., APPELLEE.

677 N.W.2d 139

Filed April 9, 2004. No. S-02-1316.

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: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
4. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of the 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.
5. **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.
6. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
7. **Jury Instructions.** The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission.

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

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., and Cathy S. Trent, Stephen L. Ahl, and James Snowden, of Wolfe, Snowden, Hurd, Luers & Ahl, for appellants.

Christopher D. Jerram, of Kelley & Lehan, P.C., and Stanley White, of White & White, L.L.C., for appellee Danny Houston.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

This is a negligence action brought by Danny Houston against Metrovision, Inc., doing business as Lincoln Cablevision (Metrovision), and Telecommunication Services, Inc. (TSI) (collectively the appellants). Houston received a jury verdict in his favor, prompting this appeal and Houston's cross-appeal. We affirm.

BACKGROUND

At all relevant times, Metrovision provided cable television services in Lincoln, Nebraska. In the early 1990's, Metrovision began an upgrade of its cable television system. Metrovision hired TSI as the general contractor for the project. In turn, TSI hired a number of subcontractors to perform various aspects of the project. Houston was an employee of one of the subcontractors hired by TSI.

On July 27, 1992, Houston was performing "wreck-out" on a utility pole near 14th and Avery Streets in Lincoln. "Wreck-out" is a term used to describe the process of removing old cable television wires and other equipment from utility poles after the new wires have been installed. Linemen performing "wreck-out" climb the utility poles, cut the old wires, drop them to the ground, remove hardware on the pole, and then descend from the pole.

Houston was in the process of descending from the utility pole when his arm brushed against an energized ground wire. He received a shock, causing him to fall from the pole to the street

below and suffer injuries. Houston was aware that the electricity to the cable television system was still on while he did his work. He also testified that before he climbed the pole, he noticed that a ground wire on the pole was broken. To test to see if the wire was "hot," Houston touched the wire with the back of his hand but felt nothing. In addition to the broken ground wire, there is evidence that a "neutral connector" on the pole had failed, unbeknownst to Houston.

Houston filed a negligence action against the appellants and other defendants. The other defendants have long since been dismissed from the case. Houston alleged that the appellants were negligent in failing to turn off the electrical power to the cable television system. The appellants asserted that Houston was contributorily negligent and that he assumed the risk. The case proceeded to a jury trial. At trial, the court granted Metrovision's motion for a directed verdict, and the jury later returned a verdict in favor of TSI. Houston appealed to the Nebraska Court of Appeals, and Metrovision and TSI cross-appealed. In a memorandum opinion, the Court of Appeals reversed, and remanded for a new trial. *Houston v. Telecommunication Servs., Inc.*, 8 Neb. App. xiii (No. 97-956, Feb. 17, 2000). No petition for further review was filed. The conclusions reached by the Court of Appeals in its opinion are discussed in greater detail below.

Following the Court of Appeals' mandate, the cause was once again tried to a jury. This time, the jury found that Houston was 40 percent negligent and that the appellants were 60 percent negligent. Houston's $2,375,000 in damages was therefore reduced to $1,425,000 to reflect the allocation of negligence to Houston, and judgment was entered in that amount. The appellants filed motions for judgment notwithstanding the verdict or for a new trial, but both were denied. We moved the case to our own docket.

ASSIGNMENTS OF ERROR

The appellants assign, consolidated, that the district court erred in (1) denying the appellants' motions for directed verdict and judgment notwithstanding the verdict or for a new trial; (2) failing to hold that the appellants owed no duty of care to Houston, as an employee of a subcontractor who had received workers' compensation benefits for his on-the-job injury; (3) failing to hold

that the appellants owed no duty of care to Houston because the "wreck-out" work was not a "peculiar risk"; (4) submitting the case to the jury because there was no proof of the appellants' knowledge of a risk and because of Houston's superior knowledge; (5) failing to instruct the jury that the verdict should be for the appellants if the sole proximate cause of the accident was the negligence of the subcontractor; (6) failing to instruct the jury to make an allocation for the negligence of the subcontractor; (7) giving verdict form No. 5 and in not giving a verdict form requiring a separate allocation of negligence between Metrovision and TSI; and (8) denying the appellants' motion in limine and receiving evidence of subsequent remedial measures.

On cross-appeal, Houston assigns that the district court erred in (1) failing to allow him to elicit testimony from a witness regarding Occupational Safety and Health Administration (OSHA) requirements; (2) failing to submit his proposed jury instructions regarding violation of OSHA requirements; and (3) submitting assumption of the risk as a defense because (a) there was insufficient evidence he assumed the risk and (b) assumption of the risk violates Neb. Const. art. I, § 3.

STANDARD OF REVIEW

[1] 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. *Carlson v. Okerstrom, ante* p. 397, 675 N.W.2d 89 (2004).

[2] Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Steele v. Sedlacek, ante* p. 1, 673 N.W.2d 1 (2003).

[3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Id.*

ANALYSIS

In their first four assignments of error, the appellants argue that the district court erred in denying their motions for directed

verdict and judgment notwithstanding the verdict or for a new trial because they did not owe a duty of care to Houston, an employee of a subcontractor. They claim that they owed no duty of care to Houston for a number of reasons, including that (1) workers' compensation provided Houston's exclusive remedy against the appellants, (2) the wreck-out work Houston performed did not involve a peculiar risk, and (3) Houston had knowledge of the dangers presented.

[4,5] Houston argues that the appellants' arguments are defeated by the law-of-the-case doctrine. Under the law-of-the-case doctrine, the holdings of the 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. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001).

> "An issue which has been litigated and decided in one stage of a case should not be relitigated in a later stage. The most usual situation for the application of the doctrine involves a second or third appeal in the same case. For instance, an appellate court may reverse and remand a case for a new trial because of alleged errors of law committed by the trial court. After a second trial there may be a second appeal in which the appellant wishes to reargue the points decided on the former appeal. . . ."

In re Application of City of Lincoln, 243 Neb. 458, 467-68, 500 N.W.2d 183, 190 (1993), quoting Milton D. Green, Basic Civil Procedure 240 (2d ed. 1979). 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. *In re Estate of Stull*, 261 Neb. 319, 622 N.W.2d 886 (2001).

The first trial in this action resulted in a directed verdict for Metrovision and a jury verdict for TSI. On appeal, Houston argued that the jury should have been instructed that TSI owed him a nondelegable duty of care. The Court of Appeals agreed. The court, relying on *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993), determined "[w]ithout question" that the wreck-out work performed by Houston involved a peculiar risk and that, therefore, the jury should have been

instructed that TSI owed Houston a nondelegable duty to ensure a safe work environment. In addition, Houston also argued on appeal that the district court erred in granting a directed verdict in favor of Metrovision. The Court of Appeals again agreed with Houston. It concluded that Metrovision also owed a nondelegable duty of care to Houston because the work performed by Houston involved peculiar risks. In addition, the Court of Appeals also rejected the appellants' contention on cross-appeal that Houston's action was barred by the exclusive remedy provision of the Nebraska Workers' Compensation Act. Thus, the appellants' arguments in this appeal were squarely addressed by the Court of Appeals in the prior appeal. The Court of Appeals determined that the wreck-out work performed by Houston involved a peculiar risk and that, as a result, both Metrovision and TSI owed Houston a nondelegable duty of care. The law-of-the-case doctrine precludes the appellants from relitigating that issue in this appeal.

The appellants also assign a number of errors in the jury instructions and verdict forms. They contend that the jury should have been instructed that its verdict should be for the appellants if it found that the sole proximate cause of the accident was the negligence of the subcontractor. They also believe that verdict form No. 5 should have allowed the jury to allocate negligence to the subcontractor and should also have allowed for a separate allocation of negligence between Metrovision and TSI.

[6,7] The appellants did not raise these issues in the district court. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003). The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission. *Id.* The appellants fifth, sixth, and seventh assignments of error are not properly before this court.

Finally, the appellants assign that the district court erred in receiving evidence of subsequent remedial measures. The evidence at issue was a document written by Metrovision after Houston's accident instructing TSI, among other things, that no wreck-out work should be performed until electricity is turned

off to the system. Under Neb. Rev. Stat. § 27-407 (Reissue 1995), evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct. However, such evidence is admissible when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The admissibility of the document at issue was addressed by the Court of Appeals during the first appeal in this action. During the first trial, testimony was received from Ralph Gasow, TSI's project manager, and Jackie Harris, Metrovision's project manager. The Court of Appeals recognized that Gasow's and Harris' testimony was contradictory on the question of which party had control of the wreck-out project. Thus, the court held that the document was admissible under § 27-407 on the controverted issue of control of the project as well as to impeach their testimony. At the second trial, the depositions of both Gasow and Harris were received into evidence. Their deposition testimony in the second trial revealed the same inconsistencies previously noted by the Court of Appeals. Thus, where the facts presented at the second trial did not materially and substantially differ from the facts presented at the first trial, the admissibility of the document at the second trial was determined by the law-of-the-case doctrine. *Tank v. Peterson*, 228 Neb. 491, 423 N.W.2d 752 (1988). This assignment of error is without merit.

Houston's cross-appeal, according to his brief, was filed "in the event this Court determines that [the appellants'] argument(s) are meritorious and determines a new trial is required." Brief for appellee on cross-appeal at 39. Because we conclude that the appellants' arguments are without merit and that no new trial is required, it is not necessary that we address Houston's cross-appeal.

CONCLUSION

The Court of Appeals' conclusion, in a prior appeal in this action, that the appellants owed Houston a nondelegable duty of care became the law of the case and may not be reargued here. The appellants' assignments of error regarding the jury instructions and verdict forms are not properly before this court. Finally, their contention that evidence of subsequent remedial

measures was erroneously received into evidence is without merit. We affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM BROUDER FREEMAN, APPELLANT.

677 N.W.2d 164

Filed April 9, 2004. No. S-02-1365.

1. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
2. **Verdicts: Evidence: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
3. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **Trial: Evidence: Motions to Suppress.** The State may properly argue and introduce evidence relating to a defendant's attempt to suppress evidence or otherwise avoid the fair adjudication of a dispute.
5. **Criminal Law: Witnesses.** A defendant's attempted intimidation or intimidation of a State's witness is evidence of the defendant's conscious guilt that a crime has been committed and serves as a basis for an inference that the defendant is guilty of the crime charged.
6. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
7. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
8. **Criminal Law: Venue: Proof.** Venue may be proved like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient.
9. **Sexual Assault.** Serious personal injury is not an element of first degree sexual assault.

10. **Criminal Law: Other Acts: Sentences: Juries: Proof.** Other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.
11. **Presentence Reports: Waiver.** A defendant waives the right to personally review his presentence report with his counsel if he fails to notify the trial court that he has not reviewed it and that he wishes to do so.
12. **Presentence Reports: Appeal and Error.** The failure to object to the presentence report precludes a defendant from challenging it on appeal.

Appeal from the District Court for Nemaha County: DANIEL BRYAN, JR., Judge. Affirmed.

Gregory A. Pivovar and Anthony S. Troia for appellant.

Jon Bruning, Attorney General, and Marie Colleen Clarke for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

William Brouder Freeman was convicted of first degree sexual assault and sentenced to a term of 10 to 20 years in prison. Freeman appeals his conviction and sentence.

SCOPE OF REVIEW

[1] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

[2] A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003).

[3] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003).

FACTS

Freeman was charged by information in the Nemaha County District Court with first degree sexual assault, a Class II felony, in violation of Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1995). The information alleged that Freeman had subjected the victim to sexual penetration without her consent. An amended information was later filed, charging Freeman with violation of § 28-319(1)(a) and (b) and alleging that Freeman knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of her conduct.

On February 15, 2001, a party was held at a house in Peru, Nebraska. The victim was a student at Peru State College, where she lived in a women's dormitory. The victim arrived at the party at about 8:30 p.m.

During the next 2 hours, the victim drank four Jack Daniel's "sippers" and about half a bottle of "apple pucker." The victim testified that she was not an experienced drinker and that she was feeling "a little" intoxicated after consuming the alcohol. The victim left the party around 10:30 p.m. to attend a dance on campus. When the dance ended at midnight, she returned to the party, which had grown to include about 75 people, including some that the victim did not know. Upon her return, the victim drank 1½ Jack Daniel's sippers, for a total alcohol consumption of nearly 6 Jack Daniel's sippers and half a bottle of apple pucker.

At some time during the party, the victim began to feel ill and asked one of the residents of the house if she could lie down. On the way to a bedroom, the victim went to the bathroom and vomited. Once in the bedroom, she lay down on the bed. The victim's next memory was when she was awakened and told that the party was over and everyone had left. She was assisted to a couch in another room because she still felt dizzy. All the lights were off in the house, and she did not remember hearing or seeing anyone else in the house.

At some time during the night, the victim awoke but saw no one in the room and went back to sleep. Her next memory was when she awoke on the floor and found a man she could not identify on top of her. She could not see the man's face because the only light in the room came from a street light outside one of the windows. The victim then realized that her pants and underwear

had been removed, but her sweater and bra were still in place. The victim could feel the man's penis in her vagina.

The victim tried to push the man off, but her hands were "stuck" at her sides. The man was bigger than she and broader through the shoulders. The victim did not scream because she was scared and did not know what to do. She felt dizzy and confused. She told the man "to stop and to quit," but he did not stop. When the incident was over, the man got up, said he was going to the bathroom, and pushed the victim's pants and underwear back toward her. She did not recognize his voice, and he did not call her by name.

The victim lay on the floor for a few minutes, feeling paralyzed, scared, and confused. She then put on her underwear and pants and got up onto the couch. She questioned whether the incident actually occurred or if she had dreamed it, and she considered following the man to see who he was. The victim lay down on the couch again and fell asleep. She never saw anyone return from the bathroom.

The victim slept most of the next day. At about 3 p.m., she was awakened by two residents of the house and asked if she was all right. The victim inquired who had been at the party and whether the residents of the house heard anything or saw anyone come in or out after she moved to the couch. She then told them about the incident, and they called the school nurse, who recommended that the victim go to a hospital. The emergency room nurse testified that the victim was shaken, scared, withdrawn, and tearful at times, and had a "flat affect."

Evidence was presented which established that Freeman attended the party on the night in question and that he spent the night at the house. The State also presented evidence that the DNA from a semen stain on the victim's underwear matched Freeman's DNA.

The jury returned a guilty verdict, and the district court found that Freeman had committed a sexual offense which required him to register as a sexual offender under state law. The court found that the victim had suffered serious personal injury, and Freeman was sentenced to a term of 10 to 20 years in prison, with credit for time served. The court told Freeman that he would be eligible for

parole after serving 5 years and subject to discharge after serving 10 years.

ASSIGNMENTS OF ERROR

Freeman assigns as error that the district court erred (1) in allowing the State to designate a material witness as its representative to sit through the trial despite a sequestration order; (2) in allowing the jury to review a written transcript of Freeman's interview by a deputy sheriff while the jury listened to the tape recording; (3) in allowing the testimony of Jason Laferriere regarding conversations with Freeman prior to trial to show consciousness of guilt; (4) in overruling Freeman's motion for directed verdict or dismissal at the close of the State's case, which motion was based on the State's failure to prove venue and the State's failure to prove Freeman's identity; (5) in not allowing the jury to decide the issue of serious personal injury, which he suggests is an "aggravating factor" under § 28-319(2); (6) in allowing hearsay psychological/psychiatric reports at sentencing as proof of serious personal injury, violating Freeman's right to confrontation; and (7) in imposing an excessive sentence. He also assigns as error the jury's finding of guilt beyond a reasonable doubt.

ANALYSIS

Designation of State's Representative

Prior to trial, the State filed a notice designating Brent Lottman, a deputy sheriff for Nemaha County, as its representative for trial, citing Neb. Rev. Stat. § 27-615(2) (Reissue 1995) and *State v. Jackson*, 231 Neb. 207, 435 N.W.2d 893 (1989). Freeman filed an objection to the designation, arguing that Lottman was not a contemplated party under § 27-615(2) and was a material witness of a factual nature. The district court entered an order granting the State's motion to designate Lottman as its representative for trial. Freeman argues that Lottman should not have been present during the entire trial because the court had previously entered a sequestration order and because Lottman was a roommate of Laferriere, a Peru State College student who danced with the victim at the party.

Section 27-615 provides that a party may request the exclusion of witnesses during a trial. The rule does not authorize exclusion

of, inter alia, "an officer or employee of a party which is not a natural person designated as its representative by its attorney." See *id.* In *Jackson*, the State designated its expert witness as its representative and the trial court allowed the expert, a doctor, to remain in the courtroom throughout the trial despite a sequestration order. On appeal, we affirmed the trial court's action in allowing the doctor to be present. Also, in *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000), an expert psychological witness was allowed to remain in the courtroom during the testimony of the defendant's psychological expert. This court approved, noting that the State was limited in its ability to obtain information prior to trial concerning the defendant's mental state.

Freeman argues that because Lottman was involved with the investigation into this incident and interviewed him, Lottman was a key witness for the State and should not have been allowed to hear the testimony of other witnesses. In *Jordan v. State*, 101 Neb. 430, 163 N.W. 801 (1917), this court held that it was not an abuse of discretion for the trial court to allow a sheriff, who was also a witness, to remain in the courtroom despite a sequestration order. The trial court told the defendant he could file an affidavit of prejudice, but the defendant did not file one, and this court found no error because the sheriff was an officer of the court.

While this court has not ruled on the issue recently, several federal cases have held that it is permissible for a law enforcement officer to be present during a trial even where a sequestration order has been entered. See, *United States v. Jones*, 687 F.2d 1265 (8th Cir. 1982); *United States v. Shearer*, 606 F.2d 819 (8th Cir. 1979); *United States v. Woody*, 588 F.2d 1212 (8th Cir. 1978), *cert. denied* 440 U.S. 928, 99 S. Ct. 1263, 59 L. Ed. 2d 484 (1979).

We find no error in the district court's permitting Lottman to remain in the courtroom as the State's representative throughout the trial. This assignment of error has no merit.

Written Transcript of Tape Recording

During the investigation, Lottman conducted a tape-recorded interview with Freeman in Lottman's patrol vehicle. The quality of the tape recording was poor and included background noise

from the vehicle's engine. The tape was taken to an audio engineer to filter out some of the background noise. Freeman did not object to the offer of the reproduced tape recording or to the method used to improve the quality of the tape. Because some portions of the tape remained difficult to understand, the State asked if it could provide the jurors with a transcript of the tape prepared by Lottman. Freeman objected to the use of a transcript as being cumulative. The district court allowed use of the transcript, but the jury was instructed that the transcript was to be used as an aid and that the transcript would not be permitted in the jury room.

Freeman complains that the district court erred in allowing the jury to review a written transcript of his interview by Lottman while it listened to the tape recording. He argues that a transcript destroys the purpose of an audio recording because the tonal inflection and strength of the voices are not portrayed. He suggests that the tape itself is the best evidence and that the court abused its discretion in allowing the jury to have a transcript.

The Nebraska Court of Appeals was presented with a similar question in *State v. Wade*, 7 Neb. App. 169, 581 N.W.2d 906 (1998). There, the jury was provided with a transcript prepared by an undercover officer who was present when a drug transaction was recorded. The appellate court stated:

> [I]t is well established that one who is present and hears the conversation in question at the time the recording is made may testify for the purpose of clarifying inaudible or unintelligible portions of the recording. *State v. Loveless*[, 209 Neb. 583, 308 N.W.2d 842 (1981)]. Additionally, the court specifically instructed the jury that the transcripts were to be used only as assistance in following the recordings and that they, as the finders of fact, were free to rely on their own judgment of what the recordings said . . . . With regard to the transcript, we find that it accurately reflects the decipherable statements and is of great value in helping the listener follow the conversations and identify the speakers. We conclude, based upon *State v. Loveless, supra*, that the court properly admitted the transcripts for the limited purpose of helping the jury follow along with the recordings.

Wade, 7 Neb. App. at 183-84, 581 N.W.2d at 916.

In *State v. Loveless*, 209 Neb. 583, 308 N.W.2d 842 (1981), this court approved the use of transcripts of audio recordings as an aid to the jury. The court cited *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976), in which the federal court noted that transcripts may be needed and allowed at the court's discretion in two instances: (1) if portions of the tape are relatively inaudible or (2) if it is difficult to identify the speakers.

In the present case, the district court was careful to instruct the jury that the transcript was provided merely as an aid and that the transcript would not be allowed into the jury room during deliberations. The court acted within its discretion, and this assignment of error is without merit.

Consciousness of Guilt

Freeman assigns as error the district court's admission of Laferriere's testimony concerning a conversation he had with Freeman prior to trial. Laferriere was at the party on February 15, 2001, and was seen dancing with the victim. The State offered the testimony to attempt to demonstrate that Freeman acted to influence Laferriere's testimony concerning the events of the night in question and to demonstrate Freeman's consciousness of guilt concerning his actions that night.

The district court conducted a hearing outside the presence of the jury, during which Laferriere testified that when he saw Freeman at a bar in Omaha on Memorial Day weekend in 2002, Freeman asked if Laferriere had been contacted by attorneys or police about this case. Laferriere stated that he had not been contacted. Freeman then asked Laferriere if he had kissed the victim the night of the party. When Laferriere stated that he had not kissed her, Freeman reportedly said, " 'Well, it would help me out if you did.' " Laferriere then turned and left. The court asked Laferriere if he accurately remembered whether Freeman had said, " 'It would help me out if you did,' " or if it was possible that Freeman said, " 'It would have helped me out if you did.' " Laferriere said he was not 100 percent sure of Freeman's words.

The district court made a finding that the testimony was admissible and that it would be the jury's determination as to the weight of the testimony. In the presence of the jury, Laferriere testified that Freeman asked Laferriere if he had kissed the victim the night

of the party. According to Laferriere, he stated that he had not kissed her, and Freeman reportedly said, " 'Well, it would help me if you did.' "

[4] In *State v. DeGroot*, 230 Neb. 101, 430 N.W.2d 290 (1988), evidence was presented that the defendant asked a witness to testify for him, telling the witness to give information that would provide the defendant with an alibi. The witness testified that he would have been lying if he had testified as requested by the defendant. We found no abuse of discretion in the trial court's determination that evidence of the defendant's attempt to procure false testimony was relevant. We cited *State v. Adair*, 106 Ariz. 4, 469 P.2d 823 (1970), in which the court held that evidence of the defendant's threatening witnesses was admissible to demonstrate a consciousness of guilt. We held that "[t]he State may properly argue and introduce evidence relating to the defendant's attempt to suppress evidence or otherwise avoid the fair adjudication of a dispute." *DeGroot*, 230 Neb. at 108, 430 N.W.2d at 294-95.

[5] This court has also held that "[a] defendant's attempted intimidation or intimidation of a State's witness is evidence of the defendant's 'conscious guilt' that a crime has been committed and serves as a basis for an inference that the defendant is guilty of the crime charged." *State v. Clancy*, 224 Neb. 492, 499, 398 N.W.2d 710, 716 (1987), *disapproved on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989). Such attempted intimidation or intimidation is relevant evidence under Neb. Rev. Stat. § 27-404(2) (Reissue 1995) as to the defendant's consciousness of guilt that a crime has been committed. In *Clancy*, evidence was presented that the defendant had called a woman and threatened to kill her or her husband or to blow up their house if the woman provided further information to law enforcement authorities.

The testimony of Laferriere was offered to suggest that Freeman sought to have Laferriere testify that he had kissed the victim on the night of the assault. However, Laferriere was unable to state with assurance the exact words used by Freeman. The conversation took place at a chance encounter in a bar where loud music was playing in the background. The district court itself noted that admission of the testimony was a close call.

Laferriere's testimony alone does not show clearly and convincingly that Freeman committed any other crime, wrong, or

act. The facts here are dissimilar to other cases in which such testimony has been allowed. Freeman did not threaten Laferriere if he testified, and Freeman did not pursue the issue after Laferriere turned and walked away. Freeman did not suggest that Laferriere should commit perjury.

[6,7] We find that the district court's admission of this testimony was error; however, the error was harmless. In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003).

Other evidence at trial supported the jury's verdict, and we conclude that the verdict rendered was unattributable to the error. This assignment of error has no merit.

Venue and Identity

Freeman asserts that the district court erred in overruling his motion for directed verdict or for dismissal at the close of the State's case, arguing that the State failed to prove venue and to prove his identity. Freeman argues that the State did not present competent evidence that the crime occurred in Nemaha County or that he was the William Brouder Freeman accused of the sexual assault.

[8] This court has held that venue may be proved like any other fact in a criminal case. *State v. Liberator*, 197 Neb. 857, 251 N.W.2d 709 (1977). " 'It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient.'. . ." *Id.* at 858, 251 N.W.2d at 710, quoting *Gates v. State*, 160 Neb. 722, 71 N.W.2d 460 (1955). Accord *State v. Laflin*, 201 Neb. 824, 272 N.W.2d 376 (1978).

In *State v. Scott*, 225 Neb. 146, 152, 403 N.W.2d 351, 355 (1987), *disapproved on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989), the defendant asserted that the trial court erred in failing to dismiss the case against him when the State did not establish venue, "a jurisdictional element of the State's proof." This court reviewed the record and found that while the State had failed to directly prove venue, it provided evidence that the crimes occurred in Hitchcock County. A contract admitted into evidence included language identifying the property's location as Hitchcock County. Other evidence identified Hitchcock County as the location of the grain warehouse. Testimony was offered from the Hitchcock County sheriff, and another witness lived in that county. We held that sufficient proof was offered to demonstrate that the crimes were committed in Hitchcock County and that the trial court correctly overruled the defendant's motion for a directed verdict based on a failure to establish venue.

In the case at bar, the victim testified that she was a student at Peru State College and that the party she attended was in a house six blocks from campus. One of the residents of the house testified that she lived on Fifth Street in Peru in Nemaha County. Another of the house's residents testified to the specific address of the house. Lottman, a Nemaha County deputy sheriff, investigated the incident. A criminal investigator with the Nebraska State Patrol testified that he collected a comparative DNA sample from Freeman, and a criminalist with the Nebraska State Patrol crime laboratory testified as to the results of the DNA testing. The *Miranda* form signed by Freeman and entered into evidence indicates that it is the form used by the sheriff's office in Nemaha County. The only rational conclusion that can be drawn from this evidence is that the incident occurred in Peru, Nemaha County, Nebraska. Venue was adequately proved.

Freeman also argues that the district court erred in failing to grant his motion for directed verdict or dismissal because the State failed to prove his identity beyond a reasonable doubt. In his brief, Freeman states, "What is obvious is that no one was asked to identify or did identify the defendant as the William Freeman they were referring to." Brief for appellant at 32. Although DNA evidence linked Freeman to the assault, he argues

that the person who testified to collecting the swabs for the DNA test never identified him as the individual from whom the samples were collected.

A similar argument was made in *State v. Kaba*, 217 Neb. 81, 83, 349 N.W.2d 627, 630 (1984), where the court noted:

> [U]nfortunately, the county attorney failed to ask any State's witness two basic questions: (1) Is the defendant, Kenneth Kaba, in the courtroom today? (2) Would you point out the defendant, Kenneth Kaba? Contrary to the defendant's position, however, under the facts of this case the omission of an in-court identification does not require acquittal.

In *Kaba*, this court reviewed holdings on this issue from other states. In *State v. Hutchinson*, 99 N.M. 616, 661 P.2d 1315 (1983), the court ruled that sufficient evidence was presented to allow the jury to draw the inference that the person on trial had committed the crimes. In *State v. Hill*, 83 Wash. 2d 558, 520 P.2d 618 (1974), the appellate court held that while the omission of specific in-court identification was not recommended, the evidence was sufficient to establish the defendant's identity. The *Kaba* court then applied the rationale of these cases to the evidence and found, "beyond a reasonable doubt, that the Kenneth Kaba who appeared in the courtroom during the trial was the Kenneth Kaba whose behavior was reported by the witnesses." 217 Neb. at 86, 349 N.W.2d at 631.

This issue was also raised in *State v. Hoxworth*, 218 Neb. 647, 358 N.W.2d 208 (1984), where we concluded that the identity of the defendant was not at issue and that he was present at trial. This court also noted that the testimony was filled with references to the defendant by various witnesses.

In the present case, at the outset of the trial, the district court noted that Freeman was present with counsel. Five individuals who were friends or classmates of Freeman testified, and as we noted in *Kaba*, "It is inconceivable that [the witness] would sit silently by, knowing the wrong man had been brought to trial." 217 Neb. at 88, 349 N.W.2d at 632. Two law enforcement officers who had contact with Freeman also testified. None of these individuals suggested that the person on trial and present in the courtroom was not the same person they knew as William Freeman. The district court did not err in denying Freeman's motion for

directed verdict or for dismissal on the basis of a failure to prove identity. This assignment of error is without merit.

SERIOUS PERSONAL INJURY

Freeman argues that the district court erred in not allowing the jury to decide the issue of serious personal injury, which he describes as "an element of the crime," brief for appellant at 33, and an "aggravating factor" under § 28-319(2).

Section 28-319(2) provides that first degree sexual assault is a Class II felony and that "[t]he sentencing judge shall consider whether the actor caused serious personal injury to the victim in reaching a decision on the sentence." "Serious personal injury" is defined in Neb. Rev. Stat. § 28-318(4) (Reissue 1995) as "great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ."

[9] Serious personal injury is not an element of first degree sexual assault. Section 28-319(2) merely states that a sentencing judge shall take any serious personal injury into consideration in imposing sentence.

Freeman asserts that the issue of serious personal injury was not submitted to the jury for its determination and that the district court made no effort to address the issue until sentencing. At sentencing, the victim addressed the court to express the emotional toll taken by the incident. The court subsequently found that the victim had suffered "a major harm" or "serious personal injury" as defined in § 28-319.

[10] Freeman does not cite *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), but that case is apparently the basis for his argument. In *Apprendi*, the U.S. Supreme Court held that other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). *Apprendi* made clear that it was concerned only with cases involving an increase in penalty beyond the statutory maximum. See *Becerra, supra.*

Other courts have considered the impact of *Apprendi* on sentencing issues. In *People v. Allen*, 78 P.3d 751, 754 (Colo. App.

2001), the appellate court reviewed a statute which provided that the trial court was to consider " 'extraordinary aggravating circumstances' " in determining whether to impose a sentence in the "aggravated range." The court held that such circumstances are those normally considered by a trial court, including the defendant's character and history, and that the circumstances rise to the level of "extraordinary" because of their quantity or quality. The court found that *Apprendi* did not apply because the consideration of extraordinary aggravating circumstances did not mandate an increased penalty range or class of the offense, as did the Colorado statute that elevated sexual assault from a Class III felony to a Class II felony if it was accompanied by serious bodily injury. In Minnesota, the Court of Appeals has held that *Apprendi* applies only to situations where a sentence exceeds the statutory maximum. See *State v. McCoy*, 631 N.W.2d 446 (Minn. App. 2001).

Apprendi does not apply in this case. The key provision of the holding in *Apprendi* is that the jury must determine "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." See 530 U.S. at 490. Here, Freeman was sentenced to a term of 10 to 20 years in prison for a Class II felony, where the maximum possible term was 50 years. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002). Freeman's sentence was within the statutory limits.

In addition, prior to *Apprendi*, this court held that no evidentiary hearing is required prior to sentencing to determine whether a victim has sustained serious personal injury. See *State v. Bunner*, 234 Neb. 879, 453 N.W.2d 97 (1990). We held that a sentencing judge shall consider information appropriately before the court in the sentencing process, rather than conducting an evidentiary hearing. The holding of *Bunner* has not been altered by *Apprendi* because any injury sustained by the victim is not an element of the crime.

Freeman also relies on *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989). In that case, we stated:

> Whether "serious personal injury to the victim" . . . is an element of the crime of second degree sexual assault or simply a jury determination of the degree of the crime committed need not be decided in this case. The controlling fact

> is that for the defendant to be convicted of second degree sexual assault, there must be a jury determination as to whether the victim suffered "serious personal injury."

Id. at 399, 436 N.W.2d at 511.

The issue arose in *Beermann* in relation to charges of second degree sexual assault and sexual assault of a child under Neb. Rev. Stat. § 28-320 (Reissue 1985). The degree of sexual assault was determined by whether the actor caused serious personal injury to the victim. If such injury occurred, the crime was sexual assault in the second degree, and if no such injury occurred, the crime was sexual assault in the third degree. *Beermann* does not apply to the case at bar because serious personal injury is not an element of the crime charged, which was first degree sexual assault.

We conclude that the district court did not err in considering serious personal injury when determining Freeman's sentence. This assignment of error has no merit.

Right of Confrontation

According to Freeman, the district court erred in allowing hearsay psychological/psychiatric reports at sentencing as proof of serious bodily injury, violating his right to confrontation. He does not argue this error separately, but it is subsumed in his allegation that the court should have submitted the issue of injury to the jury.

It appears that Freeman is objecting to the district court's consideration of a report from a psychologist who testified for the State at a pretrial hearing because the State desired to present evidence at trial related to posttraumatic stress disorder and sexual assault. The evidence was not admitted at trial and was not heard by the jury, but the State submitted psychiatric evaluations of the victim as part of the presentence report.

At the sentencing hearing, the district court asked Freeman's counsel whether he had reviewed the presentence report. Counsel indicated that he had, and he raised no objection to the report's contents. At that point, Freeman was offered an opportunity to address the court, and he declined.

[11,12] This court has held that a defendant waives the right to personally review his presentence report with his counsel if he fails to notify the trial court that he has not reviewed it and that he

wishes to do so. See *State v. Plant*, 248 Neb. 52, 532 N.W.2d 619 (1995), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). The failure to object to the presentence report precludes a defendant from challenging it on appeal. See *State v. Tyrrell*, 234 Neb. 901, 453 N.W.2d 104 (1990). Freeman did not object to the psychological report in the presentence report on any basis, and he cannot now suggest that his right to confront the author of the report has been violated. This assignment of error is without merit.

Excessive Sentence

Freeman claims that the district court erred in imposing an excessive sentence. First degree sexual assault is a Class II felony and is punishable by a term of 1 to 50 years in prison. See §§ 28-105 and 28-319. Freeman was sentenced to a term of 10 to 20 years in prison.

Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). 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.* 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. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

The district court reviewed the presentence report, which indicated that Freeman had previously been convicted of possession of a controlled substance, for which he served 4 months in jail, and of false reporting and criminal mischief, for which he was sentenced to 45 days in jail. He has also been charged twice with driving while under the influence. The victim in this case addressed the court as to her emotional trauma following this incident.

The district court took this information into consideration and imposed a sentence within the statutory limits. We find no abuse of discretion in the sentence, and this assignment of error has no merit.

SUFFICIENCY OF EVIDENCE

Freeman asserts that the jury erred in finding him guilty beyond a reasonable doubt. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003). In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003).

The jury heard evidence that the victim was sexually assaulted as she lay sleeping. DNA evidence was presented which showed that Freeman's semen was present on the victim's underwear. The evidence established that the victim was incapacitated by alcohol, and her assailant knew or should have known that she was mentally or physically incapable of resisting or appraising the nature of her conduct. Construing the evidence in a light most favorable to the State, the evidence is sufficient to support the jury's verdict. This assignment of error is without merit.

CONCLUSION

We find no error or abuse of discretion on the part of the district court, and Freeman's conviction and sentence are affirmed.

AFFIRMED.

IN RE TRUST CREATED BY CARL LYMAN CEASE, SR., AND IRENE M. CEASE, SETTLORS. PAULETTE S. GLOVER, APPELLANT, V. ROBERT LEAZENBY, PERSONAL REPRESENTATIVE, APPELLEE.

677 N.W.2d 495

Filed April 9, 2004. No. S-02-1447.

1. **Contracts: Appeal and Error.** Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision.

2. ____: ____. A document must be construed as a whole, and if possible, effect must be given to every part thereof.
3. **Contracts.** In interpreting a document, a court must first determine, as a matter of law, whether the document is ambiguous.
4. **Parol Evidence: Contracts.** Unless a document is ambiguous, parol evidence cannot be used to vary its terms.
5. ____: ____. The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement.
6. ____: ____. A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous.
7. **Trial: Evidence: Presumptions: Appeal and Error.** In a trial to the court, the presumption is that the trial court considered only such evidence as is competent and relevant, and a reviewing court will not reverse such a case because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the judgment.
8. **Contracts.** The interpretation of the language of a document is a matter of law.
9. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reason.

Appeal from the County Court for Douglas County: LYN V. WHITE, Judge. Affirmed.

Robert C. McGowan, Jr., of McGowan & McGowan, for appellant.

Julie A. Frank, of Frank & Gryva, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

In this declaratory judgment action, the Douglas County Court found that a revocable inter vivos trust jointly created by Carl Lyman Cease, Sr., and Irene M. Cease (Cease Trust) had been effectively terminated by Carl's execution of a document entitled "Termination of Trust." Paulette S. Glover, a residuary beneficiary of the Cease Trust, appeals from the order of the county court.

SCOPE OF REVIEW

[1] Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated

to reach a conclusion independent of the trial court's decision. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002).

FACTS

Carl and Irene were married in either 1961 or 1962. This marriage was the second for each of them. Carl had five children from his previous marriage, one of whom is Dawn Blume. Glover was the only child from Irene's previous marriage.

On June 27, 1994, Carl and Irene created a revocable inter vivos trust. None of the parties involved in this matter challenge the terms of the Cease Trust or whether it was legitimately created, nor do they challenge which assets were conveyed into the trust. Among these assets were the following: a personal residence located in Omaha, Nebraska; certain items of tangible personal property; two motor vehicles; and bank accounts held on deposit in an Omaha federal credit union.

Carl and Irene were named cotrustees of the Cease Trust. Glover was nominated by the Cease Trust to be the successor trustee and was the sole residuary beneficiary of the trust.

Article III of the Cease Trust provided in relevant part:

> Each of the Settlors reserves the right at any time . . . to amend . . . or terminate this trust . . . by an instrument in writing signed by either of the Settlors and delivered to the Trustee in the lifetime of either of the Settlors . . . . If this trust or any trust created herein is revoked in its entirety, the revocation shall take effect upon the delivery of the required writing to the Trustee . . . .

Irene died on July 22, 2001. Sometime in the months following Irene's death, Carl moved from Omaha to Kansas. In August 2001, Carl and Blume met with Brian Carroll, an attorney practicing in Marysville, Kansas, to review the estate planning documents that Carl had executed in Nebraska. Carroll testified that Carl had concerns regarding the manner in which the trust property was to be distributed. Carl's concerns allegedly stemmed from the fact that Blume, who was providing Carl with 24-hour care, would receive nothing under the Cease Trust. Steven Gunderson, the attorney who prepared the Cease Trust in 1994, testified that Carroll contacted him in July or August 2001 and

requested copies of the documents that Gunderson had prepared for Carl.

At Carl's request, Carroll drafted a will, a power of attorney, a living will, and a document entitled "Termination of Trust," which document we will refer to hereafter as "exhibit C." Exhibit C, which was executed by Carl on September 24, 2001, stated:

> I, CARL LYMAN CEASE, SR., a resident of Geary County, Kansas, do hereby resign from my position as TRUSTEE of the Cease Revoca[b]le Trust . . . dated June 27, 1994. This resignation is pursuant to Article III of said trust agreement. This resignation is intended to terminate said trust, from and after the date indicated below. This resignation is being done voluntarily and by my own free will. Furthermore, the ownership of all assets of the Trust are [sic] hereby returned to myself as Settlor of the Trust.

Carl executed his will on November 6, 2001. In this document, the residential property that had previously been conveyed to the Cease Trust was bequeathed to Blume. The rest of Carl's property was bequeathed in various proportions to his children and to Glover. Glover did not challenge the validity of this will.

Carl died on December 3, 2001, and a petition for probate of his will was filed on February 11, 2002. Glover filed her petition for declaratory judgment on the same date. The petition asked the county court to declare that the Cease Trust was still valid, that Glover had succeeded Carl as trustee, and that the property conveyed to the trust still belonged to the trust.

The county court found that the greater weight of the evidence supported a finding that exhibit C did in fact terminate the Cease Trust. Glover filed a motion for new trial, which the court overruled. Glover filed a timely notice of appeal.

ASSIGNMENTS OF ERROR

Glover assigns the following restated errors: (1) The county court erred in admitting parol evidence to explain, vary, or contradict exhibit C; (2) the court erred in concluding that Carl's execution of exhibit C terminated the Cease Trust; (3) the court erred in concluding that Glover did not become successor trustee of the Cease Trust; and (4) the court erred in failing to

find that there was no delivery of the required notice of termination of trust to Glover in her capacity as successor trustee.

ANALYSIS

We first consider whether the county court erred in determining that exhibit C terminated the Cease Trust. Glover alleged that exhibit C was effective only insofar as it served as a valid resignation of Carl from his position of trustee of the Cease Trust. In her motion in limine and throughout trial, Glover asserted that exhibit C was not susceptible to two interpretations. She argued that this document could be interpreted only as a resignation by Carl of his position as trustee and not as a termination of the trust.

Glover's argument is based upon examination of only the first sentence of exhibit C. The argument assumes a very specific order of events in which execution of the first sentence of exhibit C effectively removed Carl from his position of trustee. Glover asserts that this resignation caused her to immediately become the successor trustee of the Cease Trust. She claims that the attempt to terminate the trust set forth in the third sentence of exhibit C failed because article III of the trust required that a notice of termination be delivered to the successor trustee. She asserts that there was no evidence that she, as successor trustee, was given notice of the termination of the trust during Carl's lifetime as required by article III.

[2] The personal representative of Carl's estate argues that the rules of construction require that exhibit C be read as a whole. This assertion correlates with the requirement that a document must be construed as a whole, and if possible, effect must be given to every part thereof. See *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

[3] In interpreting a document, a court must first determine, as a matter of law, whether the document is ambiguous. See *Fraternal Order of Police v. County of Douglas*, 259 Neb. 822, 612 N.W.2d 483 (2000). Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002). Upon reviewing exhibit C, we conclude that the document is not ambiguous. When exhibit C is construed

as a whole, and not sentence by sentence, the only reasonable interpretation is that Carl sought to have the document serve as a termination of the trust.

In connection with her claim that the county court erred in concluding that exhibit C terminated the Cease Trust, Glover argues that the court erred in admitting parol evidence regarding exhibit C. Glover argues that since exhibit C was not ambiguous, parol evidence was not admissible.

[4-6] Unless a document is ambiguous, parol evidence cannot be used to vary its terms. See *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000). The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement. *Id.* A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous. *Bank of Burwell v. Kelley*, 233 Neb. 396, 445 N.W.2d 871 (1989); *Olds v. Jamison*, 195 Neb. 388, 238 N.W.2d 459 (1976).

At trial, certain testimony was admitted over objection concerning the execution of exhibit C. Specifically, testimony was elicited by both parties regarding Carl's intentions at the time the document was executed. Before trial, Glover had filed a motion in limine seeking to prohibit the personal representative from offering extrinsic parol evidence at trial regarding exhibit C. The county court first declared that the motion was denied, but then stated that it would reserve judgment until after it had heard all of the evidence.

The admissibility of parol evidence arose next during Carroll's testimony. Carroll was asked on direct examination what Carl's concerns were with regard to the trust at the time of their first meeting. Glover's attorney objected that the testimony was attempting to explain or vary the language of exhibit C, which he characterized as unambiguous. This objection was overruled. Carroll answered that Carl was confused as to the contents of the trust. Later, Carroll was asked whether it was his understanding that Carl wished to make changes to his estate planning in order to benefit Blume. An objection by Glover's attorney was overruled. Carroll answered that Carl wanted to change his estate planning to benefit Blume.

Carroll was then asked why exhibit C was prepared in a manner that might be considered inconsistent. Again, an objection by Glover's attorney was overruled. Carroll answered that the document was intended to serve as "the final resignation and termination" of the trust pursuant to article III of the trust. When Carroll was asked about Carl's intent when he executed exhibit C, counsel for Glover objected on unspecified grounds. This objection was sustained.

Glover's attorney later raised the issue of Carl's intent during Carroll's cross-examination. Counsel asked whether Carl intended to resign as trustee. In answering, Carroll stated that "[i]t was his intention to terminate this Trust. And based on the research that I have done, we felt that — I felt that it would be best for him to resign also at the time the Trust is terminated." Counsel for Glover also asked Carroll whether exhibit C was intended to amend the Cease Trust. Carroll responded that the document was not intended to amend the trust.

On redirect, counsel for the personal representative asked Carroll if exhibit C was intended to act only as a resignation of Carl's position as trustee. This question was objected to on the grounds that the document speaks for itself and that parol evidence is therefore impermissible. This objection was sustained. Counsel for the personal representative responded by indicating that opposing counsel had been allowed to ask Carroll about Carl's intent with respect to exhibit C. The judge replied by stating: "I have been sustaining the objection both ways and I will continue to do so. This Court will determine what this document means."

[7] In the absence of fraud, mistake, or ambiguity, the only competent evidence was the written document. We have concluded that exhibit C is not ambiguous. Therefore, to the extent that parol evidence concerning exhibit C was admitted, it was error, but the error was harmless. In a trial to the court, the presumption is that the trial court considered only such evidence as is competent and relevant, and the reviewing court will not reverse such a case because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the judgment. *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999).

[8] The interpretation of the language of a document is a matter of law. See *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994). Whether the Cease Trust was terminated by exhibit C is therefore a question of law that we decide independently of the decision of the county court. See *id.*

In its final order, the county court found that the greater weight of the evidence adduced at trial supported a finding that exhibit C served to terminate the Cease Trust prior to Carl's death. However, the interpretation of exhibit C and the determination of whether it successfully terminated the trust were questions of law, not fact.

We conclude as a matter of law that exhibit C terminated the Cease Trust. Article III of the trust provided that the trust could be terminated by either settlor at any time by an instrument in writing signed by the settlor and delivered to the trustee during the lifetime of the settlor. Exhibit C was a written document signed by a settlor (Carl) that terminated the trust. Since Carl was also the trustee, termination of the trust occurred when he signed exhibit C on September 24, 2001.

Finally, Glover assigns as error the purported failure of Carl to deliver notice of termination of the Cease Trust to Glover in accordance with article III of the trust. This assignment of error is also without merit. As noted above, Carl's execution of exhibit C served to effectively terminate the trust. As such, notice to Glover was not required, since at the time the trust was terminated, Carl was the trustee. The only delivery of notice that was required by article III was by Carl to himself.

[9] Although the county court based its decision upon the weight of the evidence, the decision to be made by the court was one of law and not of fact. Since exhibit C was not ambiguous, parol evidence regarding the document should not have been admitted. However, the court reached the correct result. A proper result will not be reversed merely because it was reached for the wrong reason. *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002).

CONCLUSION

For the reasons stated herein, the decision of the Douglas County Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT McDERMOTT, APPELLANT.

677 N.W.2d 156

Filed April 9, 2004. No. S-02-1489.

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: Constitutional Law.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights.
3. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
4. **Constitutional Law: Effectiveness of Counsel: Proof.** Under the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, 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. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
6. **Effectiveness of Counsel: Proof.** To demonstrate that his or her counsel's performance was deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.
7. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony.
8. **Criminal Law: Pleas: Effectiveness of Counsel.** A defendant who pleads guilty upon the advice of counsel may attack only the voluntary and intelligent character of the plea by showing that the advice received was not within the range of competence demanded of attorneys in criminal cases.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed.

Gregory C. Damman, of Blevens & Damman, for appellant.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Under the terms of a plea agreement, Robert McDermott entered a guilty plea to possession of a controlled substance with intent to deliver in violation of Neb. Rev. Stat. § 28-416 (Reissue 1995). He appeals from an order denying his motion for postconviction relief.

FACTS

In 1997, McDermott was charged in Seward County with a single count of possession of a controlled substance with intent to deliver in violation of § 28-416. A Seward County public defender was appointed as his attorney. McDermott was subsequently arraigned in the district court for Seward County on an amended information charging him with one count of possession of a controlled substance with intent to deliver in violation of § 28-416, and with being a habitual criminal pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1995).

McDermott appeared with counsel in district court on July 21, 1998, and, under the terms of a plea agreement, entered a guilty plea to the possession with intent to deliver charge in exchange for dismissal of the habitual criminal charge, as well as an agreement by the State not to file any additional charges. On August 18, a sentencing hearing was held. The court asked trial counsel if he had had an opportunity to review the presentence report and inquired as to whether he had any additions, corrections, or deletions he wished to make. Counsel submitted a handwritten statement from McDermott for inclusion in the presentence report but did not object to the accuracy of any of the information compiled by the probation officer. The district court sentenced McDermott to a term of incarceration of 6⅔ to 20 years in an institution under the jurisdiction of the Nebraska Department of Correctional Services. Counsel filed a timely direct appeal on the sole ground that McDermott's sentence was excessive. That appeal was summarily affirmed by the Nebraska Court of Appeals on February 5, 1999. See *State v. McDermott*, 8 Neb. App. xxix (No. A-98-949, Feb. 5, 1999).

On August 25, 2000, McDermott, represented by new counsel, filed a motion for postconviction relief alleging ineffective assistance of counsel. McDermott alleged that his presentence report erroneously included four felony convictions from Bakersfield, California, between 1982 and 1992 which were attributed to him but were actually committed by a different person. McDermott contended that his trial counsel performed deficiently by failing to adequately discuss McDermott's criminal history with him prior to sentencing. He alleged that if he had been given the opportunity to review the presentence report, he would have brought the incorrect information to the attention of his trial counsel and the court.

McDermott also alleged that his plea was not "knowingly, intelligently, and voluntarily" entered because he was not informed by his counsel that his prior criminal record would not support a habitual criminal conviction. McDermott alleged that a true report of his felony criminal history at the time of sentencing would have revealed that he had only two prior felony convictions, one of which was a felony solely because of repetition and therefore could not be counted as a felony for the purposes of the habitual criminal statute. McDermott alleged that if he had known that there was no basis for conviction under the habitual criminal statute, he would not have entered a plea and would have insisted upon a jury trial.

On October 3, 2000, the district court denied McDermott's motion without an evidentiary hearing. On appeal, the Court of Appeals determined that McDermott's motion for postconviction relief contained "factual allegations which, if proved, constitute an infringement of McDermott's right to effective assistance of counsel under the federal Constitution, and the records and files do not affirmatively show that McDermott is entitled to no relief." *State v. McDermott*, No. A-00-1126, 2002 WL 452189 at *3 (Neb. App. Mar. 26, 2002) (not designated for permanent publication). The Court of Appeals therefore remanded the matter for an evidentiary hearing.

Trial counsel, McDermott, and Shane Stutzman, the probation officer responsible for compiling McDermott's presentence report, each testified at an evidentiary hearing conducted on August 26, 2002. Trial counsel testified that he had a specific

recollection of discussing the presentence report with McDermott for approximately 20 minutes prior to the sentencing hearing. Trial counsel testified that during that meeting, he "would have told [McDermott] what needed to be proven to make a habitual criminal charge effective and — and whether or not those types of offenses would have been on his record." He stated that he was not aware of any errors in the presentence report prior to sentencing. Trial counsel testified that the State's agreement not to file additional charges as part of the plea bargain conferred a benefit on McDermott because there was "at least some potential" that other charges could have been filed.

McDermott testified that it had been his intention to go to trial but that he had accepted the plea agreement because his trial counsel told him that if convicted on the charge of possession with intent to deliver, his record "would support an habitual criminal finding and it would add an additional 10 to 60 years on top of whatever [he] got for the drug charge." McDermott testified that the State's offer not to file any additional charges did not affect his decision to accept the plea agreement because he was not worried about other charges. McDermott confirmed that he met with his trial counsel for 10 to 15 minutes prior to his sentencing, but stated that he was not shown a copy of the presentence report.

Stutzman testified that she met personally with McDermott to review his prior criminal record, and McDermott's testimony confirms that this meeting occurred. Stutzman admitted that in compiling McDermott's presentence report, she erroneously included four felony convictions involving another person. Stutzman also testified, however, that even without these convictions, her sentencing recommendation to the court would have been the same because of McDermott's extensive criminal record and history of substance abuse.

On September 16, 2002, the State filed a motion to supplement the record with newly discovered evidence. The evidence consisted of a copy of a December 1989 conviction for felony burglary that had not appeared in McDermott's original presentence report. On October 8, over the objection of McDermott's counsel, the newly discovered evidence was received as exhibit 23. Exhibit

23 does not indicate what sentence McDermott received as a result of this conviction.

On December 9, 2002, the district court filed a judgment denying and dismissing with prejudice McDermott's amended motion for postconviction relief. The district court concluded that McDermott had failed to show that he was prejudiced by the erroneous inclusion of the four felony convictions because he failed to prove how the result would have been different had they not been included. Regarding McDermott's plea agreement, the court found that McDermott had received a benefit by "avoiding the risk and uncertainty of a habitual criminal enhancement hearing" and the "potential for filing other felony charges" and that therefore, the plea agreement was not illusory. McDermott filed this timely appeal, and we moved the case to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

McDermott assigns, restated, that the district court erred in determining that he was not deprived of effective assistance of counsel and therefore denying his motion for postconviction relief. He argues that he was denied his Sixth Amendment right to effective assistance of counsel when his attorney (1) failed to adequately review the presentence report with him and failed to determine if the report accurately set forth his criminal record, (2) failed to determine whether his criminal record would support a habitual criminal charge and advised him to enter an illusory plea agreement dismissing that charge, and (3) failed to advise him that his prior criminal record would not support a habitual criminal charge, thereby resulting in his guilty plea to the controlled substance charge not being entered knowingly, intelligently, and voluntarily.

STANDARD OF REVIEW

[1] 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. Ray*, 266 Neb. 659, 668 N.W.2d 52 (2003); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003).

ANALYSIS

[2,3] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights. *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002); *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000). McDermott's postconviction claims are based solely upon alleged deprivation of his constitutional right to effective assistance of counsel. Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Gonzalez-Faguaga, supra*; *State v. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002). Because McDermott was represented by his trial counsel on direct appeal, he is not procedurally barred from asserting a postconviction claim alleging ineffective assistance of counsel. See, *State v. Gonzalez-Faguaga, supra*; *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

[4,5] Under the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, 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. Buckman, supra*. The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. *Id.*; *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[6,7] To demonstrate that his or her counsel's performance was deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. *State v. Gonzalez-Faguaga, supra*; *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). In an evidentiary hearing for postconviction relief, the postconviction trial

judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony. See, *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995); *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). In this case, there was a conflict between the testimony of McDermott and that of his trial counsel concerning their discussions about the presentence report prior to sentencing. The district court expressly found that counsel's testimony was "far more credible" than McDermott's. Therefore, we consider defense counsel's performance as described in his testimony.

McDermott's first assignment of error challenges the adequacy of trial counsel's performance in reviewing the presentence report and in failing to detect the inaccuracy noted above. The criminal history set forth in the presentence report included more than 70 entries. Stutzman testified that she met with McDermott personally to review his prior criminal record in the course of preparing the report. Trial counsel testified that he went over the report with McDermott for approximately 20 minutes prior to the sentencing hearing. During this meeting, no errors in the presentence report were discovered or brought to counsel's attention. Based upon this evidence, trial counsel's failure to detect errors in the presentence report cannot be considered deficient performance under the standard set forth above. In the absence of any indication by McDermott that the recitation of his prior criminal history was inaccurate, it was reasonable for counsel to rely upon the report. To conclude otherwise would impose an undue burden on criminal defense attorneys to independently verify the information presented in a presentence report, as compiled by the probation officer pursuant to Neb. Rev. Stat. § 29-2261 (Reissue 1995). Because we conclude that counsel's performance in this regard was not deficient, we need not reach the second prong of the *Strickland* test. McDermott's first assigned error is without merit.

We note that McDermott makes no claim that the inclusion of the erroneous information in the presentence report in and of itself deprived him of due process. In addition, the district judge made no specific reference to this information at the time of sentencing, but, rather, agreed with McDermott's position, as set forth in the lengthy written statement which he submitted to the

court, that he was a drug addict and would benefit from a sentence which would give him access to "drug [r]e-hab and/or counseling" and medical facilities and services.

With respect to his second assignment of error, McDermott contends that his counsel performed deficiently in not determining whether McDermott's criminal record would support a habitual criminal charge and in advising McDermott to enter into what he claims was an illusory plea agreement dismissing that charge. A habitual criminal is defined by § 29-2221, which provides in relevant part:

> (1) Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal and shall be punished by imprisonment in a Department of Correctional Services adult correctional facility for a mandatory minimum term of ten years and a maximum term of not more than sixty years[.]

In *State v. Chapman*, 205 Neb 368, 370, 287 N.W.2d 697, 698 (1980), this court limited those felonies which could be used under § 29-2221, holding that "offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute 'felonies' within the meaning of prior felonies that enhance penalties under the habitual criminal statute." Subsequently, this court stated:

> [W]e regard the holding in *State v. Chapman* . . . as resting upon two general principles: (1) A defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute and (2) the specific enhancement mechanism contained in Nebraska's [driving under the influence] statutes precludes application of the general enhancement provisions set forth in the habitual criminal statute.

State v. Hittle, 257 Neb. 344, 355, 598 N.W.2d 20, 29 (1999) (holding felony conviction for driving under suspended license may not be used to trigger application of habitual criminal statute

because penalty has been enhanced by virtue of defendant's prior violations of other provisions within same statute).

In this case, McDermott's criminal record, as summarized in the presentence report at the time of sentencing, contained at least two felonies in addition to the four which were erroneously included. The first was a 1989 conviction in California for petty theft with priors which resulted in a 16-month jail sentence. The second was a 1994 conviction in California for possession of heroin which also resulted in a 16-month jail sentence.

McDermott argues that under *Chapman*, he could not have been found to be a habitual criminal because his 1989 conviction was elevated to felony status based solely on his prior petty theft convictions. The State contends that *Chapman* is distinguishable on several grounds and that thus, it cannot be categorically said that McDermott's record would not have supported a habitual criminal conviction. The State argues first that *Chapman* is distinguishable in that it "was decided as a matter of state statutory interpretation which is inapplicable to . . . McDermott's California convictions." Brief for appellee at 12. It is undisputed that McDermott's misdemeanor petty theft charge was enhanced to a felony by virtue of his previous offenses of that same nature. The State argues, however, that unlike *Hittle* and *Chapman*, McDermott's petty theft charge was not enhanced by virtue of a specific statute with a "specific enhancement mechanism," but, rather, McDermott was convicted under the California general penal code which specifically allows the elevation of misdemeanors to felony offenses through repetition. Brief for appellee at 13.

The State also argues that § 29-2221 does not require two prior "felonies." Rather, it states that the defendant has to have been "twice convicted of a crime, sentenced, and committed to prison . . . for terms of not less than one year each." § 29-2221(1). Based on the plain meaning of the statutory language, the State contends that any conviction—misdemeanor or felony—which results in a sentence of over a year would satisfy the plain meaning of "crime" for the purposes of § 29-2221(1). Accordingly, the State contends that McDermott's 1989 conviction, whether designated as a felony or misdemeanor, arguably satisfies this statutory requirement.

The State has thus demonstrated nonfrivolous arguments distinguishing *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980), which could have been made in support of the habitual criminal charge against McDermott, had the charge not been dismissed as a part of the plea agreement. In addition, McDermott's record now contains evidence of a third prior felony conviction for burglary. Despite the fact that there is no indication in the record of the disposition in that case, it is possible that additional information regarding the disposition of the burglary conviction, or any of the other 46 "unknown" dispositions in McDermott's presentence report, would have been discovered if the State had pursued the habitual criminal charge. McDermott conceded in his testimony that his prior misdemeanor convictions in California could have involved a sentence of incarceration for up to 1 year. The record thus reflects at least the possibility that McDermott could have been convicted as a habitual criminal had he not entered into the plea agreement and that his attorney advised him of this possibility. In addition, the plea agreement protected McDermott against the filing of additional charges in Nebraska. Accordingly, we agree with the district court that McDermott did not meet his burden of proving that the plea agreement was illusory or that trial counsel's advice with respect to the plea agreement was constitutionally deficient.

[8] In his final assignment of error, McDermott argues that counsel's deficient performance resulted in his guilty plea not being "entered knowingly, intelligently, and voluntarily because he was not aware, nor was he advised by his attorney, that his prior criminal record would not support [a] habitual criminal charge." A defendant who pleads guilty upon the advice of counsel may attack only the voluntary and intelligent character of the plea by showing that the advice received was not within the range of competence demanded of attorneys in criminal cases. *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002), citing *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), and *Tollett v. Henderson*, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973). Because we conclude that the performance of McDermott's counsel in advising him regarding the guilty plea was not constitutionally deficient, it follows that the plea was made knowingly, intelligently, and voluntarily.

CONCLUSION

Finding no error in the denial of postconviction relief, we affirm the judgment of the district court for Seward County.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JACK E. HARRIS, APPELLANT.
677 N.W.2d 147

Filed April 9, 2004. No. S-03-384.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that 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 of the lower court's decision.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
4. **Postconviction: Final Orders.** An order granting an evidentiary hearing on some issues and denying a hearing on others is a final order because a postconviction proceeding is a special proceeding.
5. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
6. **Postconviction: Proof: Appeal and Error.** The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
7. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal.
8. **Trial: Appeal and Error.** When an issue has not been raised or ruled on at the trial level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
9. **Prosecutorial Misconduct: Case Disapproved: Appeal and Error.** To the extent *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989), states that the issue of prosecutorial misconduct can be raised only on direct appeal, it is disapproved.
10. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by lawyers employed by the same office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Jack E. Harris appeals the district court's order denying him an evidentiary hearing on some of the issues he raised in a motion for postconviction relief. We determine that Harris is entitled to an evidentiary hearing regarding alleged prosecutorial misconduct concerning whether the prosecutor delivered a report to defense counsel. We also determine that Harris is entitled to a hearing about ineffective assistance of counsel concerning the report. We determine that he is not entitled to a hearing on the other issues raised. We affirm in part, and in part reverse and remand for further proceedings.

I. BACKGROUND

Harris was convicted of first degree murder and use of a deadly weapon to commit a felony. We affirmed on appeal. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). The following facts were described in *Harris*:

During the summer of 1995, Harris sold a green convertible automobile to Anthony Jones, an Omaha drug dealer. During the same summer, Harris was allegedly introduced to Howard "Homicide" Hicks through a mutual acquaintance, Corey Bass. On August 23, 1995, Jones was found dead inside his apartment. The cause of death was a gunshot wound to the head.

In 1996, Harris was incarcerated in the Douglas County Correctional Facility. Lee Warren and Tony Bass, Corey Bass' brother, were also inmates of the Douglas County Correctional Facility at that time. On December 8, 1996, Corey Bass was murdered. Tony Bass assisted authorities in investigating Corey Bass'

murder. During that investigation, Tony Bass told police that while in jail, Harris told him that Harris had been involved in the murder of Jones. According to Tony Bass, Harris said that Jones had been murdered by Harris and someone named "Homicide."

In February 1997, police investigating Jones' murder spoke to Warren. Warren told police that Harris had spoken to him about Jones' murder and had told him that Jones was killed because he recognized Harris while Harris was robbing Jones.

In May 1997, police arrested Hicks for the murder of Jones. Hicks confessed and said that he and Harris had planned to rob Jones. Hicks said that Harris had killed Jones when Jones recognized Harris during the robbery.

Harris was charged with murder in the first degree and use of a deadly weapon to commit a felony. After Harris' first trial ended in a mistrial, Harris was retried. Tony Bass, Warren, and Hicks testified at trial substantially in accord with the statements described above, as did Robert Paylor, another witness who claimed that Harris told him about the murder of Jones.

During trial, Leland Cass, an Omaha police detective, testified about an interview between himself and Harris in which Harris identified Hicks by the nickname "Homicide." Thus, Cass' testimony provided direct statements from Harris showing that he knew Hicks. On cross-examination, Cass stated that the information came from a December 10, 1996, interview report that he prepared (Cass report).

Harris objected to Cass' testimony and moved for a mistrial, arguing that he was entitled to a hearing on whether his statements were voluntary. At a hearing outside the presence of the jury, Harris presented evidence that the statements were made after he was promised they would not be used against him as part of a proffer agreement with the federal government and that the prosecutor was aware of that fact. Harris' attorney, who was not under oath, stated that he had not seen the Cass report before trial. According to Harris, part of his defense was that Harris and Hicks did not know each other and that Hicks was making up the story.

In response, the prosecutor, who also was not under oath, stated that she received two boxes of police reports and had a law clerk forward copies to defense counsel. The law clerk who made the copies did not testify. The prosecutor stated that she

believed the Cass report had been given to the defense because she found it in a box that had been separated by the law clerk and copied.

The trial judge stated that he would not resolve a "he said, she said" discovery dispute. The court determined that Harris had not made a showing that he was not given the Cass report of December 10, 1996, and thus denied a hearing on whether the statements were voluntary because the motion was untimely. The court also disagreed with Harris' argument that his defense claimed that Hicks and Harris had never met.

Harris was convicted of murder in the first degree and use of a deadly weapon to commit a felony. He was sentenced to consecutive sentences of life imprisonment on the murder charge and 10 to 20 years' imprisonment on the weapons charge. Harris appealed, arguing in part that the district court erred by (1) failing to grant a hearing about whether the statements were voluntary, (2) failing to grant a mistrial for the prosecutor's violation of a discovery order, and (3) allowing evidence of other bad acts or crimes in violation on Neb. Rev. Stat. § 27-404(2) (Reissue 1995). Harris was represented by the same counsel at trial and on direct appeal.

On appeal, we determined that the court did not abuse its discretion in determining that Harris' motion for a hearing about his statement was untimely. In reaching this determination, we stated:

> The district court was confronted with essentially a "he said, she said" scenario, as the prosecutor stated that Cass' police report regarding the December 10, 1996, interview had been provided to the defense, while defense counsel claimed that the defense had not received the report. Given the record before us, we have no basis to find that the district court abused its discretion in concluding that Harris' showing of surprise was insufficient, particularly given the court's greater familiarity with the course of the proceedings.
>
> We are not in a position to question the veracity of either the prosecution or defense on their contradictory claims regarding the process of discovery. It is possible that the prosecution overlooked the police report of the December 10, 1996, interview and failed to provide it to the defense, and it is equally possible that the defense either misplaced or

> failed to appreciate the significance of the report once it was received. Given the absence of dispositive proof, we cannot conclude that the district court abused its discretion.

State v. Harris, 263 Neb. 331, 337, 640 N.W.2d 24, 32 (2002).

Addressing the alleged discovery violation, we stated that assuming, without deciding, that the Cass report was within the scope of the discovery order, the court did not abuse its discretion when it determined that Harris failed to show that the Cass report was not provided to defense counsel. We also stated that Harris failed to seek a continuance to cure any prejudice caused by the belated disclosure of evidence.

Concerning evidence of prior bad acts, we held that Harris' counsel either failed to object or did not properly object. In each case, however, we also stated that had an objection been properly preserved, it would have been without merit. See *Harris, supra* (providing details of testimony).

II. POSTCONVICTION MOTION

Harris moved for postconviction relief. The court granted an evidentiary hearing on some of the issues raised in the motion. The court did not grant a hearing, however, on the following allegations: (1) Harris' convictions were obtained as the result of prosecutorial misconduct in violation of the Due Process Clauses of the U.S. and Nebraska Constitutions; (2) his counsel was ineffective when he failed to file motions to suppress the December 10, 1996, statements, failed to review the Cass report if it was received, and failed to obtain a proper discovery order if it was not received; (3) his appellate counsel was ineffective by failing to raise issues of prosecutorial misconduct and ineffective assistance of counsel, and by representing him both at trial and on appeal; (4) his counsel was ineffective when he failed to properly object to improper testimony under § 27-404.

The district court found that prosecutorial misconduct was an issue that could have been properly raised on direct appeal and would not be considered on postconviction. The court next found that any issues concerning the Cass report, including any failure of appellate counsel to raise the issue of prosecutorial misconduct on appeal, had been determined on direct appeal. In the alternative, the court concluded that whether Harris knew Hicks' nickname

was innocuous and did not injure his defense. The court further determined that even if Harris' counsel had objected to testimony about prior bad acts, the objections would have been without merit. Finally, the court determined that Harris' counsel was not ineffective merely because the same counsel represented Harris both at trial and on appeal. Accordingly, the court denied an evidentiary hearing on those issues. The court granted a hearing on other issues raised in the postconviction motion. Harris appeals.

III. ASSIGNMENTS OF ERROR

Harris assigns that the district court erred by denying an evidentiary hearing on (1) factual issues involving prosecutorial misconduct, (2) ineffective assistance of counsel for failure to properly move to suppress the Cass report and failure to properly object to inadmissible evidence, and (3) ineffective assistance of appellate counsel.

IV. STANDARD OF REVIEW

[1] A jurisdictional question that 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 of the lower court's decision. *Rath v. City of Sutton, ante* p. 265, 673 N.W.2d 869 (2004).

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).

V. ANALYSIS

1. JURISDICTION

In his brief, Harris notes a jurisdictional issue involving whether an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order in the light of Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2002) (addressing multiple claims for relief and multiple parties). The State does not argue that jurisdiction is lacking.

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues

presented by a case. *Pennfield Oil Co. v. Winstrom, ante* p. 288, 673 N.W.2d 558 (2004). Section § 25-1315 provides in part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Section 25-1315 requires an express determination by the trial court that no just reason exists for delay and an express direction for the entry of judgment in order to create a final order for appeal when less than all claims have been decided. However, the adoption of § 25-1315 does not change the fact that an order in a special proceeding affecting a substantial right is also a final order that may be appealed. See, e.g., *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

[4] Before the enactment of § 25-1315, we held that an order granting an evidentiary hearing on some issues and denying a hearing on others was a final order because a postconviction proceeding is a special proceeding. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). The enactment of § 25-1315 does not change the conclusion reached in *Silvers*. Accordingly, we determine that we have jurisdiction over this appeal.

2. Prosecutorial Misconduct

Harris contends that the district court should have granted an evidentiary hearing on allegations of prosecutorial misconduct that he could not have raised on direct appeal. He contends that he was denied a fair trial because the prosecutor failed to deliver the Cass report to his defense counsel before trial, thus

preventing his counsel from raising issues about the admissibility of Harris' statements. Relying on *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989), the State argues that prosecutorial misconduct must always be raised on direct appeal or it is waived. In the alternative, the State argues that the issues were addressed on direct appeal.

[5,6] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

[7,8] We have regularly held that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal. See, e.g., *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003). However, when an issue has not been raised or ruled on at the trial level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. See *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995).

In *Threet, supra*, it was alleged in a postconviction motion that a prosecutor's derogatory remarks during closing arguments resulted in prosecutorial misconduct. We concluded that the postconviction motion failed to set out facts and only alleged conclusions. We then additionally stated in dicta that "allegations of prosecutorial misconduct are proper subjects for a direct appeal, not a postconviction hearing, and in the absence of a direct appeal, the issue will not be considered in this hearing." *Id.* at 811-12, 438 N.W.2d at 748. We have held in other cases that an allegation of prosecutorial misconduct was barred in a postconviction action when the issues were known at the time of trial and were not raised on direct appeal. See, e.g., *Ortiz, supra*. We have also barred prosecutorial misconduct claims that were raised and rejected on direct appeal. See *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

[9] In many, if not most instances, a claim of prosecutorial misconduct would appropriately be raised on direct appeal. For example, allegations such as those in *Threet* about a prosecutor's statements will be in the record providing the facts necessary for a determination on direct appeal. However, when a determination of misconduct would require an evidentiary hearing that could not be conducted during trial, a defendant cannot properly present the issue on direct appeal. In such a limited case, a defendant is entitled to an evidentiary hearing on the matter if he or she has alleged facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. To the extent *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989), states otherwise, it is disapproved.

Here, although Harris did not specifically raise prosecutorial misconduct on direct appeal, we noted in *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002), that the record was insufficient to conclude the district court abused its discretion when it determined there was no violation of a discovery order. We specifically noted that the case involved a "he said, she said" situation. *Id.* at 337, 640 N.W.2d at 32. Most important, a full evidentiary hearing about prosecutorial misconduct would have been unworkable at the trial level because the attorneys involved could not act as sworn witnesses to provide the testimony necessary to determine the matter. See *State ex rel. NSBA v Neumeister*, 234 Neb. 47, 449 N.W.2d 17 (1989) (describing advocate-witness rule in Nebraska). Thus, Harris is not barred from raising prosecutorial misconduct on postconviction.

The State contends, however, that Harris has not shown how any failure of the prosecutor to deliver the Cass report resulted in prejudice to his defense. The State argues that any statement that Harris knew Hicks' nickname of "Homicide" was innocuous because Harris' defense was that he was not present at the shooting, and it made no difference if he knew who Hicks was. Harris, however, contends that part of his defense theory was that Hicks was lying and had never met Harris before the murder. Thus, he argues he was prejudiced by allowance of the Cass report and testimony into evidence.

The record contains some support for Harris' argument. The prevailing theory of Harris' case was that Hicks was lying. Although there was little focus on whether the two knew each other before the murder, on cross-examination of Hicks, Harris' attorney asked questions to indicate that Hicks did not know Harris at the time of the crime. For example, Harris' attorney asked whether anyone ever saw Hicks and Harris together and asked questions about a pager that one allegedly gave to the other. Hicks could not provide names of any people who ever saw him and Harris together and did not know the pager number. Harris' attorney also argued these points in closing. We conclude that Harris has alleged facts to support an allegation that he was prejudiced by any misconduct that occurred. We determine that Harris is entitled to an evidentiary hearing on the issue of prosecutorial misconduct. Whether any misconduct occurred or whether he was prejudiced by any misconduct is best determined at an evidentiary hearing.

3. Ineffective Assistance of Counsel

(a) Cass Report

Harris contends that if the report was properly delivered, his counsel was ineffective for failing to timely request a hearing about whether Harris' statements were voluntary. In the alternative, he argues that if the report was not delivered, his counsel was ineffective because he failed to draft a proper discovery order. The district court did not grant a hearing because it determined that all issues about the Cass report had been addressed on direct appeal.

[10] When a defendant was represented both at trial and on direct appeal by lawyers employed by the same office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief. See *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002).

Harris had the same attorney at trial and on direct appeal. Further, this court did not determine any ineffective assistance of counsel issues about the report on direct appeal. We conclude that Harris is entitled to an evidentiary hearing on the issue of ineffective assistance of counsel concerning the delivery of the Cass report.

(b) Failure to Object to Testimony From Cass About Statements of Tony Bass

Harris argues that a hearing is needed to determine whether his counsel was ineffective when he did not object to hearsay evidence from Cass about statements from Tony Bass. Cass testified, without objection, that Bass told him that Harris said that Jones was bound, the location of the gunshot wound, the purpose of the crime, and other details of the murder. There was no objection. Tony Bass testified at trial and repeated the statements.

The court concluded that the statements were hearsay, but that the testimony was cumulative to Tony Bass' own testimony, and thus harmless. We agree and find Harris' arguments to be without merit. See *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001).

(c) Failure to Object to Testimony From Cass About Statements of Harris

Harris argues that his counsel was ineffective for failing to object to hearsay evidence from Cass about statements made by Harris. The district court concluded that the first statement, involving a denial that Harris knew various people, was hearsay, but not prejudicial. Concerning the other statements, the court found either that Harris' attorney properly objected or that Cass was not repeating statements made by Hicks. Without deciding whether the statements were hearsay, we agree with the reasoning of the district court that the statements were not prejudicial. Accordingly we find Harris' argument on this issue to be without merit.

(d) Failure to Object to Statements From Warren, Robert Sklenar, Tony Bass, and Paylor

Harris contends that he is entitled to an evidentiary hearing because (1) Warren stated without objection that for his personal safety, he would get to move to another state while on parole; (2) Robert Sklenar, an Omaha police detective, testified that he spoke to Harris about "this case and another case," and no § 27-404(2) objection was made; (3) Bass testified without objection that Harris told him about the murder and "other things" such as drug dealing by Bass; and (4) Paylor, who allegedly had been shot by Harris in the past, testified without proper objection that he met

with Harris so Harris could "let [Paylor] know" who had shot Paylor.

On direct appeal, we determined that even if a proper objection would have been made to the testimony, no basis exists for reversal on each of the above issues. We apply the same reasoning and conclude that Harris is not entitled to an evidentiary hearing on this issue. See *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

4. Ineffective Assistance of Counsel on Direct Appeal

Harris argues that his appellate counsel was ineffective in failing to raise issues of prosecutorial misconduct on direct appeal and had a conflict of interest in serving as both trial and appellate counsel. Harris will receive an evidentiary hearing on the issue of prosecutorial misconduct. We find no merit in Harris' argument about a conflict of interest and determine, as we did on direct appeal, that arguments about a failure to object to statements lack merit. We determine that this assignment of error is without merit.

VI. CONCLUSION

We determine that Harris is entitled to an evidentiary hearing on issues about prosecutorial misconduct concerning delivery of the Cass report. He is also entitled to a hearing about ineffective assistance of counsel concerning the report. We determine that he is not entitled to a hearing on the other issues raised.

Affirmed in part, and in part reversed and remanded for further proceedings.

State of Nebraska, appellee, v.
James Lowe, appellant.
677 N.W.2d 178

Filed April 9, 2004. No. S-03-445.

1. **Juries: Discrimination: Appeal and Error.** A trial court's determination of whether a party has established purposeful discrimination in jury selection is a finding of fact and is entitled to appropriate deference from an appellate court because such a finding will largely turn on evaluation of credibility. The trial court's determination that there was no purposeful discrimination in the party's use of his or her peremptory

challenges is a factual determination which an appellate court will reverse only if clearly erroneous.

2. ____: ____: ____. A trial court's determination of the adequacy of a party's "neutral explanation" of its peremptory challenges will not be reversed on appeal unless clearly erroneous.
3. **Judgments: Appeal and Error.** An appellate court decides a question of law independently of the conclusion reached by the trial court.
4. **Juries: Discrimination: Prosecuting Attorneys: Proof.** In order to show that a prosecutor has used peremptory challenges in a racially discriminatory manner, a defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. If the requisite showing has been made, the prosecutor must then articulate a race-neutral explanation for striking the juror in question. Finally, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination.
5. ____: ____: ____: ____. During the jury selection process, with regard to the burden on the prosecution to come forward with a gender-neutral explanation, the second step of the test in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), does not demand an explanation that is persuasive, or even plausible. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed gender neutral. The gender-neutral explanation need not rise to the level of a "for cause" challenge; rather, it merely must be based on a juror characteristic other than gender.
6. **Juries: Discrimination: Prosecuting Attorneys: Moot Question.** Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.
7. **Constitutional Law: Trial: Appeal and Error.** There are two types of constitutional infirmities: trial errors and structural errors.
8. **Trial: Appeal and Error.** Structural errors are those errors so affecting the framework within which the trial proceeds, that they demand automatic reversal.
9. ____: ____. A *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), violation is a structural error not subject to harmless error review.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Reversed and remanded for a new trial.

David B. Eubanks, of Pahlke, Smith, Snyder, Petitt & Eubanks, G.P., for appellant.

Jon Bruning, Attorney General, Susan J. Gustafson, and Erin E. Leuenberger, Senior Certified Law Student, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

In his appeal from a criminal conviction, James Lowe contends that the trial court erred when it rejected his claim of discrimination in the use of a peremptory challenge employed by the prosecution. Lowe claims that several male jurors were struck from the venire because of gender in violation of the Equal Protection Clause of the U.S. Constitution.

BACKGROUND

An information was filed in this case on December 18, 2002, charging Lowe with sexual assault of a child, a Class IIIA felony, pursuant to Neb. Rev. Stat. § 28-320.01(2) (Cum. Supp. 2002). The case proceeded to trial, and jury selection began on March 12, 2003. After voir dire was completed but before the jury was sworn, Lowe made a motion pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), outside the presence of the jury. Lowe asserted that the State had exercised all six of its peremptory challenges—all of them striking males. The trial court asked the prosecution to provide a gender-neutral reason for striking the six jurors in question. The prosecution responded as follows:

> Well, Your Honor, I think it's important to have a mix, I don't want all men or all women and basically there's a majority of men on the jury the way it is and I think you need to have some women on a jury on a case like this who bring a different sort of experience into the jury room than just having men. Oftentimes women in our society do provide a lot of the child caretaking and I think that's a legitimate reason for the State to try to have some women on a panel. If I'd have struck women I'd almost have a 12 person panel here, it just happens to be that there seems to be more men on this mix of people than there are women and so that's the mix that are left, I think is a legitimate mix for a 12 person jury.

Lowe's attorney responded, stating:

> Well, Judge, I don't know under Batson if that qualifies as an explanation for neutral striking of exclusively men to the exclusion of females. And essentially what I hear [the

> prosecutor] saying is, yeah, I wanted to get off as many men as I could so I can get as many women on the jury and that's not neutral, that isn't neutral gender obviously.

The trial court thereafter overruled Lowe's motion, stating:

> We'll, here's what it seems to me and I rule with probably not a lot of background on this because it has not come up but the idea of Batson and cases that extended Batson to other areas were allegations of denial of equal protection and so we end up with a jury of five of one gender and 7 of another. I can't see that that would be a violation of the equal protection.
>
> And in reviewing the strikes, the State struck [males] but, on the other hand, all of the defense strikes, the ones that were taken were all [females] and, again, we end up with a fairly equal blend of males and women which from my perspective anyway would not deny equal protection. In fact, if anything, it would comport to equal protection of having that type of a mix.

A review of the record reveals that the jury list for February and March 2003 consisted of 30 males and 30 females. Of those venirepersons appearing on the general jury list, 29 were assigned to the jury list in this case, 15 of which were males and 14 females. The record confirms that 6 females and 6 males were impaneled and sworn in this matter. The record does not contain a transcript or otherwise reveal the nature of the questions posed to members of the jury panel during voir dire.

Following a jury trial, Lowe was found guilty and sentenced to probation. Lowe appeals.

ASSIGNMENT OF ERROR

For his sole assignment of error, Lowe assigns, restated, that the trial court erred in overruling Lowe's *Batson* challenge which alleged that the State intentionally discriminated on the basis of gender in the jury selection process.

STANDARD OF REVIEW

[1] A trial court's determination of whether a party has established purposeful discrimination in jury selection is a finding of fact and is entitled to appropriate deference from an appellate

court because such a finding will largely turn on evaluation of credibility. The trial court's determination that there was no purposeful discrimination in the party's use of his or her peremptory challenges is a factual determination which an appellate court will reverse only if clearly erroneous. *Jacox v. Pegler*, 266 Neb. 410, 665 N.W.2d 607 (2003); *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993).

[2] A trial court's determination of the adequacy of a party's "neutral explanation" of its peremptory challenges will not be reversed on appeal unless clearly erroneous. *Jacox v. Pegler, supra*; *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

[3] An appellate court decides a question of law independently of the conclusion reached by the trial court. *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002).

ANALYSIS

APPLICATION OF *BATSON* TEST

In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the U.S. Supreme Court held that the Equal Protection Clause of the 14th Amendment forbids prosecutors from using peremptory challenges to strike potential jurors solely on account of their race. See, also, *Jacox v. Pegler, supra*. The Court extended this holding to gender-related discrimination in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). See, also, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). *J.E.B.* involved a suit for determination of paternity and child support. When the matter was called for trial, the trial court assembled a panel of 36 potential jurors, 12 males and 24 females. After the trial court excused three jurors for cause, the state then used 9 of its 10 peremptory challenges to remove male jurors. The petitioner used all but one of his strikes to remove female jurors. All of the remaining jurors were female. Before the jury was impaneled, the petitioner challenged the state's peremptory strikes on the ground that they were exercised against male jurors solely on the basis of gender in violation of the Equal Protection Clause of the 14th Amendment. The trial court rejected the petitioner's claim and impaneled the jury.

The U.S. Supreme Court held that it is axiomatic that intentional discrimination on the basis of gender in jury selection by

state actors violates the Equal Protection Clause. This is particularly so where the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women. *J.E.B. v. Alabama ex rel. T.B., supra.* The Court further stated that gender, like race, is an unconstitutional proxy for juror competence and impartiality. The Court noted that its decision and supporting rationale in *Hoyt v. Florida*, 368 U.S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961), in which the Court upheld a state statute exempting women from serving on juries on the ground that women, unlike men, occupied a unique position " 'as the center of home and family life,' " was later repudiated by the Court in *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 134.

In *J.E.B.*, the State of Alabama maintained that its decision to exercise its peremptory challenges to strike effectually all the males from the jury was

> "based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child."

511 U.S. at 137-38. The Court rejected this justification as embodying " 'the very stereotype the law condemns.' " 511 U.S. at 138.

The Court continued, holding that "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

[4] In *Jacox v. Pegler*, 266 Neb. 410, 665 N.W.2d 607 (2003), we applied the three-step process established in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), for evaluating whether a party has used peremptory challenges

in a racially discriminatory manner. We stated that the defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. If the requisite showing has been made, the prosecutor must then articulate a race-neutral explanation for striking the juror in question. Finally, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination. We apply this same three-step process for evaluating whether the prosecution in this case discriminated on the basis of gender in exercising all six of its peremptory challenges to strike males from the venire. See *J.E.B. v. Alabama ex rel. T.B., supra* (applying *Batson* three-step process to gender discrimination claims).

[5] With regard to the burden on the prosecution to come forward with a gender-neutral explanation, " '[t]he second step of [the *Batson* test] does not demand an explanation that is persuasive, or even plausible.' " *Jacox v. Pegler*, 266 Neb. at 414, 665 N.W.2d at 612. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed gender neutral. See *id.* (articulating this principle with respect to race discrimination). The gender-neutral explanation "need not rise to the level of a 'for cause' challenge; rather, it merely must be based on a juror characteristic other than gender." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 145.

[6] With respect to the first step of the *Batson* test, we note that the trial court did not issue written or oral findings or otherwise comment regarding whether Lowe met his prima facie burden of showing the prosecution engaged in gender discrimination in the exercise of its peremptory challenges. However, whether Lowe made a prima facie showing is a moot issue in this case. The prosecution, at the trial court's request, offered a purported gender-neutral explanation before the trial court commented on the sufficiency of Lowe's prima facie showing. We noted in *Jacox* that " '[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.' " *Jacox v. Pegler*, 266 Neb. at 416, 665 N.W.2d at 613 (quoting *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)). Accordingly, because the

prosecution offered a purported gender-neutral explanation, we do not comment on the adequacy of Lowe's prima facie showing of discrimination.

In this case, the trial court's application of a harmless error analysis presumes the court found that the prosecution engaged in gender-based discrimination in exercising all six of its peremptory strikes to exclude males from the venire. The trial court, however, did not expressly find that the prosecution failed to offer a gender-neutral reason for its peremptory challenges or that the explanation, while gender-neutral, was a pretext. Thus, we must independently determine whether the trial court's belief, implicit in its ruling, that the prosecution engaged in gender-based discrimination is supported in law. See *State v. Gamez-Lira*, 264 Neb. 96, 645 N.W.2d 562 (2002) (where record adequately demonstrates that decision of trial court is correct, although such correctness is based on ground or reason different from that assigned by trial court, appellate court will affirm). In so doing, we review the trial court's decision under a clearly erroneous standard. *Jacox v. Pegler*, 266 Neb. 410, 665 N.W.2d 607 (2003).

The State contends, under the second step of the *Batson* test, that the prosecution provided a gender-neutral explanation for striking the jurors in question. At the *Batson* hearing, the prosecution explained that its purpose for using its peremptory strikes in the manner in question was not to remove all of the males from the jury, but was to have a mixture of both males and females on the final jury panel. The prosecution told the court that if it would have struck female jurors, the overwhelming majority of the final jury panel would have been males. The prosecution stated that it was important to have a mix of females and males on this jury.

The U.S. Supreme Court, in *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975), rejected the State of Louisiana's purported facially neutral desire to achieve gender balance in the final jury panel. In *Taylor*, a case in which a Louisiana law excluding women from jury service was declared unconstitutional, the Court held that a jury must be drawn from venires representative of the community. As such, the Court stated, women as a class could no longer be excluded. *Id.* In so holding, the Court emphasized that "in holding that petit juries must be drawn from a source fairly representative of the

community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition." 419 U.S. at 538.

The State further argues that the prosecution also expressed at the *Batson* hearing the importance in this case of having females on the jury because of the "child caretaking" experience females often possess. The State's explanation for exercising its peremptory strikes in the manner in question is anything but gender neutral. It invokes the very "invidious, archaic, and overbroad stereotypes about the relative abilities of men and women" that the U.S. Supreme Court rejected in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

Indeed, in *J.E.B.*, the U.S. Supreme Court expressly recognized its repudiation of the rationale it had previously relied upon to uphold state statutes exempting women from serving on juries on the ground that women, unlike men, occupied a unique position " 'as the center of home and family life.' " *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 134. In the present case, the State's explanation regarding the relative child caretaking experience of women is not too dissimilar from the explanation offered by the State of Louisiana and rejected by the Court in *J.E.B.* There, the state justified its decision to strike males from the jury in a paternity action because women might be more sympathetic and receptive to the arguments of the complaining witness who bore the child. *J.E.B. v. Alabama ex rel. T.B., supra.* The U.S. Supreme Court rejected this justification as embodying " 'the very stereotype the law condemns.' " 511 U.S. at 138. Here, the State's explanation that "[o]ftentimes women in our society do provide a lot of the child caretaking and I think that's a legitimate reason for the State to try to have some women on a panel" typifies the very stereotype rejected by the U.S. Supreme Court in *J.E.B.*

The Utah Court of Appeals, in *State v. Chatwin*, 58 P.3d 867 (Utah App. 2002), similarly rejected an explanation offered by the prosecution of achieving gender balance. In *Chatwin*, the prosecutor explained that he struck a male venireperson because he felt that " 'this jury would be better able to deliberate the evidence that I anticipate[d] presenting to it if [the jury was] balanced between men and women. I therefore made efforts to take

men off of the jury.' " 58 P.3d at 868. The trial court denied the defendant's challenge to the prosecutor's strike, finding the prosecutor sufficiently justified exercising the strike. Applying the U.S. Supreme Court's decision in *J.E.B. v. Alabama ex rel. T.B.*, *supra*, the Utah Court of Appeals reversed. The court of appeals addressed the state's argument that the prosecutor's intent was to seat a jury composed of a fair cross section of the community rather than to remove jurors based on gender. Citing *J.E.B.* and *Batson*, the court of appeals stated that "the Constitution does not guarantee either the State or a defendant a jury comprised of any specific gender balance or composition. . . . Rather, the Constitution guarantees only that every defendant will be tried by a jury whose members are selected pursuant to 'nondiscriminatory criteria.' " (Citations omitted.) *State v. Chatwin*, 58 P.3d at 872. The court determined that the prosecutor failed to provide a facially neutral explanation for its peremptory strike. The court held that dismissing a potential juror on the basis of gender in an attempt to achieve gender balance in the jury was discriminatory and in violation of the Equal Protection Clause.

Other jurisdictions have similarly concluded that exercising peremptory strikes in an attempt to achieve gender balance in the final jury panel constitutes a gender discriminatory motivation. See, *U.S. v. Tokars*, 95 F.3d 1520 (11th Cir. 1996); *People v. Hudson*, 195 Ill. 2d 117, 745 N.E.2d 1246, 253 Ill. Dec. 712 (2001).

Based on the foregoing, we determine that the State failed to offer a gender-neutral explanation for using all six of its peremptory challenges to strike males. Accordingly, we need not address the third step under *Batson* and we conclude that the State improperly exercised all of its peremptory challenges on the basis of gender in violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. We turn now to a discussion of whether the trial court's decision to apply a harmless error analysis was proper.

Trial Error Versus Structural Error

During the hearing on the *Batson* motion, the trial court implicitly found that the prosecution engaged in gender discrimination in the exercise of its peremptory challenges. The trial court, applying a harmless error analysis, nonetheless overruled Lowe's

Batson motion, finding no equal protection violation because the final jury panel consisted of an equal number of males and females. We have never before addressed the issue of whether a harmless error analysis is appropriate in the context of a *Batson* challenge, and neither party has meaningfully addressed the issue in their respective briefs to this court. Accordingly, we must determine whether the trial court was correct to apply a harmless error analysis to a *Batson* challenge.

[7,8] In *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), we recognized two types of constitutional infirmities established and later refined by the U.S. Supreme Court in *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991): trial errors and structural errors. In *Bjorklund*, we noted the U.S. Supreme Court defined structural errors as those so " 'affecting the framework within which the trial proceeds,' that they demand automatic reversal." 258 Neb. at 504, 604 N.W.2d at 225. The Court in *Fulminante* defined trial errors as those " 'which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.' " *State v. Bjorklund*, 258 Neb. at 504, 604 N.W.2d at 225. We noted that the U.S. Supreme Court limited structural errors to a few very specific categories—total deprivation of counsel, trial before a judge who is not impartial, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial. We also observed that the Court listed several errors, many of constitutional magnitude, which are properly termed trial errors and subject to harmless error review. Among those listed were the denial of counsel at a preliminary hearing, the admission of a defendant's coerced statement, and a jury instruction containing an erroneous conclusive presumption.

The federal courts of appeals that have considered the question have generally treated *Batson* violations as structural and thus subject to per se reversal. See, *U.S. v. Serino*, 163 F.3d 91, 93 (1st Cir. 1998) (finding *Batson* violation and reversing "without proof of prejudice or proceeding to consider harmlessness"); *Tankleff v. Senkowski*, 135 F.3d 235, 248 (2d Cir. 1998) (holding that

"[b]ecause the effects of racial discrimination during voir dire 'may persist through the whole course of the trial proceedings,' " *Batson* challenge structural error "not subject to harmless error review"); *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992) (holding harmless error analysis inappropriate in cases involving discrimination in jury selection process); *U.S. v. Broussard*, 987 F.2d 215 (5th Cir. 1993) (declining to apply harmless error analysis to trial court's misapplication of *Batson* test), *abrogated on other grounds, J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994); *U.S. v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998) (finding *Batson* violation involves " 'structural error' " not subject to harmless error analysis); *Rosa v. Peters*, 36 F.3d 625 (7th Cir. 1994) (opining U.S. Supreme Court would not characterize *Batson* violation as trial error and concluding harmless error analysis inapplicable); *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995) (holding constitutional error involving *Batson* violation not subject to harmless error analysis); *U.S. v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996) (holding proper remedy for improper use of peremptory challenge under *Batson* is automatic reversal); *U.S. v. Thompson*, 827 F.2d 1254 (9th Cir. 1987) (finding harmless error inapplicable to *Batson* violation); *Davis v. Secretary for Dept. of Corrections*, 341 F.3d 1310 (11th Cir. 2003) (concluding harmless error review inapplicable in context of *Batson* violations); Pamela S. Karban, *Race, Rights, and Remedies in Criminal Adjudication*, 96 Mich. L. Rev. 2001 (1998).

In *Davis v. Secretary for Dept. of Corrections, supra*, the 11th Circuit observed that the U.S. Supreme Court has not yet suggested that discriminatory exclusion of prospective jurors is subject to harmless error review. The 11th Circuit noted, however, that the U.S. Supreme Court has on several occasions reversed convictions without first determining whether the improper exclusion of jurors made any difference in the outcome of the trial. For example, the 11th Circuit noted that in *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the U.S. Supreme Court reversed, and remanded based upon a finding that the defendant was wrongfully barred from raising a *Batson* claim. *Davis v. Secretary for Dept. of Corrections, supra.* In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the Court ordered that the defendant's conviction be reversed if

the defendant, on remand, was able to establish a prima facie case of discrimination and the state was unable to provide a neutral explanation for the challenged strikes. The Court has also required automatic reversal in a similar context of discrimination in the selection of members of a grand jury. *Batson v. Kentucky, supra* (citing *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986); *Rose v. Mitchell*, 443 U.S. 545, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979)).

The 11th Circuit further opined that the U.S. Supreme Court has expressly recognized that discrimination in the exercise of peremptory challenges harms not only the defendant's interests, but also the interests of jurors themselves in not being excluded improperly from jury service, as well as the interest of the community in the unbiased administration of justice. *Davis v. Secretary for Dept. of Corrections, supra* (citing *Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); *Powers v. Ohio, supra*; and *Batson v. Kentucky, supra*). The court stated that the doctrine of third party standing enables defendants to act on behalf of improperly excluded jurors by raising *Batson* claims in their stead, even when the defendant and the improperly excluded juror are not of the same race. *Davis v. Secretary for Dept. of Corrections, supra* (citing *Powers v. Ohio, supra*). The court further observed that a defendant is no more entitled to exercise peremptory strikes on a racially discriminatory basis than the prosecution. As such, the court maintained, the harm proscribed by *Batson* must redound to interests beyond the defendant's if it constrains the defendant's own selection of trial strategies. *Davis v. Secretary for Dept. of Corrections, supra* (citing *Georgia v. McCollum, supra*). Accordingly, the 11th Circuit concluded that a *Batson* violation warrants automatic reversal and is not subject to harmless error review.

The Eighth Circuit reached a similar conclusion in *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995). In *Ford*, the court concluded that a constitutional error involving the race-based exclusion of jurors infects the entire trial process itself and is, therefore, a structural error not subject to a harmless error analysis. The court stated:

> "A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation

> committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The *voir dire* phase of the trial represents the jurors' first introduction to the substantive factual and legal issues in a case. The influence of the *voir dire* process may persist through the whole course of the trial proceedings."

Ford v. Norris, 67 F.3d at 171. The Eighth Circuit concluded that when jurors are excluded solely because of racial considerations, the irregularity may pervade all the proceedings that follow.

In the instant case, the fact that an equal number of males and females appeared on the final jury panel is inapposite. The U.S. Supreme Court stated in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994), that it is irrelevant to the constitutionality of gender-based peremptory challenges that women, unlike African-Americans, are not in the numerical minority and therefore are likely to remain on the jury if each side uses its peremptory challenges in an equally discriminatory fashion. The Court stated:

> Because the right to nondiscriminatory jury selection procedures belongs to the potential jurors, as well as to the litigants, the possibility that members of both genders will get on the jury despite the intentional discrimination is beside the point. The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system.

511 U.S. at 142 n.13.

[9] We agree with the rationale of the federal circuit courts of appeals that have held that a *Batson* violation is a structural error not subject to harmless error review. Accordingly, we hold that the trial court erred in applying a harmless error analysis to Lowe's *Batson* challenge. It is of no consequence that the composition of the final jury panel in this case consisted of an equal number of men and women.

CONCLUSION

We conclude that the prosecution impermissibly exercised its peremptory challenges on the basis of gender in violation of the

Equal Protection Clause. Applying a structural error analysis, we reverse the decision of the trial court and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DANIEL J. THAYER, RESPONDENT.

677 N.W.2d 188

Filed April 9, 2004. No. S-03-1204.

Original action. Judgment of public reprimand.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

Respondent, Daniel J. Thayer, was admitted to the practice of law in the State of Nebraska on September 14, 1990, and at all times relevant hereto was engaged in the private practice of law in Grand Island, Nebraska. On October 23, 2003, formal charges were filed against respondent. The formal charges set forth two counts, including charges that the respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule), and DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997).

On February 25, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly did not challenge or contest the allegations that he violated DR 1-102(A)(1) and (5), as well as his oath of office as an attorney, and waived all proceedings against him in connection therewith in exchange for a public reprimand. Upon due consideration, the court approves the conditional admission and orders that respondent be publicly reprimanded.

FACTS

In summary, the formal charges allege that during the course of his representation of one client, respondent failed to manage his calendar, resulting in conflicting obligations for the same date and an inability to represent the client at certain case-related proceedings. The formal charges also allege that respondent failed to adequately review the client's billing statement, resulting in an inaccurate bill being sent to and paid by the client. The formal charges further allege that as to a second client, respondent improperly issued subpoenas under an incorrect case caption and failed to provide service and notice of the subpoenas to appropriate entities.

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly does not challenge or contest the essential relevant facts outlined in the formal charges and knowingly does not challenge or contest that he violated DR 1-102(A)(1) and (5), as well as his oath of office as an attorney. We further find that respondent waives all proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1) and (5), as well as his oath of office as an attorney, and that respondent should be and hereby is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ROGER L. HARRIS, RESPONDENT.

677 N.W.2d 145

Filed April 9, 2004. No. S-04-038.

Original action. Judgment of suspension.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

Respondent, Roger L. Harris, was admitted to the practice of law in the State of Nebraska on September 18, 1981, and at all times relevant hereto was engaged in the private practice of law in Beatrice, Nebraska. On January 9, 2004, formal charges were filed against respondent. The formal charges set forth two counts, including charges that the respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); DR 1-102(A)(6) (engaging in conduct adversely reflecting on fitness to practice law); and Canon 6, DR 6-101(A)(3) (neglecting legal matter), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997).

On March 10, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly did not challenge or contest the truth of the allegations that he violated DR 1-102(A)(1), (5), and (6), and DR 6-101(A)(3), as well as his oath of office as an attorney, and waived all proceedings against him in connection therewith in exchange for a 30-day suspension of his license to practice law. Upon due consideration, the court approves the conditional admission and orders that respondent be suspended from the practice of law in the State of Nebraska for 30 days.

FACTS

In summary, the formal charges allege that during the course of his representation of one client, respondent neglected to act to protect the client's interests in certain court and administrative proceedings. The formal charges further allege that as to a second client, respondent delayed in handling a legal matter for that client. Finally, the formal charges allege that respondent failed to respond fully to inquiries from the Counsel for Discipline's office regarding his handling of these clients' legal matters.

The conditional admission filed by respondent includes a "Declaration of the Counsel for Discipline." The declaration states in part that "respondent's misconduct as stipulated to herein, arose, in part, from his depression and not the intentional disregard or indifference of his clients' interests. [As a result of treatment, r]espondent's requested 30-day suspension of his license to practice law is appropriate under the facts of this case."

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval

> by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly does not challenge or contest the essential relevant facts outlined in the formal charges and knowingly does not challenge or contest that he violated DR 1-102(A)(1), (5), and (6), and DR 6-101(A)(3), as well as his oath of office as an attorney. We further find that respondent waives all proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1), (5), and (6), and DR 6-101(A)(3), as well as his oath of office as an attorney, and that respondent should be and hereby is suspended for a period of 30 days, effective immediately, after which time respondent may apply for reinstatement. Respondent shall comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

MARIA AGUALLO, APPELLANT AND CROSS-APPELLEE, V. CITY OF SCOTTSBLUFF, A POLITICAL SUBDIVISION, APPELLEE AND CROSS-APPELLANT.

678 N.W.2d 82

Filed April 16, 2004. No. S-02-879.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under 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 verdict, it must be considered in the light most favorable to the successful party.
2. **Trial: Negligence: Damages.** The purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis.
3. **Trial: Negligence: Damages: Proof.** Determining apportionment is solely a matter for the fact finder, and its action will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.
4. **Negligence: Liability: Invitor-Invitee: Proximate Cause: Proof.** In cases when a lawful visitor claims that he or she was injured by a condition on the owner or occupier's premises, the owner or occupier is subject to liability if the lawful visitor proves (1) the owner or occupier either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the owner or occupier should have expected that a lawful visitor 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 owner or occupier failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the lawful visitor.
5. **Negligence: Damages.** Comparative negligence abrogates the common-law concept of contributory negligence, thus relieving both parties of an all-or-nothing situation, and substitutes apportionment of the damages by fault.
6. ____: ____. A fact finder cannot properly compare a plaintiff's negligence to a defendant's negligence when it uses the incorrect standard of care for either party.
7. **Negligence: Damages: New Trial: Appeal and Error.** When a fact finder has used an incorrect standard of care in apportioning fault between a plaintiff and a defendant, the appropriate appellate remedy generally will be to remand for a new trial so that the fact finder can employ the correct standard in its apportionment analysis.
8. **Political Subdivisions Tort Claims Act: Liability.** In determining if the discretionary function exemption to the Political Subdivisions Tort Claims Act applies, a court must first consider whether the action is a matter of choice for the acting employee.
9. ____: ____. In determining if the discretionary function exemption to the Political Subdivisions Tort Claims Act applies, once a court has concluded that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exemption was designed to shield.
10. **Witnesses: Testimony.** The rule that a party who changes his or her testimony during litigation is bound by his or her earlier statements does not apply when the party's earlier statements are ambiguous.

11. **Political Subdivisions: Negligence.** While a political subdivision is not an insurer of a pedestrian's safety, it can be held liable if it should have reasonably anticipated that a hole or depression in a public way presented an unreasonable danger.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded for a new trial.

Maren Lynn Chaloupka and Robert Paul Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

Steven W. Olsen, of Simmons Olsen Law Firm, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The appellant, Maria Aguallo, injured both of her ankles when she fell in a parking lot owned by the City of Scottsbluff (City). Aguallo claims that the City's failure to perform proper maintenance caused the surface of the parking lot to become dangerously eroded. She further claims that her fall occurred when she stepped onto the eroded area. Following a bench trial, the court determined that the City and Aguallo were equally negligent and entered judgment for the City. We conclude that because the court used the wrong standard to evaluate the City's negligence, its comparison of the City's and Aguallo's negligence was flawed. Accordingly, we reverse, and remand for a new trial.

I. FACTUAL BACKGROUND

1. PARKING LOT AND AGUALLO'S FALL

After finishing work on the night of July 20, 1999, Aguallo walked to her car, which was parked in a city-owned parking lot. Aguallo's employer had instructed her and her coworkers to park their vehicles in the parking lot.

The parking lot has three rows of diagonal parking. Concrete tire barriers separate the first row from the second and the second row from the third. The barriers, which are wide enough for people to walk on, are 8 inches high. Aguallo had parked her car next to one of these barriers on the day of the accident. Photographs

show erosion in the area where the asphalt meets this parking barrier. The erosion ran the length of the parking barrier, and the width of the eroded area varied from 8 to 14 inches. The depth of the eroded area was disputed, but the court determined that it was "somewhat more than an inch deep and somewhat less than two inches deep." According to Aguallo, when she was returning to her car, she stepped down off the barrier and onto the edge of the eroded area, the uneven surface caused her ankle to twist, and she fell.

2. City's Knowledge of Eroded Area

The parties dispute whether the City should have known about the erosion at the time that Aguallo fell. City workers inspect the city-owned parking lots once each year after the freeze-and-thaw cycle to determine if any repairs need to be made. In addition to this inspection, the City relies on the workers who sweep, paint, and weed the parking lot to report conditions that might need maintenance.

Aguallo presented expert testimony from a civil engineer that the erosion would most likely have taken 2 to 3 years to develop. Thus, according to Aguallo, the City, employing its normal inspection routine, would have had ample opportunity to discover and repair the eroded area in the parking lot before her fall.

The City presented testimony from its transportation supervisor, who has experience with asphalt erosion. He claimed that the 1998-99 freeze-and-thaw cycle caused cracking in the asphalt and that a heavy rain during a hailstorm on June 27, 1999, washed away the loosened asphalt, leaving behind the eroded area. The City further notes that it had no reasonable opportunity to discover the eroded area because the yearly inspection of the parking lot occurred in May 1999 and the only sweeping, painting, or weeding was done before the hailstorm.

3. Aguallo's Knowledge of Eroded Area

The parties also dispute whether Aguallo should have known about the eroded area when she fell. Before her fall, Aguallo had parked her vehicle in and walked through the parking lot several times during the previous 3 weeks. She testified, however, that up to the time of her fall, she had not noticed any defects in the surface of the parking lot other than a crack in one of the cement

parking barriers. She explained that when she walked through the parking lot, she was not generally "pinpointing anything."

Aguallo also claimed that she did not notice the eroded area before she stepped off the concrete barrier on the night of the accident. At the time, Aguallo was carrying materials which she had taken home from work. In addition, she testified that she looked down before she stepped, but that because of poor lighting in the parking lot, the eroded area was dark.

Several of Aguallo's coworkers also testified that the parking lot was poorly lit. However, a civil engineer who measured the lighting in the parking lot for the City testified that the lighting at the spot where Aguallo fell met the standards published by the Illuminating Engineering Society of North America.

II. PROCEDURAL BACKGROUND

Aguallo filed a petition under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997), alleging that the City's negligence had caused her injuries. In its amended answer, the City denied Aguallo's allegations and affirmatively alleged that Aguallo had been contributorily negligent. In addition, the City alleged that Aguallo's claim was based upon the performance or the failure to perform a discretionary function and that thus, the City was exempt from liability under the discretionary function exemption of the Political Subdivisions Tort Claims Act. See § 13-910(2).

After a bench trial, the court determined that the eroded area was a "hazard" which was "prone to cause injury" and that the City was negligent in failing to discover and repair the eroded area. But the court further determined that Aguallo was equally negligent in failing to notice the eroded area and to take proper precautions to avoid injury. Accordingly, the court entered judgment for the City. Following the denial of her motion for a new trial, Aguallo appealed.

III. ASSIGNMENTS OF ERROR

Aguallo assigns that the court erred in (1) finding that her negligence was equal to the City's negligence and (2) overruling her motion for a new trial.

On cross-appeal, the City assigns that the court erred in failing to find that (1) the City was not negligent, (2) the City was

exempt from liability under the discretionary function exemption of the Political Subdivisions Tort Claims Act, and (3) Aguallo's claims were too speculative to be actionable.

IV. STANDARD OF REVIEW

[1] In actions brought under 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 verdict, it must be considered in the light most favorable to the successful party. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

V. ANALYSIS

1. Comparative Negligence

[2,3] Aguallo assigns as error the court's determination that her negligence was equal to the City's. The purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis. *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000). Determining apportionment is solely a matter for the fact finder, and its action will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial. *Id.* But here, in determining that the City had been negligent, the court used the wrong standard of care. Our task is to determine how this affects our review of the trial court's apportionment decision.

(a) Specialized Standard of Care for Premises Liability Cases Involving Conditions on Premises

In *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), we abrogated the distinction between licensees and business invitees for premises liability cases. Before *Heins*, this court held that for a business invitee to recover from an owner or occupier for an injury caused by a condition on the owner or occupier's premises, it was not enough for the business invitee to show that his or her injuries were caused by the owner or occupier's failure to exercise the ordinary duty of reasonable care. Instead, we required the business invitee to prove that the owner or occupier had breached a specialized standard of care that included three

additional elements. Specifically, we required the business invitee to prove: *(1) the defendant 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 the 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 business invitee against the danger; and (5) the condition was a proximate cause of damage to the business invitee. See, *Derr v. Columbus Convention Ctr.*, 258 Neb. 537, 604 N.W.2d 414 (2000); *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995).

The language we used in *Heins* created some confusion whether, in addition to abrogating the distinction between business invitees and licensees, we had also eliminated the specialized standard of care for cases in which the plaintiff claimed an injury caused by a condition on the owner or occupier's premises. In *Heins*, we stated:

> Our holding does not mean that owners and occupiers of land are now insurers of their premises, nor do we intend for them to undergo burdens in maintaining such premises. We impose upon owners and occupiers only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. Among the factors to be considered in evaluating whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors will be (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.

Heins v. Webster County, 250 Neb. 750, 761, 552 N.W.2d 51, 57 (1996).

In *Herrera v. Fleming Cos.*, 10 Neb. App. 987, 641 N.W.2d 417 (2002), the Nebraska Court of Appeals construed the language in *Heins* as eliminating the specialized standard of care for cases in which a plaintiff claimed an injury caused by a condition on an owner or occupier's premises. According to the Court of Appeals, after *Heins*, a lawful visitor needed only to show that the owner or occupier failed to exercise reasonable care under all of the circumstances and that the failure to exercise reasonable care caused the lawful visitor injury. Whether the owner or occupier had exercised reasonable care was to be determined by evaluating the nonexhaustive list of factors set out in *Heins*.

[4] We reversed the Court of Appeals' *Herrera* decision, concluding that *Heins* had not "abrogate[d] the elements necessary to establish liability on the part of a possessor of land for injury caused to a lawful visitor by a condition on the land." *Herrera v. Fleming Cos.*, 265 Neb. 118, 122, 655 N.W.2d 378, 382 (2003). In other words, we reaffirmed our commitment to the specialized standard of care for the owner or occupier in cases when a lawful visitor claims that he or she was injured by a condition on the owner or occupier's premises. Thus, in such cases, the owner or occupier is subject to liability if the lawful visitor proves (1) the owner or occupier either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the owner or occupier should have expected that a lawful visitor 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 owner or occupier failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the lawful visitor. *Id.* The several factors described in *Heins* regarding reasonable care are to be considered under subsection (4) above. *Id.*

(b) Effect of Trial Court's Reliance on Court of Appeals' *Herrera* Decision

The trial court, when it decided this case, did not have the benefit of our decision overruling the Court of Appeals' *Herrera*

decision. As a result, it did not use the specialized standard of care for cases involving an injury caused by a condition on an owner or occupier's premises. We need to determine how this error affected the court's comparison of negligence.

[5] Comparative negligence abrogates the common-law concept of contributory negligence, thus relieving both parties of an all-or-nothing situation, and substitutes apportionment of the damages by fault. *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000). To compare fault, it is critical that the fact finder knows the correct standard of care for each party. For example, in some situations, like the one here, the law imposes a specialized standard of care on one party (e.g., the City), while imposing only the ordinary standard of reasonable care on the other (e.g., Aguallo). That the one party fell short of the specialized standard of care, while the other party failed to meet only the ordinary standard of reasonable care is a legitimate factor to be considered in apportioning fault. Further, another important factor to be considered in apportioning fault is "the extent to which [each person's risk-creating] conduct failed to meet the applicable legal standard." Restatement (Third) of Torts: Apportionment of Liability § 8, comment *c.* at 87 (2000). That party X deviated substantially from its standard of care while party Y's deviation was only slight suggests that X should shoulder a higher burden for the damage done. But it would be impossible for a fact finder to accurately gauge how far a party has deviated from its standard of care if the fact finder does not have the correct understanding of the party's standard of care.

[6,7] Given the importance of a correct understanding of each party's standard of care, we conclude that a fact finder cannot properly compare a plaintiff's negligence to a defendant's negligence when it uses the incorrect standard of care for either party. Cf. *Dever v. Goranflo*, 473 S.W.2d 131 (Ky. 1971). Thus, when a fact finder has used an incorrect standard of care in apportioning fault between a plaintiff and a defendant, the appropriate appellate remedy generally will be to remand for a new trial so that the fact finder can employ the correct standard in its apportionment analysis.

2. CITY'S CROSS-APPEAL

Because the trial court's comparative negligence analysis was flawed, the appropriate remedy for this case is to remand for a new trial unless the City can offer some reason why we should not do so. The City argues that remand is unnecessary for three reasons. First, it argues that it is immune from liability because the case falls within the discretionary function exemption of the Political Subdivisions Tort Claims Act. Second, the City argues that Aguallo made admissions in a pretrial deposition that makes her claim speculative. Third, the City argues that Aguallo cannot show that the City breached the specialized standard of care for injuries caused by a condition on its premises.

(a) Discretionary Function Exemption

The Political Subdivisions Tort Claims Act does not apply to "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused." § 13-910(2).

[8] A court engages in a two-step analysis to determine if the discretionary function exemption applies. First, the court must consider whether the action is a matter of choice for the acting employee. *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 591 N.W.2d 532 (1999). This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. *Id.*

[9] If the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exemption was designed to shield. *Id.* As we have explained,

> [t]he basis for the discretionary function exception was the desire to "'"'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'. . ."'" . . . The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. "'"In sum, the discretionary function exception insulates the Government from

> liability if the action challenged in the case involves the permissible exercise of policy judgment.' "

Id. at 417, 591 N.W.2d at 540 (quoting *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994)).

Here, the City contends that the erosion to the parking lot occurred 3 to 4 weeks before Aguallo's fall, when a hailstorm washed loosened asphalt out of the parking lot. The hailstorm caused widespread damage throughout the City. According to the City, it decided to shift its resources to cleanup and repair of the storm damage. The employees the City relied on to report erosion in the parking lot—i.e., weeding, painting, and sweeping crews—were shifted to the cleanup and repair operation. Thus, according to the City, its decision to forgo the ordinary maintenance routine for the parking lot resulted in its failure to discover and repair the damage to the parking lot.

The City's argument is dependent upon its theory that the erosion in the parking lot occurred because of the hailstorm. But this is not Aguallo's theory of the case. She contends that the damage to the parking lot occurred 2 to 3 years before her fall. Under Aguallo's theory, the City's failure to discover the erosion in the parking lot was not the result of a conscious policy decision. Rather, it was the result of the failure of the City employees who were responsible for discovering parking lot erosion to discover the eroded area despite repeated opportunities to do so.

Thus, whether the discretionary function exemption applies depends upon whether the hailstorm caused the erosion. If Aguallo's theory that the hailstorm did not cause the erosion is accepted, the first part of the test for the discretionary function exemption is not met because the conduct of the pertinent employees did not involve "a matter of choice." See *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. at 417, 591 N.W.2d at 540. But if the City's theory is accepted, then the conduct did involve a matter of choice and the question would become whether the decision of the City officials to forgo the usual inspections at the parking lot involved a judgment the discretionary exemption was meant to shield.

Whether the hailstorm caused the erosion to the parking lot is a question of fact. The court did not specifically address whether the discretionary function exemption applied because it resolved

this case on the comparative negligence issue. Some evidence in the record supports the City's interpretation that the hailstorm caused the erosion; other evidence supports Aguallo's theory that the erosion predated the hailstorm. Given the conflicting evidence, we decline the City's invitation to resolve the discretionary function exemption issue as a matter of law. Instead, the trial court can resolve the issue on remand.

(b) Aguallo's Alleged Admissions During Her Deposition

At trial, Aguallo testified that she fell when she stepped down from the parking barrier onto the edge of the eroded area. According to the City, however, during her deposition, Aguallo admitted that she did not know if she fell when she stepped onto the eroded edge of the parking lot. The City claims that it was possible that she had simply lost her balance when she first began to step down from the parking barrier. The City claims that Aguallo's deposition testimony is fatal to her case because it would require the fact finder to guess whether the City's failure to repair the eroded area had caused her to fall. See *Swoboda v. Mercer Mgmt. Co.*, 251 Neb. 347, 557 N.W.2d 629 (1997).

[10] A party who changes his or her testimony during litigation is bound by his or her earlier statements upon proof that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet exigencies of the pending case, and that there is no rational or sufficient explanation for the changes in testimony. *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003). The rule does not apply, however, when the party's earlier statements are ambiguous. Here, Aguallo's deposition testimony could be interpreted as the City suggests. Alternatively, it is possible to interpret her testimony to mean that the fall occurred when she stepped onto the eroded asphalt, but that she was unsure which way her ankle twisted as she fell. Thus, we refuse to treat Aguallo's deposition testimony as an admission that she was unsure what had caused her to fall.

(c) City's Negligence Under Specialized Standard of Care for Owners or Occupiers

To show that the City is liable for her injuries, Aguallo needed to show that (1) the City either created the condition, knew of the

condition, or by the exercise of reasonable care would have discovered the condition; (2) the City should have realized the condition involved an unreasonable risk of harm to Aguallo; (3) the City should have expected that a lawful visitor such as Aguallo either (a) would not discover or realize the danger or (b) would fail to protect herself against the danger; (4) the City failed to use reasonable care to protect Aguallo against the danger; and (5) the condition was a proximate cause of damage to Aguallo. Because the trial court was relying on the Court of Appeals' decision in *Herrera v. Fleming Cos.*, 10 Neb. App. 987, 641 N.W.2d 417 (2002), it did not consider the first three of these elements. The City asks us to determine as a matter of law that Aguallo failed to prove these three elements.

(i) City's Failure to Discover Erosion

First, the City claims that there is no evidence that it created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition. We agree that there is no evidence that the City either created or knew of the condition. Aguallo, however, presented evidence which, if believed, would have allowed a reasonable fact finder to determine that the erosion had existed for 2 to 3 years, but that the City's inspection process had failed to discover it. The City, as noted in our discussion of the discretionary function exemption, presented evidence suggesting the hailstorm had caused the erosion and that between the time of the hailstorm and the time of Aguallo's fall, the City did not have a reasonable opportunity to discover the erosion. The trial court, because it did not use the specialized standard of care, did not resolve this disputed factual question, and we decline to do so.

(ii) Unreasonable Risk of Harm

Next, the City claims that the erosion, as a matter of law, did not present an unreasonable risk of harm to Aguallo. The City relies on *Doht v. Village of Walthill*, 207 Neb. 377, 299 N.W.2d 177 (1980). In *Doht*, the plaintiff fell when she stepped on a raised portion of a sidewalk. The rise in the sidewalk was 1½ to 1¾ inches. The trial court entered judgment for the plaintiff. We reversed, concluding that the 1½- to 1¾-inch rise in the sidewalk

was such a minor irregularity that negligence could not be predicated upon it. *Id.*

[11] The City argues that, like *Doht*, this case involves only a slight hole or depression and that as a matter of law, we should conclude that it did not present an unreasonable risk of harm. But *Doht* does not state a per se rule that a political subdivision is automatically not liable for slight holes or depressions in public ways. See *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996). While a political subdivision is not an insurer of a pedestrian's safety, it can be held liable if it should have reasonably anticipated that a hole or depression presented an unreasonable danger. See, *id.*; *Doht v. Village of Walthill, supra.*

Here, the erosion was only 1 to 2 inches deep. But, unlike *Doht*, the erosion was at the bottom of an 8-inch-high parking barrier. A reasonable fact finder could conclude that because pedestrians would be forced to encounter the erosion as they stepped off the 8-inch-high parking barrier, the City should have reasonably anticipated that the hole or depression presented an unreasonable danger. Thus, we refuse to resolve the question as a matter of law.

(iii) Open and Obvious Danger

To show that the City breached its specialized standard of care, Aguallo also needed to show that the City should have expected that a lawful visitor such as Aguallo either (1) would not discover or realize the danger or (2) would fail to protect herself against the danger. The City argues that the court made an express ruling that Aguallo failed to prove this element of the specialized standard of care. It relies on the following comments made by the court after closing arguments:

> Now on the law, I don't agree with counsel for both parties that NJI 8.22 [i.e., the specialized standard of care] determines the law of this case because if it does, the plaintiff loses. There's no question that the plaintiff cannot prove the elements *because the plaintiff cannot prove that the defendant should have expected that a one-inch hole would be something that people would not discover or realize the danger.* It can't be proved. So if that was the standard, I think I would find — I know that I would find that the

> plaintiff didn't prove what they have to prove to show negligence, but I don't think 8.22 applies, I never have.

(Emphasis supplied.)

Generally, when the danger posed by a condition is open and obvious, the owner or occupier is not liable for harm caused by the condition. See *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982). However, "[d]espite the fact that the danger may be open and obvious or known, the possessor of the land may owe the duty if he should expect that the [lawful visitor] will fail to protect himself against the hazard." *Id.* at 222, 322 N.W.2d at 632. See, also, Restatement (Second) of Torts § 343 A (1965). As the comments to the Restatement explain:

> There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.
>
> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.

Restatement, *supra*, comment *f.* at 220. See *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989).

Assuming, without deciding, that the trial court's comments following the trial constitute findings of fact, the court's analysis of the open and obvious danger rule was incomplete. Although it determined that the danger was open and obvious, it did not decide whether the City should have anticipated that persons, such as Aguallo, would fail to protect themselves despite the open and obvious risk. Our case law requires this analysis. See, *Burns v. Veterans of Foreign Wars, supra*; *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988).

Further, the evidence presented at trial shows that whether the City should have anticipated that persons such as Aguallo would fail to protect themselves despite the open and obvious risk was a disputed question. Aguallo presented evidence showing that the lot was meant to provide parking for those shopping and working in downtown Scottsbluff. A reasonable fact finder could conclude that the City should have anticipated that the users of the parking lot would fail to protect themselves from the erosion because they might have forgotten about it while shopping or at work, or because they were distracted by items they were carrying. Cf., *Burns v. Veterans of Foreign Wars, supra*; Restatement, *supra*, illustration 4. In addition, the fall occurred at night and Aguallo presented evidence showing that the lighting in the parking lot was of questionable quality. Thus, a fact finder could also reasonably conclude that the City should have anticipated that persons using the parking lot would fail to protect themselves because the poor lighting did not illuminate the eroded area. Given that the trial court did not resolve whether the City should have anticipated that persons, such as Aguallo, would fail to protect themselves despite the open and obvious nature of the risk, we will not do so on appeal.

VI. CONCLUSION

We determine that the failure of the court to use the appropriate standard of care in determining the City was negligent rendered its comparison of negligence analysis invalid and entitles Aguallo to a new trial. On remand, Aguallo will have the burden to prove the five elements previously set out. If the court concludes that Aguallo has met her burden of proof on these five elements, then the City will have the burden to show that Aguallo was contributorily negligent.

REVERSED AND REMANDED FOR A NEW TRIAL.

HAMAKO I. HAMILTON, APPELLEE, V. DR. HAROLD R. BARES, APPELLANT.

678 N.W.2d 74

Filed April 16, 2004. No. S-02-1475.

1. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
2. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
3. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was a proximate cause of the plaintiff's alleged injuries.
4. **Negligence: Proximate Cause.** A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them.
5. **Malpractice: Physician and Patient: Proof: Proximate Cause.** Proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.
6. **Physicians and Surgeons: Health Care Providers: Informed Consent: Words and Phrases.** A physician's duty to obtain informed consent is measured by what information would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities.
7. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed and remanded for further proceedings.

Mark E. Novotny and Shun Lee Fong, of Lamson, Dugan & Murray, L.L.P., for appellant.

Mandy L. Strigenz and E. Terry Sibbernsen, of E. Terry Sibbernsen, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Hamako I. Hamilton brought this medical malpractice action against Dr. Harold R. Bares, alleging that she suffered damages resulting from Bares' treatment of her vision problems. The district court overruled motions for directed verdict made by both parties. The jury was unable to reach a verdict, and the court declared a mistrial. The court overruled Bares' motions for new trial and for judgment notwithstanding the verdict, and Bares appeals.

SCOPE OF REVIEW

[1] On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

[2] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003).

FACTS

In the summer of 1997, Hamilton sought medical attention for vision problems in her right eye. She consulted with Bares, an ophthalmologist practicing in Bellevue, Nebraska. Bares advised her that she required cataract surgery. Hamilton underwent such surgery on August 7. Bares reported that the surgery was successful and that she could expect a full recovery in approximately 6 weeks. At that time, she would be given a new prescription for eyeglasses.

Following surgery, Hamilton suffered from decreased visual clarity, abnormal drooping and closure of the eye, and excessive watering of the eye, for which Bares prescribed a pain reliever and

antibiotic eye drops. He took x rays of Hamilton's eye and advised her that there was bleeding surrounding the retina which caused the decreased vision and excessive watering and that the condition would improve over time. Bares told her that laser treatment to attempt to stop the bleeding would be risky and could cause further damage to her vision.

On January 30, 1998, Hamilton went to Bares for a followup appointment, at which time Bares performed a capsulotomy. In her petition, Hamilton alleged that her right eye became more distressed and that she had diminished visual ability after the capsulotomy. She also alleged that Bares performed the procedure without proper advance notice to her, denying her the opportunity to obtain a second opinion. Hamilton continued to see Bares until November 1998, when she sought alternative medical attention.

Hamilton brought suit in August 1999, asserting that Bares had breached his duty to her. She alleged that Bares had negligently failed to conduct an adequate examination of her right eye and failed to perform diagnostic tests on her eye. She claimed that Bares failed to note and treat an existing retinal problem, negligently performed the cataract surgery and capsulotomy, and failed to advise her of the risks to her retina during cataract surgery.

At trial, Dr. Frederick Mausolf, an ophthalmologist who practices in Lincoln, Nebraska, testified as an expert for Hamilton. Mausolf had examined Hamilton in November 1998 and observed that she had "severe surface wrinkling with fibrosis at the macula on the right side," meaning that the inner layer of the retina was wrinkled. Mausolf told her that the only treatment available was surgery to remove the membrane and smooth out the retina.

From his review of Hamilton's medical records, Mausolf noted that her vision was 20/60 prior to the cataract surgery and that it decreased dramatically after the surgery. He also noted that in 1995, Hamilton had been seen at the Offutt Air Force Base hospital, and the records indicated that she had "macular pucker secondary to retina ERM, epiretinal membrane," a condition where the surface of the retina is wrinkled. Mausolf testified that he saw no mention or diagnosis of epiretinal membrane in the medical records made by Bares.

Mausolf was asked whether he had an opinion within a reasonable degree of medical certainty as to whether Bares had

followed the standard of care required for an ophthalmologist practicing in Bellevue on August 1, 1997. Following a relevancy objection that was overruled, Mausolf gave his opinion that the epiretinal membrane was not seen, noted, or taken into account prior to the cataract surgery, and he opined that Hamilton "wasn't given proper informed consent regarding the epiretinal membrane in order to make an informed decision as to whether to proceed with the cataract surgery or not." Mausolf stated that the cataract was of enough clarity that the epiretinal membrane could have been seen.

Mausolf testified that Hamilton should have been informed that she had two problems causing visual loss, the cataract and the epiretinal membrane, and that removing the cataract alone would not compensate for the loss of vision due to the epiretinal membrane. He found no evidence in the records he reviewed to indicate that she was informed about the epiretinal membrane.

Mausolf was asked if, in his opinion, Bares had breached the standard of care for an ophthalmologist practicing in Bellevue based on his failure to provide Hamilton with sufficient information to permit her to make an informed decision whether to have the cataract surgery. Mausolf stated that "it was required of the doctor to do a complete examination to find out the possible causes for her visual loss." Mausolf opined that Hamilton should have been informed that her visual loss was "partially due to the epiretinal membrane disease and due to the cataract." This information could have been taken into consideration in deciding whether to have the cataract removed. Mausolf said he did not see in the records that Bares discussed with Hamilton any alternative methods of treatment.

Hamilton's visual acuity was 20/80 when Mausolf saw her in November 1998 and when he saw her again in June 2001. In September 2001, her visual acuity was 20/200. Mausolf stated to a reasonable degree of medical certainty that the cataract surgery aggravated Hamilton's preexisting epiretinal membrane condition and caused her vision to further decrease.

Dr. Ira Priluck, an ophthalmologist in Omaha, Nebraska, testified for Bares. Priluck specialized in retinal problems and performed retinal surgeries. Priluck said that Hamilton came to him for a second opinion concerning her retinal problem and that he

recommended additional surgery, but she refused. Priluck testified to a reasonable degree of medical certainty that he believed Bares met the standard of care in diagnosing the retinal problem before cataract surgery and in advising Hamilton as to the risks, complications, and benefits of the cataract surgery.

Priluck testified that many patients do not remember having given informed consent prior to eye surgery, an issue which he has studied and about which he has published articles. Priluck's studies showed that about 80 percent of the patients remembered being told about the positive aspects of the surgery, while almost 80 percent denied they were ever told about the possibility of a bad outcome. Priluck said that because Hamilton's macular problem existed previously, her diminished vision would not have been caused by Bares' failure to diagnose the epiretinal membrane prior to surgery or his failure to obtain informed consent.

Dr. Gerald Christensen, an ophthalmologist who also testified for Bares, said that he was familiar with the generally accepted standard of care for ophthalmologists in the Sarpy County area as to the diagnosis, treatment, and informed consent related to cataracts, macular problems, and epiretinal membranes. To a reasonable degree of probability or medical certainty, Christensen said he believed that Bares met the appropriate standard of care in advising Hamilton of her retinal problem prior to surgery and that Bares met the standard of care in advising Hamilton of the risks of cataract surgery prior to the procedure.

Both parties made motions for directed verdict during trial that were overruled by the district court. The motions were renewed at the close of all the evidence and were again overruled. The jury was unable to reach a verdict, and a mistrial was declared. Bares subsequently filed motions for new trial and for judgment notwithstanding the verdict. The motions were overruled, and Bares filed this appeal.

ASSIGNMENTS OF ERROR

Bares asserts that the district court erred in overruling his motions for directed verdict, for new trial, and for judgment notwithstanding the verdict.

ANALYSIS

We first note that we have jurisdiction over this appeal pursuant to Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2002), which authorizes an appeal from the denial of a judgment notwithstanding the verdict after the jury has been discharged as the result of an inability to reach a verdict. See *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000).

[3-5] In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was a proximate cause of the plaintiff's alleged injuries. *Neill v. Hemphill*, 258 Neb. 949, 607 N.W.2d 500 (2000). The plaintiff must prove each essential element of the claim asserted by a preponderance of the evidence. *Snyder v. Contemporary Obstetrics & Gyn., supra.* A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them. *Id.* Proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff. *Id.*

Bares argues that Hamilton did not prove that he deviated from the standard of care or that his actions were a proximate cause of the alleged injury to Hamilton. We have held that ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony. *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003). Thus, in order to meet the burden of proof, Hamilton was required to present expert testimony establishing that Bares did not meet the standard of care and that his actions proximately caused Hamilton's injury.

Because this case concerns informed consent, we first consider whether Mausolf's testimony was sufficient to demonstrate that Bares failed to obtain informed consent from Hamilton prior to the cataract surgery and, therefore, failed to meet the standard of care required in Bellevue.

Informed consent is defined in state law as follows:

> Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers

> engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

Neb. Rev. Stat. § 44-2816 (Reissue 1998).

The statute refers to the locality standard in two phrases: "in the locality or in similar localities" and "in the community or similar communities." *Id.* It is apparent that the Legislature intended that the question of the appropriate standard of care regarding informed consent could be addressed by physicians familiar with medical treatment in similar localities or communities, and not necessarily by only those physicians in the same locality or community in which the alleged malpractice occurred.

Bares asserts that although Mausolf testified that the standard of care regarding informed consent in Bellevue was not met, his opinion should be disregarded due to lack of foundation. Bares' objection to the opinion on the basis of relevance was overruled. Bares argues that Hamilton's expert, Mausolf, did not know the standard of care for informed consent in Bellevue because he practiced in Lincoln and that, therefore, Hamilton has not shown that Bares deviated from the standard of care in Bellevue.

We have previously addressed the standard of care for informed consent. In *Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992), this court noted that two theories have been developed concerning the extent of a physician's duty to disclose risks of a particular treatment or procedure: the "material risk theory" and the "professional theory." We held that the adoption of § 44-2816 committed the citizens of Nebraska to abide by the professional theory, " 'under which expert evidence is indispensable to establish what information would ordinarily be provided under the prevailing circumstances by physicians in the relevant and similar localities.' " *Eccleston v. Chait*, 241 Neb. at 968, 492 N.W.2d at 864, quoting *Smith v. Weaver*, 225 Neb. 569, 407 N.W.2d 174 (1987).

In *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997), Charles and Josephine Robinson proffered the testimony

of one expert regarding the issue of informed consent. The expert had no experience in Lincoln or anywhere else in Nebraska, and the trial court refused to allow the expert to testify. The Robinsons cited *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990), for the proposition that a medical expert from one medical community is competent to testify as an expert witness as to the standard of care or skill required in another community if the expert has knowledge of or familiarity with the practice and standard of the locality or a similar community. We stated that since the Robinsons' action was based upon a lack of informed consent, the locality standard was applicable and the rule set forth in *Capps* was not applicable. We concluded that the expert witness had no knowledge "with respect to the standard of informed consent in Lincoln on March 24, 1988," and that it was not an abuse of discretion for the district court to exclude his testimony. *Robinson v. Bleicher*, 251 Neb. at 760, 559 N.W.2d at 479.

Our decision in *Robinson* may be interpreted to be in conflict with § 44-2816. The comment to NJI2d Civ. 12.03 states that *Robinson* created a conflict with § 44-2816 and disagrees with previous cases that used a same-or-similar-locality standard. It goes on to state that the rule from *Robinson* provides that in an informed consent case, the standard of the reasonable medical practitioner is the prevailing standard of the locality in question, and not " 'the locality in question *or a similar or like community*,' " as provided in § 44-2816. See NJI2d Civ. 12.03 comment at 799.

More recently, this court considered the locality standard in *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003). Therein, we reviewed the evidence to determine whether the plaintiff had established by expert testimony the standard of care in North Platte, Nebraska, and similar communities for obtaining informed consent and whether there was sufficient evidence to establish that the physician had violated the standard.

In *Walls*, the plaintiff met with the physician in his office to discuss strabismus surgery on the plaintiff's left eye. During surgery, the physician found excessive scar tissue on the left eye and elected to adjust the muscles of the right eye instead. The patient subsequently experienced problems with the right eye and sued the physician for medical malpractice. The surgery was

conducted in North Platte, and at trial, an ophthalmologist from Scottsbluff, Nebraska, testified on behalf of the plaintiff. This witness testified that informed consent was required ethically " 'in our country.' " *Id.* at 688, 658 N.W.2d at 691. We found that this testimony established the standard of care in North Platte and similar communities.

[6] In order to resolve any perceived conflict among *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997); other informed consent cases; and § 44-2816, we hold that a physician's duty to obtain informed consent is measured by what information would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. This language mirrors the provisions of § 44-2816. To the extent that *Robinson* can be interpreted to conflict with § 44-2816 and the same-or-similar-locality standard regarding informed consent, that interpretation is disapproved.

In the case at bar, Bares' practice was in Bellevue. Hamilton's expert witness who testified as to the standard of care regarding informed consent was an ophthalmologist practicing in Lincoln. The witness testified that Bares had breached the standard of care for an ophthalmologist practicing in Bellevue based on his failure to provide Hamilton with sufficient information to permit her to make an informed decision regarding whether to have the cataract surgery. Therefore, Hamilton offered evidence concerning the standard of care in Bellevue.

Section 44-2816 specifies that the standard of care regarding informed consent is based on the practice of health care providers engaged in a similar practice in the locality or similar localities. We conclude that it is reasonable to infer that the cities of Bellevue and Lincoln are similar localities.

On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001). Assuming the truth of all relevant evidence which is favorable to Hamilton and giving

her the benefit of all proper inferences therefrom, we conclude that Mausolf's testimony was sufficient to show that Bares deviated from the generally recognized medical standard of care.

We must then consider whether Hamilton offered expert testimony that the deviation was a proximate cause of her alleged injury. See *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003). Mausolf stated that Hamilton's medical records showed that she was seen at the Offutt hospital in 1995, prior to the cataract surgery, and found to have "macular pucker secondary to retina ERM, epiretinal membrane," a condition where the surface of the retina is wrinkled. The cataract surgery was performed in August 1997. When Mausolf saw Hamilton in November 1998, her visual acuity was 20/80. In June 2001, it remained 20/80. By September 2001, her visual acuity was 20/200. Mausolf opined that the cataract surgery aggravated Hamilton's preexisting epiretinal membrane condition and caused her vision to further deteriorate. This evidence, if believed by the finder of fact, would satisfy Hamilton's burden to show that the cataract surgery was a proximate cause of her injury.

[7] Bares also claims that the district court should have granted his motion for a directed verdict at the close of all the evidence. In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003). A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Williams v. Allstate Indemnity Co.*, 266 Neb. 794, 669 N.W.2d 455 (2003). At the close of evidence, it was possible for reasonable minds to differ as to whether Hamilton had met the burden of proof to establish medical malpractice. Thus, the court did not abuse its discretion in failing to grant Bares' motion for directed verdict.

CONCLUSION

The district court did not abuse its discretion in failing to grant Bares' motions for directed verdict, for new trial, and for judgment notwithstanding the verdict. The judgment of the district court is affirmed, and the cause is remanded for further proceedings.

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. BYRON J. WEAVER, APPELLANT.

677 N.W.2d 502

Filed April 16, 2004. No. S-03-458.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
5. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
6. **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.
7. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
8. **Homicide: Jury Instructions: Circumstantial Evidence.** Ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence

is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter.

9. **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.
10. **Jury Instructions.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.
11. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
12. **Sentences.** In imposing a sentence, a 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.
13. ____. In considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
14. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Scott P. Helvie, and Shawn Elliott for appellant.

Jon Bruning, Attorney General, and Jeffrey J. Lux for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN, Chief Judge.

WRIGHT, J.

NATURE OF CASE

Byron J. Weaver was charged by information with first degree murder. After a trial, the jury returned a verdict finding Weaver guilty of the lesser-included offense of second degree murder. Weaver was sentenced to a term of 60 years to life in prison. We are presented with Weaver's direct appeal of this judgment and sentence.

SCOPE OF REVIEW

[1,2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). On a question of law, an appellate court is obligated to

reach a conclusion independent of the determination reached by the court below. *Id.*

[3] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003).

[4] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003).

[5] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003).

FACTS

Weaver was charged with first degree murder following the death of Marie Hall, his maternal grandmother. At the time of her death, Hall was 70 years old and living in an apartment in Lincoln, Nebraska. Hall had spoken with her son by telephone on the evening of August 6, 2001. The following morning, Hall failed to show up to perform some volunteer work. When a friend who volunteered with Hall tried to telephone her and Hall did not answer, the friend left a message on Hall's answering machine. The friend then attempted to contact Hall's daughter, leaving a message on her answering machine as well. Hall's daughter returned from a vacation on August 12 and was unable to contact Hall. She then drove to Lincoln from Nebraska City and discovered Hall's body.

The police found Hall's body in a closet in her apartment underneath a layer of blankets and pillows. The body was in a state of advanced decomposition. The police found no signs of forced entry. A newspaper dated August 6, 2001, which appeared

to have been read, was found in the apartment. Newspapers dated August 8 and 9 were found in the apartment but did not appear to have been read. Outside the door to the apartment, newspapers dated August 10, 11, and 12 were found in a stack. The police were unable to find Hall's car in the apartment's parking lot.

Dr. Patrick Keelan performed the autopsy on Hall's body. At trial, Keelan testified that in his opinion, Hall died as a result of asphyxiation by ligature strangulation. He estimated that she died 5 to 7 days before the autopsy.

Dr. Mathias Okoye issued the final autopsy report. This report indicated that Hall's death was the result of asphyxia by strangulation and that the manner of her death was homicide. At trial, Okoye reiterated his opinion as to the cause and manner of death.

Weaver was 20 years old in August 2001. He had moved back to Lincoln after living for more than a year in Wyoming. After returning to Lincoln, he had some contact with Hall.

At trial, Weaver testified as to his version of the events of August 7, 2001. That morning, Weaver was to begin work at a new job, and he was driven to the worksite by a friend. Upon arriving at the worksite, Weaver decided that he did not want to work that day, and he walked off the site. He then walked to Hall's apartment to inquire about temporarily staying with her.

Weaver stated that when he arrived at Hall's apartment complex, she did not respond to his request to be allowed inside the security door. Weaver said he then walked around to the back of Hall's apartment. When he looked through a glass door, he observed Hall lying face down in the apartment. The back door was open, so Weaver let himself into the apartment and turned Hall over, which caused blood to trickle from her mouth. He then unsuccessfully attempted to resuscitate Hall using CPR.

Weaver said that once it became clear Hall was dead, he thought about calling the 911 emergency dispatch service, but he panicked at the thought of potentially being a suspect in her death. He also decided against calling his father or paternal grandparents. Weaver testified that his thinking became "mixed" and "non-logical" and that he decided to try to put Hall "at rest." He placed her in a closet, a decision that he stated was "obviously a wrong or poor" one. According to Weaver, he arranged pillows and blankets around the body once he had placed it in the closet.

He said he locked the back door, grabbed Hall's purse, and left the apartment. Weaver took Hall's purse because he thought her car keys might be inside.

That night, Weaver and a friend drove Hall's car to a party in Lincoln and then set out toward Omaha. En route, Hall's car was involved in a one-vehicle accident. The car had to be towed due to the damage sustained in the accident. While completing an inventory of the car's contents, the police found Hall's purse. Weaver did not tell the police about the death of Hall. He later returned to Lincoln.

A few days later, the Lincoln Police Department learned that Hall's car was located in a Sarpy County tow lot. A shirt found in the car was stained with blood that matched Hall's DNA. On August 13, 2001, Weaver was interviewed by a Lincoln police officer, and Weaver said that he had not seen Hall for 1½ weeks. In an information filed in the Lancaster County District Court on October 9, Weaver was charged with first degree murder. He was arraigned on October 10 and entered a plea of not guilty.

At the conclusion of the trial, the jury was instructed that, depending on the evidence, it could find Weaver guilty of first degree murder, guilty of second degree murder, guilty of manslaughter, or not guilty. On January 31, 2003, the jury returned a verdict finding Weaver guilty of second degree murder. Weaver was sentenced to a term of 60 years to life in prison.

ASSIGNMENTS OF ERROR

Weaver assigns the following errors: (1) The district court erred in permitting the jury to consider the lesser-included offenses of second degree murder and manslaughter, (2) the court erred in the manner in which it instructed the jury on the material elements of second degree murder, (3) the court erred in the manner in which it instructed the jury on the definition of premeditation, (4) the evidence was not sufficient for the jury to find Weaver guilty of second degree murder, and (5) the court erred in imposing an excessive sentence.

ANALYSIS

Instruction on Lesser-Included Offenses

[6] Weaver argues that it was error for the district court to instruct the jury on the lesser-included offenses of second degree

murder and manslaughter. Whether jury instructions given by a trial court are correct is a question of law. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.* 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. *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003).

Neb. Rev. Stat. § 29-2027 (Supp. 2003) states in pertinent part: "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it is murder in the first or second degree or manslaughter . . . ." In *State v. Archbold*, 217 Neb. 345, 350, 350 N.W.2d 500, 504 (1984), we stated that "[w]hen a proper, factual basis is present, a court must instruct a jury on the degrees of criminal homicide, that is, the provisions of § 29-2027 are mandatory."

In the case at bar, Weaver asserts that the district court's instruction on second degree murder and manslaughter was erroneous. He first argues there was insufficient evidence to justify instructing on the lesser-included offenses. In support of this argument, Weaver cites *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), a homicide case wherein we upheld a trial court's refusal to instruct on lesser-included offenses.

[7] In *McCracken*, we quoted the two-pronged test enunciated in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), with regard to determining whether an instruction on lesser-included offenses is proper:

> "[A] court must instruct on a lesser-included offense if (1) the elements of the lesser offense . . . are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense."

McCracken, 260 Neb. at 250, 615 N.W.2d at 917. In *McCracken*, the record showed that the defendant had deliberately planned the murder. Therefore, there was no basis for giving an instruction on

second degree murder or manslaughter. Accordingly, the trial court's refusal to instruct the jury on lesser-included offenses was proper.

[8] We also interpreted § 29-2027 in *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981), which involved the direct appeal of a defendant who had been convicted of manslaughter. One of the errors assigned was the trial court's instructions regarding first and second degree murder. The evidence linking the defendant to the crime was largely of a circumstantial nature. The victim was discovered in a secluded area, and there were no eyewitnesses to her death. We stated that "ordinarily, in a case charging first degree murder, where there is no eyewitness to the act, and the evidence is largely circumstantial, the jury should be instructed as to the law governing murder in the first degree, second degree, and manslaughter." *Id.* at 389, 303 N.W.2d at 748, citing *Bourne v. State*, 116 Neb. 141, 216 N.W. 173 (1927). Under the facts presented, we held that the jury was properly instructed by the trial court.

In the case at bar, as in *Ellis*, there were no eyewitnesses to the death of Hall. In addition, the evidence linking Weaver to Hall's death was largely circumstantial. The State presented evidence of encounters between Weaver and Hall during the summer of 2001 during which Weaver's requests for money were denied. The police found no signs of forced entry into Hall's apartment, which could have suggested to the jury that Hall was familiar with whomever killed her. Weaver admitted to taking Hall's car and purse after her death and admitted to lying to law enforcement officers in the days following Hall's death. The testimony of Keelan and Okoye established that Hall died by ligature strangulation during a period of time when Weaver's admissions and other evidence placed him at the scene.

[9] 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. *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997). Because of this duty, the trial court, on its own motion, must correctly instruct on the law. *Id.* In view of the fact that there were no eyewitnesses to Hall's death and that the evidence adduced was largely circumstantial, the district court was required to instruct the jury as to the lesser-included offenses of second

degree murder and manslaughter. The instruction given was correct. Weaver's argument that the State presented insufficient evidence to justify this instruction is without merit.

Weaver's second argument regarding the jury instruction on lesser-included offenses is that *Ellis* stands only as a "rule of thumb" for the application of § 29-2027. He asserts that given advances in DNA technology and his own admission that he was in the apartment near the time of Hall's death, the lack of an eyewitness to the death did not justify giving the instruction on lesser-included offenses. However, this argument ignores that it is the combination of the circumstantial evidence and the fact that there were no eyewitnesses that requires the application of § 29-2027.

Weaver has not sustained his burden of showing that the instruction on second degree murder and manslaughter was prejudicial or otherwise adversely affected a substantial right. Accordingly, this assignment of error is without merit.

SECOND DEGREE MURDER INSTRUCTION

Weaver assigns as error the manner in which the district court instructed the jury as to the material elements of second degree murder. Under Neb. Rev. Stat. § 28-304 (Reissue 1995), a person commits second degree murder if he causes the death of a person intentionally, but without premeditation.

> Essentially, Weaver argues that the current way in which the [L]egislature has chosen to define first degree and second degree murder does not make logical sense, and therefore, an accused runs the risk of being convicted by a jury as a result of a compromise verdict rather than a verdict based upon proof beyond a reasonable doubt as to all material elements.

Brief for appellant at 40. Weaver argues that the court should "consider the jury instruction for first degree and second degree murder together." See *id.* "[I]t is logical to conclude . . . that the jury would consider the instructions together." *Id.* at 41. Weaver claims that due to this fundamental flaw in the manner in which the district court instructed the jury as to first and second degree murder, the verdict was unreliable, since it could have been based upon a compromise rather than proof beyond a reasonable doubt.

The district court gave the following instruction on second degree murder:

> The material elements which the [S]tate must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the second degree are:
>
> 1. That the defendant, Byron J. Weaver, killed Marie Hall.
> 2. That he did so intentionally, but without premeditation.
> 3. That he did so on or about August 7, 2001.
> 4. That he did so in Lancaster County, Nebraska.

[10] Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999). A comparison of § 28-304 and the jury instruction given shows that the instruction, read as a whole, fairly presented the law. All of the material elements that constitute the statutory definition were reflected in the instruction. As such, we must conclude that the giving of this instruction was not error. Weaver has failed to satisfy his burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right, and this assignment of error is without merit.

Instruction Defining Premeditation

Weaver argues that the district court erred in the manner in which it instructed the jury on the definition of premeditation. Premeditation was defined in the instructions as "a design formed to do something before it is done." The jury was instructed that the time needed for premeditation may be "so short as to be instantaneous provided that the intent to act is formed before the act and not simultaneously with the act." Neb. Rev. Stat. § 28-302(3) (Reissue 1995) defines premeditation as "a design formed to do something before it is done."

Weaver is asking this court to overrule our decision in *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). *McBride* involved the direct appeal of a conviction for first degree murder wherein the appellant challenged a jury instruction defining premeditation. Premeditation was defined almost exactly as it was defined in the present case. The appellant argued that the nonstatutory language confused and misled the jury by blurring the distinctions between first degree murder, second degree murder,

and manslaughter. We held that "[t]he additional statement in the instruction given by the court merely stated a correct proposition of the law," and we found that the appellant was not prejudiced by the instruction. See *id.* at 664, 550 N.W.2d at 678.

Unlike the appellant in *McBride*, who was convicted of first degree murder, Weaver was convicted of second degree murder. The jury found that Weaver acted without premeditation. Therefore, Weaver could not have been prejudiced by the instruction defining premeditation. Weaver has not shown that this instruction was prejudicial or otherwise adversely affected a substantial right. This assignment of error is without merit.

SUFFICIENCY OF EVIDENCE

Weaver argues that the evidence presented at trial was insufficient for the jury to conclude that he was guilty beyond a reasonable doubt of second degree murder. Specifically, he suggests that the State failed to present sufficient evidence that Hall's death was an act of homicide and not the result of natural causes.

When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003). In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003).

To prove its case that Hall was murdered and did not die from natural causes, the State presented the testimony of two pathologists: Keelan and Okoye. Keelan, an assistant coroner's physician for Lancaster County, testified as to the performance of Hall's autopsy and the conclusions that he ultimately drew from the examination. Keelan testified that his external examination revealed an area on Hall's neck that suggested injury, not merely

decomposition. This was supported by his internal examination, which revealed evidence of injury in an area extending from underneath the chin to the posterior of the neck. Keelan opined that Hall died as a result of ligature strangulation. He stated that aside from decomposition, he saw no disease process at work during his internal examination, and that decomposition would have made it impossible to tell whether Hall was suffering from heart disease.

Okoye, a forensic pathologist and the Lancaster County coroner's physician, testified to having performed more than 10,000 autopsies. He did not perform Hall's autopsy, but he issued the final report on the autopsy. Okoye confirmed Keelan's findings of internal and external neck injury caused by strangulation, not decomposition. Okoye's examination of Hall's eyes revealed evidence of hemorrhaging, which he testified was an indication of asphyxiation. He also found hemorrhaging in the neck strap muscles that was not caused by decomposition. Okoye also concluded that Hall died as a result of ligature strangulation. He testified that the evidence he reviewed did not suggest that Hall died of a heart attack.

Weaver presented the testimony of Hall's physician and a pathologist who had reviewed her autopsy report. The testimony of the physicians who served as witnesses during the trial presented the jury with a number of possible conclusions that could be drawn from the evidence. Pursuant to our scope of review, this court does not resolve these conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence.

The State presented the testimony of two pathologists who concluded that Hall's death was caused by ligature strangulation. When viewing this evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found the essential elements of the crime of second degree murder were proved beyond a reasonable doubt. The record contains sufficient evidence to sustain Weaver's conviction, and this assignment of error has no merit.

Excessive Sentence

Weaver asserts that the district court imposed an excessive sentence. Weaver was convicted of second degree murder, a Class IB

felony punishable by a minimum of 20 years' imprisonment and a maximum of life imprisonment. See § 28-304(2) and Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002). Weaver was sentenced to a term of imprisonment of 60 years to life.

[11] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Smith*, 266 Neb. 707, 668 N.W.2d 482 (2003).

[12-14] In imposing a sentence, a 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. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). In considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *Id.*

In arguing that the district court abused its discretion in imposing his sentence, Weaver points to his minimal criminal record. Weaver was never arrested as a juvenile, but was arrested twice as an adult before his arrest on this charge. He was first arrested for assault, a charge that was reduced to disturbing the peace, for which he paid a $200 fine. His second arrest was for robbery. This charge was dismissed so that Weaver could take part in a pretrial diversion program. However, his entry into the program was rejected after his arrest for first degree murder.

Weaver also argues that the district court abused its discretion by failing to consider his age and his troubled upbringing. At the time of his arrest, Weaver was 20 years old. His parents divorced when he was 9 years old, and he has stated that his parents have had problems with alcohol abuse. Weaver described a deterioration in his relationship with his mother over the years and stated

that his mother verbally abused him. A woman with whom he and his father lived became somewhat of a stepmother to Weaver, but she committed suicide when Weaver was 13 years old.

It appears from the presentence investigation report that the district court was aware of these circumstances when it considered the sentence to be imposed. The court also had before it the evidence presented with regard to Weaver's actions before, during, and after arriving at Hall's apartment on August 7, 2001. Considering the totality of the circumstances, we cannot say that the district court abused its discretion in sentencing Weaver as it did. Weaver's assignment of error regarding the imposition of an excessive sentence is without merit.

CONCLUSION

For the reasons stated herein, Weaver's conviction and sentence are affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA EX REL. SPECIAL COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. RICHARD M. FELLMAN, RESPONDENT.

678 N.W.2d 491

Filed April 23, 2004. No. S-02-540.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (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 respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.

4. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
5. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.

Original action. Judgment of suspension and probation.

Dean Skokan, Special Counsel for Discipline, for relator.

John R. Douglas and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for respondent.

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

PER CURIAM.

NATURE OF CASE

The office of the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against Richard M. Fellman alleging that Fellman violated several provisions of the Code of Professional Responsibility and his oath of office as an attorney. After a formal hearing, the referee concluded that Fellman had violated the Code of Professional Responsibility and his oath of office and recommended a suspension of 90 days followed by 2 years' probation. Fellman takes exception to the referee's findings and recommended sanction.

BACKGROUND

Fellman was admitted to the practice of law in Nebraska on June 19, 1959. He has practiced law in Douglas County, Nebraska, since 1960. For the last 15 or 20 years, his practice has primarily involved domestic relations, personal injury, and workers' compensation matters.

The formal charges filed against Fellman in this case arise out of his representation of Henry Peoples in a child support and visitation case. Peoples, of Las Vegas, Nevada, initially contacted Fellman on February 28, 2000, regarding his son, who lived in Omaha with his mother, Valerie Davis. Fellman's notes of the conversation indicate that Peoples sought joint custody of his son as well as visitation in Las Vegas, telephone contact with his son, notification of his son's progress in school, and some photographs. During their telephone conversation, Fellman estimated

that the total fee for his services would be $2,500 to $3,500. Fellman also required a retainer of $1,000 and a cost deposit of $100. Shortly thereafter, Peoples paid Fellman $1,100. It is undisputed that Fellman deposited the $1,100 in his regular business account. Fellman never billed Peoples for any additional amount, nor did he ever refund any of the $1,100 to Peoples. Fellman testified that if Peoples had asked for a refund, he would have refunded any unearned money to Peoples.

Fellman testified that he was not in contact with Peoples again until May 17, 2000, at which time Peoples provided the Omaha address of Davis. However, the record indicates Peoples attempted to communicate with Fellman several times in April and May 2000, although Fellman contends the notes from these communications were actually from 2001. Nevertheless, on May 17, 2000, Fellman began preparing a petition to file on Peoples' behalf. On May 19, Fellman sent a draft petition to Peoples for his review. A few days later, Peoples returned the draft with corrections and suggestions. This process of revising the petition continued several more times until the petition was finally filed on June 28.

On July 24, 2000, an answer and cross-petition was filed by Davis through her attorney. Davis' cross-petition sought child support and contribution for unreimbursed medical and daycare expenses. On August 2, interrogatories and document requests were served upon Fellman. The interrogatories and document requests went unanswered; therefore, on September 19, Davis' attorney filed a motion to compel answers to discovery and requested that the court impose sanctions. Fellman was given an additional 10 days to answer the interrogatories, but when he again failed to do so, a second motion to compel was filed. Fellman finally answered the cross-petition and interrogatories on November 3.

Fellman's November 3, 2000, answer to the cross-petition and interrogatories came shortly after he informed Peoples, apparently for the first time, that a cross-petition and interrogatories had been filed. This communication occurred by letter dated October 25. Fellman claims that he did not inform Peoples of Davis' cross-petition and interrogatories until October because Fellman believed Peoples would be "inflame[d]" if he learned

of the discovery requests and also because Fellman wanted to settle the case without having to respond to discovery.

On January 2, 2001, Fellman received a notice from the district court advising him that a certificate of readiness must be filed within 30 days. By stipulation between the parties, the deadline for a certificate of readiness was extended until April 30. Fellman did not file a certificate. On May 1, 2001, the district court dismissed Peoples' petition without prejudice for failing to file a certificate of readiness. Fellman described such a dismissal as a common occurrence. The case was reinstated on June 1. A third motion to compel was served on Fellman on June 22, requesting additional income documentation from Peoples that had not been provided with the initial discovery requests. That motion was sustained, and the court ordered Peoples to pay $600 toward Davis' attorney fee. Thereafter, Fellman testified that Peoples, contrary to his initial position, wanted to challenge his paternity. This led Fellman to eventually withdraw from representing Peoples on August 15, 2001.

PROCEDURAL BACKGROUND

On April 10, 2001, the Counsel for Discipline notified Fellman that he was the subject of a grievance filed by Peoples. Pursuant to Neb. Ct. R. of Discipline 9(E) (rev. 2001), Fellman was required to file an appropriate written response to the grievance within 15 working days. He did not respond. By letter dated May 2, 2001, the Counsel for Discipline notified Fellman that it had not received a response to Peoples' grievance and directed Fellman to respond upon receipt of the letter. Again, Fellman did not respond. Another letter, dated May 17, 2001, was sent to Fellman indicating that the Counsel for Discipline would seek temporary suspension if Fellman failed to respond. On May 25, Fellman filed a response to Peoples' grievance. In his response, Fellman indicated that "[t]he case is again moving along in a normal manner," despite the fact that the case had been dismissed on May 1.

In late July 2001, the Counsel for Discipline requested from Fellman that it be allowed to review Peoples' file. Assistant Counsel for Discipline Kent Frobish visited Fellman's office on August 1. According to Fellman, after Frobish reviewed the file,

Frobish accused Fellman of fraud, dishonesty, and the mishandling of client funds. Fellman testified that Frobish's accusation caused him to panic. Frobish denied making any such accusations. According to Frobish, Fellman appeared nervous during the entire visit, but was cooperative.

On August 7, 2001, the Counsel for Discipline sent a letter to Fellman seeking Fellman's response to several specific questions regarding Peoples' case. Fellman did not respond. The Counsel for Discipline sent another letter to Fellman on November 29, requesting a response within 7 days. No response came. On March 26, 2002, the Counsel for Discipline sent a complaint to Fellman. Fellman finally responded on July 10.

Fellman testified that he could not bring himself to open the letters that he had received from the Counsel for Discipline. He eventually sought professional help. Dr. Bruce Gutnik diagnosed Fellman as suffering from "Specific Phobia," which results in Fellman's feeling anxiety, fear, and panic. Fellman's phobia is triggered by public censure or ridicule.

Formal charges were filed against Fellman on May 17, 2002. Fellman was formally charged with violating his oath of office as well as Canon 1, DR 1-102(A)(1), (5), and (6); Canon 6, DR 6-101(A)(3); and Canon 9, DR 9-102(A)(1) and (2).

Referee's Findings

After a formal hearing, the referee found Fellman guilty of neglect under DR 6-101(A)(3) in four respects. First, the referee found that Fellman failed to promptly advise Peoples that his custody and visitation requests were not reasonable. Second, the referee found that Fellman delayed the discovery process in failing to promptly notify Peoples that he had been served with interrogatories and in failing to answer those interrogatories. Third, the referee found that Fellman did nothing to bring the case to trial after discovery was essentially completed in December 2000. Finally, the referee found that Fellman failed to return Peoples' telephone calls and e-mails and, more generally, to keep Peoples apprised of the status of his case.

The referee also found clear and convincing evidence of a violation of DR 9-102(A)(2). The referee found that the "retainer" in this case was an advance fee representing work to be done in

the future and should have been initially deposited in Fellman's trust account and withdrawn only as it was earned.

Finally, the referee found that Fellman violated DR 1-102(A)(1), (5), and (6) and his oath of office as an attorney. The referee recommended that Fellman be suspended for 90 days. Upon applying for reinstatement, the referee recommended that Fellman prove that he is fit to practice law under the terms of his probation, including that treatment for his phobia has resulted in a meaningful and sustained recovery. Upon reinstatement, the referee recommended that Fellman be subject to probation for 2 years, during which time he should engage a practicing attorney to act as a practice monitor, subject to approval by the Counsel for Discipline.

ASSIGNMENTS OF ERROR

Fellman contends, rephrased and consolidated, that the Counsel for Discipline failed to prove by clear and convincing evidence that he violated the Code of Professional Responsibility and his oath of office. Fellman also takes exception to the referee's recommended sanction.

STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Counsel for Dis. v. James, ante* p. 186, 673 N.W.2d 214 (2004). To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence. *Id.*

ANALYSIS

NEGLECT

Fellman was charged with violating DR 6-101(A)(3), which provides in part that "[a] lawyer shall not . . . [n]eglect a legal matter entrusted to him or her." The referee found that Fellman neglected Peoples' case under DR 6-101(A)(3) in four respects.

First, the referee found that Fellman failed to promptly advise Peoples that his custody and visitation requests were not reasonable. During their initial conversation on February 28, 2000, Peoples told Fellman that he wanted joint custody of his son and visitation with his son in Las Vegas, among other things. Fellman testified that in his experience as an attorney practicing law in the domestic relations field, Peoples' expectations were unrealistic. However, Fellman failed to share this opinion with Peoples until shortly before his withdrawal as Peoples' attorney. "A lawyer as adviser furthers the interest of a client by giving a professional opinion as to what the lawyer believes would likely be the ultimate decision of the courts on the matter at hand . . . ." Canon 7, EC 7-5, of the Code of Professional Responsibility. Clients are ill served by attorneys when the attorney cannot be trusted to give frank legal advice.

Second, the referee found that Fellman delayed the discovery process in failing to promptly notify Peoples that he had been served with interrogatories and in failing to answer those interrogatories. The evidence establishes that an answer and cross-petition was filed by Davis on July 24, 2000, and that interrogatories and document requests were served on August 2. Despite this, Fellman neglected to even inform Peoples of these events until October 25.

Third, the referee found that Fellman did nothing to bring the case to trial after discovery was essentially completed in December 2000. Finally, the referee found that Fellman failed to return many of Peoples' telephone calls and e-mails and, more generally, to keep Peoples apprised of the status of his case. Based on all of the above, we find clear and convincing evidence that Fellman neglected a legal matter entrusted to him in violation of DR 6-101(A)(3).

Client Funds

Fellman was also charged with violating the following provisions of the Code of Professional Responsibility:

> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> (A) All funds of clients paid to a lawyer or law firm shall be deposited in an identifiable account or accounts

> maintained in the state in which the law office is situated in one or more state or federally chartered banks, savings banks, savings and loan associations, or building and loan associations insured by the Federal Deposit Insurance Corporation, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> . . . .
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

The facts surrounding this charge of commingling client funds are undisputed. When first contacted by Peoples, Fellman indicated that he initially required a payment of $1,100—$1,000 in the form of a retainer and a cost deposit of $100. Upon receipt, Fellman deposited the entire $1,100 into his regular business account rather than his trust account. Peoples never asked for the return of any portion of the $1,100, and no allegation was ever made that Fellman did not eventually earn the $1,100. Fellman's handling of the retainer did not serve as a basis for Peoples' complaint to the Counsel for Discipline and was discovered only during the Counsel for Discipline's own investigation of the matter.

Fellman argues that the $1,100 belonged to him upon receipt. He distinguishes it from an advance fee that would have been required to be deposited into a trust account and withdrawn only as earned. Other courts have recognized such distinctions. "General retainers" or "engagement retainers" compensate an attorney for agreeing to take a case and making other commitments to a client that benefit a client immediately. These types of retainers belong to the attorney on receipt. On the other hand, advance fees are payments made by a client for the performance of legal services and belong to the client until earned by the attorney. See, *In re Sather*, 3 P.3d 403 (Colo. 2000); *Iowa Supreme Court Bd. of Ethics v. Apland*, 577 N.W.2d 50 (Iowa 1998). The record in this case reveals no basis to find that the $1,100 was an engagement retainer that belonged to Fellman upon receipt. Upon

receipt of the $1,100, Fellman had not yet done any work on Peoples' case other than discussing the case during their initial telephone call of February 28, 2000. Furthermore, Fellman testified that if Peoples had asked for a refund at any time, he would have refunded any unearned portion of the $1,100 to Peoples. Peoples' payment was still unearned when Fellman received it; i.e., Fellman had yet to provide a benefit or service to Peoples. See *In re Sather, supra.* Therefore, Fellman was required to deposit the $1,100 in his trust account. See, also, *State ex rel. Counsel for Dis. v. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001) (attorney violated DR 9-102(A) when he deposited unearned attorney fees into his personal account rather than his trust account). We find clear and convincing evidence that Fellman violated DR 9-102(A)(2).

MISCONDUCT

Fellman was also charged with violating the following provisions of the Code of Professional Responsibility: "DR 1-102 Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (5) Engage in conduct that is prejudicial to the administration of justice. . . . (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law."

The record establishes that on April 10, 2001, Fellman was notified by the Counsel for Discipline that he was the subject of a grievance filed by Peoples. Rule 9(E) requires that an appropriate written response to a grievance be filed with the Counsel for Discipline within 15 working days. Fellman did not file a timely response, nor did he respond to a subsequent letter from the Counsel for Discipline. Only after a third attempt by the Counsel for Discipline, and when faced with an impending temporary suspension, did Fellman file a response to Peoples' grievance. This pattern repeated itself beginning in August 2001, when Fellman failed to respond to the Counsel for Discipline's inquiries regarding Peoples' case. Once again, it took three attempts by the Counsel for Discipline (and nearly a year) before Fellman responded. We find clear and convincing evidence that Fellman violated DR 1-102(A)(1), (5), and (6). We also find, based on all of the above, that there is clear and convincing evidence that Fellman violated his oath of office as an attorney.

DISCIPLINE

[3] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (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 respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Villarreal, ante* p. 353, 673 N.W.2d 889 (2004).

[4] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases. *State ex rel. Counsel for Dis. v. Janousek, ante* p. 328, 674 N.W.2d 464 (2004). In *State ex rel. Counsel for Dis. v. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001), an attorney received an initial payment of $5,000, which he believed was an engagement retainer that was earned when received, and deposited it into his personal account. We found that the attorney's actions violated DR 9-102(A) because the fee had yet to be earned when it was deposited into the personal account. In addition, the attorney was also guilty of collecting an excessive fee. The attorney was suspended for 6 months. In *State ex rel. NSBA v. Kelly*, 221 Neb. 8, 374 N.W.2d 833 (1985), the attorney received bond receipts from his clients in lieu of a cash retainer. The attorney forged one of the clients' names and cashed the bond receipts to apply to his fee. Noting the attorney's alcohol dependence, we declined to disbar him and instead suspended him for 1 year.

[5] The above-cited cases aid us in determining the appropriate sanction in this case involving commingling of client funds, as well as neglect and misconduct. In addition, the determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors. *Janousek, supra*; *Huston, supra*; *Kelly, supra.* As aggravating factors, we note that Fellman has received four private reprimands from the Counsel for Discipline since 1994 for conduct similar to what occurred in this case. In each of those four matters, Fellman was privately reprimanded for failing to respond to inquiries from the

Counsel for Discipline, in violation of DR 1-102(A). Two of the private reprimands were also based upon Fellman's neglect of a legal matter, in violation of DR 6-101(A)(3).

The mitigating factors in this case include 29 affidavits from active and retired judges and attorneys familiar with Fellman. Each attests to Fellman's integrity, honesty, professionalism, and overall competence to act as an attorney. In addition to these affidavits, we also note Fellman's admirable record of service to the bar and his community. We also consider the phobia that Fellman has been diagnosed with, which causes anxiety and panic in Fellman and which, in the words of Fellman's doctor, "interfere significantly with [Fellman's] normal routine and occupational functioning." Fellman testified that he is taking medication and receiving therapy for his condition. Finally, we note that once Fellman answered the Counsel for Discipline, he was fully cooperative and worked to promptly resolve Peoples' case.

In our de novo review, we conclude that Fellman should be suspended from the practice of law for a period of 1 year. Following his period of suspension, Fellman may apply for reinstatement and shall prove that he is fit to practice law under the terms of his probation. Upon reinstatement, Fellman shall be subject to probation for a period of 2 years and shall be required to engage a practicing attorney to act as a practice monitor during his probation, subject to approval by the Counsel for Discipline.

CONCLUSION

We find by clear and convincing evidence that Fellman violated DR 1-102(A)(1), (5), and (6); DR 6-101(A)(3); DR 9-102(A)(2); and his oath of office as an attorney. It is the judgment of this court that Fellman be suspended from the practice of law for a period of 1 year and, if reinstated, shall be subject to 2 years' probation as outlined above. He is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Fellman is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION AND PROBATION.

HENDRY, C.J., and MILLER-LERMAN, J., not participating.

MICHELLE SMITH, APPELLANT, V. LINCOLN MEADOWS HOMEOWNERS ASSOCIATION, INC., A NEBRASKA CORPORATION, APPELLEE.

678 N.W.2d 726

Filed April 23, 2004. No. S-02-1467.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Dismissal and Nonsuit.** When a case is dismissed by a party, the controversy between the parties upon which a trial court may act ends.
5. ____. Parties to a case are incapable of pursuing judicial relief in the case after it has been voluntarily dismissed.
6. **Dismissal and Nonsuit: Final Orders: Appeal and Error.** Where a case is voluntarily dismissed, there is no final order on the law or facts of the case, nor has there been a decision on the merits; accordingly, no appeal will lie.
7. **Final Orders: Appeal and Error.** If an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court.
8. ____: ____. A party cannot move to voluntarily dismiss a case without prejudice, consent to entry of such an order, and then seek interlocutory appellate review of an adverse pretrial order.
9. **Jurisdiction: Final Orders: Dismissal and Nonsuit: Appeal and Error.** In the absence of a judgment or a valid order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.
10. **Judgments: Jurisdiction: Final Orders: Appeal and Error.** Though an extrajudicial act of a lower court cannot vest the appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or other final order sought to be reviewed.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Vacated and dismissed.

Thomas E. Zimmerman, of Jeffrey, Hahn, Hemmerling & Zimmerman, P.C., for appellant.

Mark A. Christensen and Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

HENDRY, C.J., CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

BACKGROUND

This is a premises liability action, in which the plaintiff, Michelle Smith, alleged that she was injured on the premises of Lincoln Meadows Homeowners Association, Inc. (Homeowners Association), when the Homeowners Association's swing set broke. Smith sued the Homeowners Association, alleging damages including broken bones, spinal injuries, disability, lost wages, and, most pertinent, that her fall triggered the onset of multiple sclerosis (MS). The Homeowners Association filed a pretrial motion for partial summary judgment on the allegation of MS, in conjunction with a motion in limine to exclude the plaintiff's expert testimony supporting that allegation.

The district court held a hearing to determine if the plaintiff's expert testimony satisfied the standards adopted in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). The court concluded that the plaintiff's expert testimony was inadmissible and granted the Homeowners Association's motion in limine. Because Smith was without admissible expert testimony to support her MS allegation, the court entered partial summary judgment with respect to that component of Smith's damages.

Smith then filed a motion to dismiss her sole cause of action, without prejudice, purporting to reserve her right to appeal from the partial summary judgment. In particular, the motion asked the court

> for a final ORDER dismissing the above-entitled action without prejudice in accordance with Neb. Rev. Stat. § 25-601(1) (Reissue 1995). In keeping with this Motion, Plaintiff expressly reserves her right to appeal this Court's Order dated January 18, 2002 granting partial summary judgment on the issue of multiple sclerosis to the Defendant.

The court granted the motion to dismiss without prejudice, stating, in an order prepared by Smith's counsel, that "the Plaintiff shall have the right if she so elects to timely appeal this Court's now final ruling on the issue of multiple sclerosis as contained in the Court's order dated January 18, 2002." The court's order

dismissed Smith's petition without prejudice. Smith then filed a notice of appeal.

ASSIGNMENTS OF ERROR

Smith assigns, consolidated and restated, that the court erred in granting the Homeowners Association's motion in limine excluding the testimony of Smith's expert witness and in granting the Homeowners Association's motion for partial summary judgment.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Pennfield Oil Co. v. Winstrom*, *ante* p. 288, 673 N.W.2d 558 (2004).

In this appeal, Smith's voluntary dismissal without prejudice of her only cause of action is, quite clearly, an attempt to obtain interlocutory review of an order that would otherwise not be appealable. See, e.g., *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003) (explaining limited circumstances under which partial summary judgment may be appealed). Because of doubts concerning our appellate jurisdiction, prior to oral argument in this matter, we entered an order to show cause why this appeal should not be dismissed for lack of a final, appealable order. Smith's argument in response to our order to show cause is unpersuasive, and we conclude that there is no final order in this case.

Smith does not dispute that absent her voluntary dismissal, the partial summary judgment and the court's ruling on the motion in limine would not be appealable orders. See *Cerny*,

supra. Therefore, the question presented here is whether a voluntary dismissal without prejudice, under these circumstances, can effectively create finality and confer appellate jurisdiction.

Our case law makes clear that it cannot. We have previously explained that a plaintiff cannot consent to an order of dismissal and seek review of the order. *Hill v. Women's Med. Ctr. of Neb.*, 254 Neb. 827, 580 N.W.2d 102 (1998). Only a party aggrieved by an order or judgment can appeal; one who has been granted that which he or she sought has not been aggrieved. *Federal Dep. Ins. Corp. v. Swanson*, 231 Neb. 148, 435 N.W.2d 659 (1989), *overruled in part on other grounds, Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992). See, also, *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 531 N.W.2d 523 (1995) (recognizing overruling in part). Simply put, "a party is not entitled to prosecute error upon the granting of an order or the rendition of a judgment when the same was made with his [or her] consent, or upon his [or her] application." *Robins v. Sandoz*, 175 Neb. 5, 11-12, 120 N.W.2d 360, 364 (1963). Accord *Hill, supra*.

[4-6] In *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999), Michael Dorcey was charged in the county court with driving under the influence of alcohol. The county court granted Dorcey's pretrial motion to suppress evidence, and the county attorney, on behalf of the State, voluntarily dismissed the complaint. Thereafter, the State filed a notice of its intent to appeal the county court's order sustaining the motion to suppress. On appeal, the district court concluded that it had no jurisdiction to consider the State's appeal because the notice of appeal was filed by the State in a voluntarily dismissed case. We agreed, stating that "[w]hen a case is dismissed by a party, the controversy between the parties upon which a trial court may act ends." *Id.* at 799, 592 N.W.2d at 498.

> Parties to a case are incapable of pursuing judicial relief in the case after it has been voluntarily dismissed. . . . Where the case is voluntarily dismissed, there is no final order on the law or facts of the case . . . nor has there been a decision on the merits. . . . Accordingly, no appeal will lie.

(Citations omitted.) *Id.* at 799-800, 592 N.W.2d at 498. See, also, *State v. Jacob*, 256 Neb. 492, 591 N.W.2d 541 (1999).

In response to our order to show cause, Smith relies on *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000), which Smith claims presents an analogous situation to the instant case. In that case, Judy Iwanski sued her physician and former employer, William Gomes, for professional negligence and intentional infliction of emotional distress, attributing her severe emotional distress to the lingering effects of a defunct sexual relationship with Gomes. The district court granted partial summary judgment for Gomes. First, the court concluded that Gomes' conduct did not constitute intentional infliction of emotional distress, as a matter of law. Second, the court concluded that the sexual contact between the parties was not sufficiently linked to medical treatment to support the theory of professional negligence. The court denied summary judgment, however, as to any acts arising in the course of medical treatment. Iwanski voluntarily dismissed the remaining allegations and filed a timely appeal from the court's order dismissing the operative petition. This court, without discussing appellate jurisdiction, disposed of Iwanski's appeal on the merits. See *id.*

However, *Iwanski* is distinguishable from the case at bar. In *Iwanski*, the district court dismissed distinct theories of recovery and Iwanski voluntarily dismissed her other allegations in order to resolve all the matters pending before the court. Even setting aside the voluntarily dismissed allegations, the two theories of recovery against which partial summary judgment had been entered remained for appellate review. Iwanski did not attempt to prosecute error with respect to any of the allegations she voluntarily dismissed.

In this case, however, Smith brought a single cause of action, with a single theory of recovery. That cause of action remained viable after the district court's partial summary judgment as to one element of damages. Smith voluntarily dismissed her only cause of action, without prejudice, and the errors she assigns on appeal relate solely to the cause of action she dismissed. The holdings of *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999), and *Robins v. Sandoz*, 175 Neb. 5, 120 N.W.2d 360 (1963), are squarely on point in this circumstance.

Smith also relies on federal authority that, according to her, supports the exercise of appellate jurisdiction over a case that

has been voluntarily dismissed at the trial level. But the authority cited does not support Smith's argument. For instance, Smith cites *Hicks v. NLO, Inc.*, 825 F.2d 118 (6th Cir. 1987), for the proposition that "parties can stipulate under [Fed. R. Civ. P.] 41(a) to dismissals of remaining claims without prejudice to obtain finality for an otherwise interlocutory order that the parties seek to appeal before proceeding to trial." Memorandum brief for appellant in response to order to show cause at 3. But *Hicks*, 825 F.2d at 120, specifically holds that

> [w]here a court has entered judgment against a plaintiff in a case involving more than one claim and the plaintiff voluntarily dismisses the claim or claims, which made the judgment non-appealable and the dismissal is brought to the attention of the district court, this Court will not penalize the plaintiff by dismissing his or her appeal.

That rule has no application here. A claim, for these purposes, is equivalent to a separate cause of action. See *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). Even if we were to adopt the *Hicks* holding—a matter we have no occasion to decide here—this case does not present more than one claim.

Smith also directs our attention to authority from the Eighth Circuit apparently holding that a party may voluntarily dismiss claims, without prejudice, in order to expedite appellate review. See, e.g., *Helm Financial Corp. v. MNVA R.R., Inc.*, 212 F.3d 1076 (8th Cir. 2000); *Great Rivers Co-op. of S.E. Iowa v. Farmland Ind.*, 198 F.3d 685 (8th Cir. 1999). As with *Hicks, supra*, we have no cause to adopt or reject this holding in the instant case, because Smith voluntarily dismissed her only claim. But we note that the Eighth Circuit's holding is a minority view; the general rule is that a plaintiff cannot appeal from the dismissal of some claims when the balance of his or her claims have been voluntarily dismissed without prejudice. See, e.g., *Construction Aggregates v. Forest Commodities Corp.*, 147 F.3d 1334 (11th Cir. 1998); *Chappelle v. Beacon Communications Corp.*, 84 F.3d 652 (2d Cir. 1996); *Concha v. London*, 62 F.3d 1493 (9th Cir. 1995); *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147 (10th Cir. 1992); *Horwitz v. Alloy Automotive Co.*, 957 F.2d 1431 (7th Cir. 1992); *Management Investors v. United Mine Wkrs., Etc.*, 610 F.2d 384 (6th Cir. 1979). See, generally, 15A Charles Alan Wright

et al., Federal Practice and Procedure § 3914.8 (1992 & Supp. 2002). Those courts have reasoned that "because a dismissal without prejudice does not preclude another action on the same claims, a plaintiff who is permitted to appeal following a voluntary dismissal without prejudice will effectively have secured an otherwise unavailable interlocutory appeal." *Chappelle*, 84 F.3d at 654.

We also note that although these federal decisions are not on point with respect to the instant case, the underlying reasoning of these decisions supports our determination here. As in *Chappelle*, 84 F.3d at 654, were we to conclude that appellate jurisdiction was proper in this case, we would effectively abrogate our long-established rules governing the finality and appealability of orders, as " 'the policy against piecemeal litigation and review would be severely weakened.' " When causes of action or theories of recovery are dismissed without prejudice, a plaintiff remains free to file another complaint raising those same claims. *Cook, supra.* "Thus, the litigation is not finally over for all parties on all claims." *Hood v. Plantation General Medical Center, Ltd.*, 251 F.3d 932, 934 (11th Cir. 2001). An order lacks finality, and concerns about piecemeal litigation are raised, unless a party's remaining claims are finally abandoned, i.e., dismissed with prejudice. See *Adonican v. City of Los Angeles*, 297 F.3d 1106 (9th Cir. 2002).

[7] If an order is interlocutory, immediate appeal from the order is disallowed so that courts may avoid piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court. *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999). To that end, the availability of interlocutory review has generally been limited to orders which affect substantial rights, or contain an express direction from the trial court that there is no just reason for delay, or where an appeal from a judgment dispositive of the entire case would not be likely to protect a party's interests. See, *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001); *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997). If a "voluntary dismissal exception" were to provide a mechanism for securing appellate review of any trial court order, the "exception" would quickly subsume

the rule, and we would be left without any meaningful way to regulate interlocutory appeals.

[8] We conclude that this case is subject to the rule that a party cannot move to voluntarily dismiss a case without prejudice, consent to entry of such an order, and then seek interlocutory appellate review of an adverse pretrial order. See *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999). The remaining question is how to dispose of this appeal.

[9,10] Generally, in the absence of a judgment or a valid order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003). However, though an extrajudicial act of a lower court cannot vest the appellate court with jurisdiction to review the merits of the appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or other final order sought to be reviewed. See *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999). In the present case, Smith sought to voluntarily dismiss her petition on the condition that she could reserve her right to appeal from the district court's partial summary judgment. This was a condition that the court was powerless to grant, and the court both erred and acted beyond its statutory authority when it purported to reserve Smith's right to appeal from a nonappealable order. We view the court's dismissal of Smith's petition as inextricable from its ultra vires reservation of the plaintiff's purported right to appeal. Consequently, we conclude that the appropriate disposition of this appeal is to vacate the district court's order dismissing Smith's petition, and dismiss this appeal.

CONCLUSION

Smith's voluntary dismissal of her cause of action without prejudice did not create a final order from which an appeal could be brought to this court, and the district court acted beyond its authority when it dismissed Smith's petition while purporting to reserve her right to appeal from a nonappealable order. We vacate the district court's order dismissing Smith's petition and dismiss the appeal.

VACATED AND DISMISSED.

WRIGHT and STEPHAN, JJ., not participating.

ROBERT G. CURRY AND PAMELA CURRY, HUSBAND AND WIFE, APPELLANTS AND CROSS-APPELLEES, V. LEWIS & CLARK NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION, APPELLEE AND CROSS-APPELLANT.

678 N.W.2d 95

Filed April 23, 2004. No. S-03-086.

1. **Eminent Domain: Verdicts: Appeal and Error.** A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong.
2. **Trial: Expert Witnesses: Appeal and Error.** It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his opinion about an issue in question. A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.
3. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
5. **Jury Instructions.** The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used.
6. **Jury Instructions: Appeal and Error.** If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. It may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.

Appeal from the District Court for Dixon County: MAURICE REDMOND, Judge. Reversed and remanded for a new trial.

David Domina, James F. Cann, and Claudia L. Stringfield, of Domina Law, P.C., for appellants.

John Thomas for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This is a condemnation action involving two parcels of land in Dixon County, Nebraska, which were owned by Robert G. Curry and Pamela Curry and condemned by the Lewis & Clark Natural Resources District (NRD) for a flood control and erosion prevention project. Following a jury trial, the district court for Dixon County entered judgment in favor of the Currys in the amount of $367,000. The Currys appeal from an order denying their motion for attorney fees. The NRD cross-appeals, contending that the district court erred in excluding certain expert testimony and in instructing the jury.

FACTS

At all relevant times, the Currys resided in Dixon County and owned two parcels of land situated in that county which we will refer to as "Parcel 1" and "Parcel 2." The NRD determined that Parcel 1 was required for the construction of a flood control and erosion prevention project known as the Powder Creek Project, or more formally referred to as the "Aowa Creek Watershed Project Structure #31-20A." The NRD further determined that a perpetual easement over Parcel 2 was required for the project.

Appraisers appointed by the county court for Dixon County determined damages attributable to the taking of Parcel 1 to be $371,750 and damages attributable to a perpetual easement over Parcel 2 to be $500. The Currys filed notices of their intention to appeal both awards to the district court, asserting that the appraisers' awards did not reflect the fair market value of the property and therefore were not just compensation as required by law. The NRD appealed only the award for Parcel 1, claiming that it was excessive. The cases were consolidated for appeal to the district court. Before the jury was convened, the parties informed the court that they had agreed to an award of $500 for the perpetual easement on Parcel 2 and asked to remove that issue from consideration by the jury.

Also prior to trial, the district court sustained that portion of a motion in limine filed by the NRD which sought to preclude the Currys from offering any evidence regarding "[m]oving expenses, relocation expenses, interest on funds deposited or withdrawn, [or] real estate tax differentials." The district court also sustained

the Currys' motion in limine which sought to preclude the NRD from offering the testimony of Gary Way, an appraiser consulted by Robert, on the ground that Way's opinions lacked foundation.

Despite the pretrial order granting the NRD's motion in limine with respect to evidence of the Currys' relocation expenses, Robert testified in this regard without timely objection by the NRD. Robert testified that he was asking the jury to award $70,000 of the $89,000 he spent to construct a replacement farm building; $36,000 he spent on relocation of the livestock facilities, corrals, bunks, silage pit, and fences; $172,000 of the $191,000 the family spent on their replacement house; and $1,500 per acre for each of the 160 acres condemned. On cross-examination, Robert conceded that in a separate proceeding, the NRD had agreed to award the Currys a differential between the value of the house on the condemned property and the house they purchased to replace it and admitted that a jury award of the differential would be "doubling up." Pamela likewise acknowledged that she did not expect double payment of the relocation expenses. The NRD moved to strike the Currys' testimony regarding the "replacement house differential costs, the moving the cattle operation, and the [farm building] on the grounds that those are the subject of the separate relocation proceeding" through the NRD with rights of appeal to this court under the Administrative Procedure Act. The district court denied the motion.

In its case in chief, the NRD presented the testimony of Kenneth Beckstrom, a certified real estate appraiser retained by the NRD. Based upon his analysis of sales of comparable farmland in Dixon County, Beckstrom testified that the damage attributable to the taking of Parcel 1 was $224,000, or $1,400 per acre, which included a value of $58,000 attributed to the house which was situated on the property. The NRD offered Way's deposition, and the Currys objected on grounds of relevance, foundation, and hearsay. The district court overruled the offer and excluded Way's deposition testimony.

Tom Moser, the manager of the NRD, testified that the NRD had offered the Currys $105,960 as a replacement housing payment; $20,000 for relocating the farm; $1,560 for moving residential items; and $5,864.85 in real estate tax differential incurred with respect to their new residence. Moser explained that under

Nebraska law, such relocation expenses are determined and paid in a separate administrative proceeding which is subject to judicial review. On cross-examination, the Currys' counsel asked Moser if he would agree to "just dispose of it all here" and Moser replied that he personally had no objection.

The parties further addressed this issue by offering a stipulation requiring that the jury be given a special verdict form with stipulated relocation costs entered on the form. The stipulation provided that there would not be a separate proceeding in which the Currys could receive any additional funds or compensation.

At the instruction conference following submission of the evidence, the NRD objected to the court's proposed jury instructions Nos. 3 and 4 on the issue of fair market value and requested that the Nebraska Jury Instructions be given in their stead. In rejecting the NRD's objection and request, the court indicated that instruction No. 3 was in fact NJI2d Civ. 13.02 "a little bit modified" by *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998), and *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996). The court also noted that instruction No. 4 was a direct quote from this court's opinion in *Westgate Rec. Assn., supra.*

The jury returned the following verdict in favor of the Currys:

A) Land and Buildings, excluding house SW ¼, Section 10	$216,000[.00]
B) House on SW ¼, Section 10	$ 65[,]000[.00]
C) Cost for New House Over B	$ 70[,]000[.00]
D) Severance Damages to Land Excluding SW ¼ Section 10	$ 86[,]000[.00]
E) Relocation Costs — Residence	$ 1,560.00
F) Relocation Costs — Farming	$ 20,000.00
G) Tax Differential for C	$ 5,864.85
H) Incidental Allowance	$ 378.25

The court entered judgment in favor of the Currys on items A, B, and D, for a total of $367,000. The judgment also provided that pursuant to the stipulation of the parties, the Currys should claim directly from the NRD amounts due under parts C and E through H of the jury verdict.

The Currys filed a motion for taxation of costs and award of attorney fees. The NRD filed a motion for new trial alleging that

there were irregularities in the proceedings, the damages were excessive, the verdict was not sustained by sufficient evidence, and errors of law occurred at trial. A hearing was held on these motion on August 7, 2002. At the hearing, the NRD argued against awarding attorney fees based on the fact that the $367,000 judgment awarded by the district court was not greater than the appraisers' award of $371,750. The NRD further argued that the damages awarded under parts C and E through H were not part of the condemnation action, but, rather, they were amounts properly claimed under an administrative proceeding. See Neb. Rev. Stat. § 76-1214 et seq. (Reissue 1995).

In a January 22, 2003, journal entry, the district court denied the Currys' application for attorney fees as well as the NRD's motion for new trial. The Currys perfected this timely appeal, and the NRD cross-appealed.

ASSIGNMENTS OF ERROR

The Currys assign, restated, that the district court erred in (1) entering judgment that did not reflect the entire jury award and (2) failing to award reasonable attorney fees.

The NRD assigns on cross-appeal, restated, that the district court erred in (1) modifying the Nebraska Jury Instructions regarding the determination of fair market value in instructions Nos. 3 and 4 and (2) refusing to admit Way's testimony.

STANDARD OF REVIEW

[1] A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong. *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001); *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998); *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996).

[2] It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his opinion about an issue in question. *Walkenhorst, supra.* A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[3] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003); *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

ANALYSIS

We address the parties' assignments of error in the order that they are alleged to have occurred. We begin with the NRD's claim on cross-appeal that the district court erred in excluding the deposition testimony of Way, a real estate appraiser who was consulted by Robert but not called as a witness at trial. At Robert's request, Way reviewed the appraisal which had been completed by Beckstrom on behalf of the NRD in order to determine if Robert was being "low-balled." Based on his cursory review of the Beckstrom appraisal, Way informed Robert that in his opinion, the appraisal was " 'strong' " and he could not " 'beat it.' " Robert decided not to have Way undertake a separate appraisal. The NRD argues that Way's testimony was relevant to buttress the credibility and opinion of Beckstrom, and cites *Gerken v. Hy-Vee, Inc.*, 11 Neb. App. 778, 660 N.W.2d 893 (2003). *Gerken* was a personal injury case involving a slip and fall in a grocery store. The Nebraska Court of Appeals held that the trial court erred in excluding a store manager's statement that a new maintenance employee had applied too much wax to the floor because the statement was admissible under Neb. Rev. Stat. § 27-801(4)(b)(iv) (Reissue 1995) as a statement offered against a party by its agent or servant within the scope of his agency or employment.

Here, there is no evidence that Way was an agent or employee of the Currys. The record reflects that he was at most an independent contractor who was requested to render a preliminary opinion, on the basis of which the Currys chose not to retain him to conduct a formal appraisal. We acknowledge that there may be circumstances in which an expert who performs an appraisal at the request of a party to a condemnation proceeding can be compelled by the opposing party to testify regarding that appraisal at trial. See 7 Patrick J. Rohan & Melvin A. Reskin, Nichols on Eminent Domain § 7A.03 (rev. 3d ed. 2003). In this

case, however, Way did not actually appraise the Currys' property but merely rendered a preliminary opinion as to whether any appraisal he might perform would meet or exceed the fair market value as determined by the NRD's appraiser. Such an opinion is inherently speculative, and we therefore conclude that the trial court did not abuse its discretion in excluding it.

[4] The NRD also contends in its cross-appeal that the district court erred in giving jury instructions Nos. 3 and 4 over its objection instead of giving the requested NJI2d Civ. 13.02, which provides:

> The "fair market value" of a piece of property is the price that someone ready to sell, but not required to do so, would be willing to accept in payment for the property, and that someone ready to buy, but not required to do so, would be willing to pay for the property.
>
> In determining fair market value, you may consider the uses to which the property has been put and the uses to which it might reasonably be put in the immediate future.
>
> [In determining the amount of compensation to be paid, you must not consider any change in the fair market value of the property caused by the public improvement or by the knowledge that the improvement would be (constructed, altered, et cetera).
>
> [You must not compensate the plaintiff for any decrease in the property's fair market value caused by physical deterioration that the plaintiff could reasonably have prevented.]]

To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003); *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002).

[5] The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). NJI2d Civ. 13.02 is a correct statement of the law approved by this court in *Walkenhorst*. It was clearly warranted by the evidence. The remaining question is

whether the NRD was prejudiced by the giving of the following instructions instead of NJI2d Civ. 13.02:

INSTRUCTION NO. 3

A person whose property is taken by condemnation or eminent domain is entitled to recover compensation. This requires that the party whose property is condemned be awarded the fair market value of the property taken.

The "fair market value" of a parcel of property is the price that someone ready to sell, but not required to do so, would be willing to accept in payment for property, and the price that someone ready to buy, but not required to do so, would be willing to pay for the property.

In determining fair market value, you may consider the uses to which the property has been put and the uses to which it might reasonably be put in the immediate future.

In determining fair market value, you may consider all relevant conditions concerning a value including, but not limited to:

1. The presence or absence of active competitors in the market in the area of the property;

2. The trends of prices in the area;

3. Comparable sales of similar properties in arms-length transactions between willing buyers and willing sellers;

4. Replacement cost of the property taken and improvements thereon; and

5. Other relevant factors.

You may consider only legally permissible uses as potential uses for the property.

. . . .

INSTRUCTION NO. 4

There are three generally accepted approaches used for the purpose of valuing real property in eminent domain cases:

1. The market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties;

2. The income or capitalization of income approach, which establishes value on the basis of what the property is producing or is capable of producing in income; and

3. The replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation.

Each of these approaches is but a method of analyzing data to arrive at the fair market value of the real property as a whole.

[6] "If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal." *Walkenhorst v. State*, 253 Neb. 986, 997, 573 N.W.2d 474, 484 (1998). The district court noted that instruction No. 4 was taken directly from language in *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996), and subsequently approved in *Walkenhorst, supra.* While the quotation is indeed accurate as far as it goes, when viewed in isolation, it conveys the impression that any of the three valuation approaches are appropriate under any circumstances. That impression is contrary to the law. In *Westgate Rec. Assn.*, we agreed with the majority rule that the reproduction cost method as an independent test of value "may be used only in rare cases where there is a lack of comparable sales of similar property, where the structures on the property are in some sense unique, or where the character of the improvements is unusually well adapted to the kind of land upon which they exist." 250 Neb. at 22, 547 N.W.2d at 494. We further noted that an appraiser utilizing the reproduction cost method "cannot include as a factor the value of existing improvements, unless the improvements enhance the value of the land." *Id.* at 24, 547 N.W.2d at 495. See, also, 4 Julius L. Sackman, Nichols on Eminent Domain § 13.01[10] at 13-18 (rev. 3d ed. 2003) (noting although replacement cost approach is generally accepted method of fair market valuation, it is least preferred method and "tends to be used when the market data approach or income approach fail to establish fair market value").

In *Walkenhorst, supra*, we held that the district court properly excluded evidence regarding the separate value of a shelterbelt situated on the condemned farmland. Citing our holding in *Westgate Rec. Assn., supra*, that the replacement or reproduction cost method could be utilized only in "rare cases," we reasoned

that the shelterbelt was not "of such a unique nature as to render use of the fair market value standard unjust, to render the determination of the market value impossible, or to require use of one of the other valuation methods described in *Westgate Rec. Assn.*" *Walkenhorst*, 253 Neb. at 992-93, 573 N.W.2d at 481. We held that "[t]he condemnees cannot be compensated for the value of the shelterbelt as a shelterbelt; instead, the only relevant inquiry is how the presence of the shelterbelt on the condemned land affects the fair market value of the land taken." *Id.* at 992, 573 N.W.2d at 481.

The record in this case does not establish any of the factual prerequisites for application of the replacement or reproduction cost method of valuing real property, and there is no expert testimony employing this method of valuation. However, Robert testified on direct examination as to the replacement cost of his house, his farm building, and other improvements including corrals, fences, and a silo. Robert testified that unless the jury awarded him replacement costs, he would be unable to recover them, and further stated that he was asking the jury to award him the fair market value of his land, which he estimated to be $1,500 per acre, *plus* the replacement costs on the house, the farm building, and the other improvements.

We conclude that on this record, instruction No. 4 was not a complete statement of the law and was misleading and prejudicial because it improperly suggested that the jury was free to award the replacement cost of improvements in addition to the fair market value of the farmland on which they were situated. See *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). The prejudicial nature of this instruction was exacerbated by the statements in instruction No. 3 that the jury could consider "[r]eplacement cost of the property taken and improvements thereon" and "[o]ther relevant factors." No other instructions given to the jury serve to ameliorate the misleading and prejudicial effect of instructions Nos. 3 and 4. Thus, the giving of these instructions instead of NJI2d Civ. 13.02 constitutes reversible error which necessitates a new trial.

[7] The remaining issues relate to the Currys' assignments of error pertaining to the denial of attorney fees. An appellate court is not obligated to engage in an analysis which is not needed to

adjudicate the controversy before it. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003); *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). It may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002). Resolution of the Currys' assignments of error are unnecessary to the disposition of this matter, and inasmuch as we are unable to assess the likelihood that these issues will recur at the new trial necessitated by our disposition of the cross-appeal, we do not address them here.

CONCLUSION

Although we determine that the district court did not abuse its discretion in excluding the testimony of appraiser Way, we conclude that the giving of instructions Nos. 3 and 4 instead of NJI2d Civ. 13.02 constituted reversible error. Accordingly, the judgment of the district court is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CARL R. HOLM, APPELLANT, V. BARBARA K. HOLM, NOW KNOWN AS BARBARA K. ASHBRIDGE, APPELLEE.

678 N.W.2d 499

Filed April 23, 2004. No. S-03-290.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **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 court below.
3. **Courts: Public Policy.** The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.
4. **Supreme Court: Appeal and Error.** While the doctrine of stare decisis forms the bedrock of our common-law jurisprudence, it does not require the Nebraska Supreme Court to blindly perpetuate a prior interpretation of the law if the court concludes that it was clearly incorrect.
5. **Divorce: Alimony: Statutes.** With respect to any alimony award included in a decree of dissolution entered on or after July 1, 2004, the statutory grounds for termination set forth in Neb. Rev. Stat. § 42-365 (Reissue 1998) will apply unless the decree, or

a written agreement of the parties, includes explicit language stating that the death of either party and/or the remarriage of the alimony recipient shall not terminate the alimony order.

Appeal from the District Court for Otoe County: JOHN F. STEINHEIDER, County Judge. Affirmed.

Timothy W. Nelsen, of Fankhauser, Nelsen & Werts, P.C., for appellant.

Jeffery R. Kirkpatrick and Mary K. Hansen, of McHenry, Haszard, Hansen, Roth & Hupp, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This appeal presents the question of whether an obligation to pay alimony terminates upon remarriage of the recipient by operation of Neb. Rev. Stat. § 42-365 (Reissue 1998) where the decree provides that "alimony shall terminate upon the death of either party" but makes no reference to termination upon remarriage.

FACTS

A decree dissolving the marriage of Carl R. Holm and Barbara K. Holm, now known as Barbara K. Ashbridge, was entered by the district court for Otoe County on August 18, 2000. The decree provided in relevant part:

> The Petitioner, Carl R. Holm, should be and is hereby Ordered and directed to pay alimony to the Respondent, Barbara K. Holm, in the sum of ONE THOUSAND DOLLARS ($1,000.00), each month, for a period of SIXTY (60) consecutive months, the first payment being due on the 1st day of August, 2000, and continuing on the 1st day of each month thereafter for a total of SIXTY (60) consecutive months. The petitioner should be and is further Ordered and directed, in this respect, to thereafter pay alimony to the respondent in the sum of SEVEN HUNDRED FIFTY DOLLARS ($750.00), each month, for a period of SIXTY (60) consecutive months, the first of said payments being due on the 1st day August, 2005, and continuing on the 1st day of each month thereafter for a total of SIXTY (60) consecutive

months. *Said alimony shall terminate upon the death of either party.*

(Emphasis supplied.)

Barbara remarried on October 5, 2002. On November 12, Carl filed a petition to modify the decree, asserting that Barbara's remarriage was a material change in circumstances. He further asserted that the remarriage should operate to terminate the alimony obligation as a matter of law under § 42-365, which provides in relevant part that "[e]xcept as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient."

Following a hearing, the district court denied the petition to modify. The court reasoned that its specific finding that "'alimony shall terminate upon the death of either party'" was incorporated into the decree and fell within the exception to the general termination rule stated in § 42-365 and, thus, declined to terminate alimony as requested in Carl's petition to modify. Carl filed this timely appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Carl assigns, restated, that the district court erred in its interpretation of § 42-365 when it determined that silence in the decree as to the effect of remarriage was the same as if the decree specifically ordered alimony to continue after remarriage.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law. *Brown v. Harbor Fin. Mortgage Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004); *Dean v. Yahnke*, 266 Neb. 820, 670 N.W.2d 28 (2003). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004); *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (2003).

ANALYSIS

Section 42-365 provides, in relevant part, that "[e]xcept as otherwise agreed by the parties in writing or by order of the

court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient." In this case, it is undisputed that there was no agreement by the parties in writing. The issue, therefore, is whether the decree is an order of the court providing the requisite exception.

We addressed a similar circumstance in *Watters v. Foreman*, 204 Neb. 670, 284 N.W.2d 850 (1979). In that case, the divorce decree provided in relevant part that the alimony payments " 'shall cease upon the death of [the recipient] prior to the making of all of such payments' " and that " 'said provisions for alimony and property settlement are final and complete and not subject to revision or amendment.' " (Emphasis omitted.) *Id.* at 673, 284 N.W.2d at 852. We determined that the language in the decree fell within the exception in § 42-365, reasoning that although the decree would have been clearer if it had addressed the issue of remarriage, its meaning was that the alimony obligation would terminate only in the event of the recipient's death, and not upon her remarriage. We wrote:

> Had the court intended to subject the decree to the provisions of section 42-365 . . . *both* as to death *or* remarriage, it would not have been necessary to say anything about death. Section 42-365 . . . would have taken care of that situation, just as it would have taken care of remarriage. However, by including *only* the death provision of section 42-365 . . . and otherwise prohibiting any other act from modifying or amending the decree, it appears clear beyond question that the trial court intended that *only* death could terminate the required payments.

Watters, 204 Neb. at 675, 284 N.W.2d at 853.

We have also addressed decrees that are silent as to the effect of both the alimony recipient's remarriage and the recipient's death. *Kingery v. Kingery*, 211 Neb. 795, 320 N.W.2d 441 (1982); *Euler v. Euler*, 207 Neb. 4, 295 N.W.2d 397 (1980). In *Kingery*, we concluded that language in the decree awarding alimony " 'until the total alimony award of $10,000.00 is paid in full' " was not an order of the court falling within the exception in § 42-365. 211 Neb. at 798, 320 N.W.2d at 443. We reasoned that the words said no more than if the court had simply calculated the date upon which the payments would end and thus did not alter the general

rule of § 42-365 that alimony was to terminate at either death or remarriage. Similarly, the decree in *Euler* provided that alimony payments were to " 'continue . . . for a period of One Hundred Twenty-one (121) months, or a total of ten (10) years and one (1) month.' " 207 Neb. at 6, 295 N.W.2d at 399. Reasoning that this language failed to provide for the termination of alimony upon the occurrence of a specified event and included no provision that the alimony was not modifiable, we held that it did not fall within the exception in § 42-365.

Unlike *Kingery* and *Euler*, the language of the decree at issue in this case is not silent regarding the effect on alimony of both remarriage and death of the recipient. Rather, as in *Watters v. Foreman*, 204 Neb. 670, 284 N.W.2d 850 (1979), the decree here specifically sets forth a specified event—the death of either party—upon which alimony is to terminate. Applying the reasoning of *Watters*, if the district court had intended the default rule to apply, it would not have made the specific finding that the alimony was to terminate upon the death of either party. Although the decree in *Watters* contained an express provision that the alimony award was not modifiable and no similar provision is contained in the decree in the instant case, we find this to be a distinction without a difference.

Watters constituted controlling precedent when the decree in this case was entered and became final. Because we perceive no meaningful distinction between the facts in this case and those in *Watters*, we conclude that the district court did not err in determining that under the decree, Carl's obligation to pay alimony would terminate only when all required payments were made or upon the death of either party, but not upon Barbara's remarriage.

[3,4] We are nevertheless persuaded that the *Watters* rule should not enjoy continued vitality. The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). See, also, *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003). While the doctrine of stare decisis forms the bedrock of

our common-law jurisprudence, it does not require us to blindly perpetuate a prior interpretation of the law if we conclude that it was clearly incorrect. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). The plain language of § 42-365 states that "alimony orders shall terminate upon the death of either party or the remarriage of the recipient" *except* where the parties agree otherwise "or by order of the court." If a court chooses to exercise its authority to override the default termination provisions of § 42-365, it easily can and should do so explicitly, leaving no doubt as to its intent. We agree that "[a]n order of the court 'otherwise' in an alimony decree should be specific and in clear terms negate the specific condition or conditions which do not operate to terminate the obligation." *Watters v. Foreman*, 204 Neb. 670, 678, 284 N.W.2d 850, 855 (1979) (Clinton, J., dissenting).

[5] Accordingly, we overrule *Watters* prospectively and hold that with respect to any alimony award included in a decree of dissolution entered on or after July 1, 2004, the statutory grounds for termination set forth in § 42-365 will apply unless the decree, or a written agreement of the parties, includes explicit language stating that the death of either party and/or the remarriage of the alimony recipient *shall not* terminate the alimony order.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. EDWARD L. WINTROUB, RESPONDENT.

678 N.W.2d 103

Filed April 23, 2004. No. S-03-452.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and

may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.

2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
4. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (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 respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
5. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
6. **Disciplinary Proceedings: Words and Phrases.** In the context of attorney discipline proceedings, "misappropriation" is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom.
7. **Disciplinary Proceedings.** Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment.
8. **Disciplinary Proceedings: Presumptions.** In cases involving misappropriation and commingling of client funds, mitigating factors overcome the presumption of disbarment only if they are extraordinary.
9. **Disciplinary Proceedings.** Misappropriation of client funds by an attorney violates basic notions of honesty and endangers public confidence in the legal profession.
10. ____. Misappropriation as the result of a serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of improper intent or deliberate wrongdoing.

Original action. Judgment of suspension and probation.

John W. Steele, Assistant Counsel for Discipline, for relator.

Waldine H. Olson, of Nolan, Olson, Hansen, Fieber & Lautenbaugh, L.L.P., for respondent.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

The office of the Counsel for Discipline of the Nebraska Supreme Court, as relator, commenced this disciplinary proceeding against attorney Edward L. Wintroub, respondent. Following

an evidentiary hearing, a referee appointed by this court found multiple violations of the Code of Professional Responsibility and recommended a 1-year period of suspension, with readmission subject to a period of probation. Both parties have filed exceptions to the referee's report.

BACKGROUND

Wintroub was admitted to the practice of law in Nebraska on June 28, 1965. At all relevant times, he was engaged in private practice in Omaha. From 1974 to 2001, Wintroub's practice consisted of insurance defense work regarding liquor liability laws for one principal client. Sometime in 2001, Wintroub's relationship with this client ended, causing significant financial pressures on his law practice.

At all relevant times, Wintroub maintained a trust account at First Westroads Bank. He did not, however, keep a separate ledger for each client's account. Instead, when a settlement draft was received, he would obtain a statement of the case expenses found in the client's file and prepare two checks; one for his fee and expenses and the other for the client.

On December 30, 2002, this court granted the application of the Committee on Inquiry of the Second Disciplinary District for a temporary suspension of Wintroub's license pursuant to Neb. Ct. R. of Discipline 12 (rev. 2002) on the basis of alleged multiple irregularities in Wintroub's trust account. On April 22, 2003, the Counsel for Discipline filed formal charges consisting of five counts alleging multiple trust account violations occurring in 2001 and 2002. Wintroub filed an answer which neither admitted nor denied the factual allegations, but placed the Counsel for Discipline on strict proof. At the hearing before the referee, Wintroub admitted the factual allegations of counts I through IV while denying the legal conclusions asserted by relator. During the hearing, relator voluntarily dismissed the fifth count. We summarize the factual allegations thus admitted and the referee's findings with respect thereto.

COUNT I

On or about November 7, 2001, Wintroub purported to settle a personal injury case on behalf of his client, Debra Gillam, for $30,000, apparently believing that he had the requisite authority

to do so. He negotiated the settlement draft issued by an insurance company by signing Gillam's name and his, and then deposited the draft in his trust account. He then issued a check to himself in the amount of $10,150 for fees and expenses relating to the settlement.

At some time thereafter, Gillam informed Wintroub that she had not authorized him to settle her case for $30,000. Wintroub sent a check in the amount of $30,000 to the insurance company, but then notified the company that he was stopping payment on the check. He did not refund the settlement proceeds to the insurance company until December 2002, after being requested to do so by Gillam's new attorney.

At the point that Wintroub realized that Gillam had not authorized the settlement, there should have been at least $19,850, representing Gillam's share of the failed settlement, on deposit in Wintroub's trust account. When Wintroub sent the initial refund check to the insurance company, his trust account balance should have been at least $30,000. Between November 1 and 30, 2001, the balance in Wintroub's trust account fell to a low of $122.13. Between December 1, 2001, and July 1, 2002, Wintroub's trust account balance fell below $30,000 on numerous occasions and in fact had a negative balance on March 18, 2002. Relator alleged that the foregoing constituted a violation of Wintroub's oath of office as an attorney and the following disciplinary rules:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> . . . .
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> (A) All funds of clients paid to a lawyer or law firm shall be deposited in an identifiable account or accounts maintained in the state in which the law office is situated in one or more state or federally chartered banks, savings banks, savings and loan associations, or building and loan associations insured by the Federal Deposit Insurance

> Corporation, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay account charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
>
> (B) A lawyer shall:
>
> . . . .
>
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.

With respect to count I, the referee found by clear and convincing evidence that Wintroub failed to preserve client funds regarding the settlement proceeds, constituting a violation of Canon 9, DR 9-102(A), and his oath of office as an attorney. The referee rejected Wintroub's argument that because Gillam refused the funds and denied authorizing the settlement, the proceeds which he received from the insurance company never became client funds. The referee further concluded that such conduct was a violation of a disciplinary rule prohibited by Canon 1, DR 1-102(A)(1), and Wintroub's oath of office as an attorney. He concluded, however, that there was not clear and convincing evidence that Wintroub engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

COUNT II

On January 23 and 30, 2002, Wintroub deposited two checks from the Great Northern Insurance Company into his trust account. The checks, both payable to Wintroub and his wife, were in the amounts of $54,500 and $27,250. On December 13, 2001, and January 3, February 15 and 25, and March 18, 2002, Wintroub made deposits into his trust account in the amounts of $40,000, $55,000, $30,000, $5,000, and $5,000, respectively.

The deposit slips did not disclose the source of the funds. On March 4 and April 8 and 22, 2002, Wintroub deposited $30,000, $9,500, and $9,600 into his trust account, respectively. Wintroub was identified as the remitter for the cashier's checks used to make the deposits. On June 17, 2002, Wintroub deposited a check from an Omaha jeweler in the amount of $20,000, payable to him, into his trust account. The memorandum portion of the check indicates it was for a purchase.

Relator alleged that the foregoing conduct constituted a violation of Wintroub's oath of office as an attorney, as well as DR 1-102(A)(1) and (4) and DR 9-102(A) and (B).

With respect to this count, the referee found by clear and convincing evidence that Wintroub had commingled personal funds in his trust account, constituting a violation of DR 9-102(A), and that he had failed to maintain a complete record of client funds, constituting a violation of DR 9-102(B). As such, the referee found clear and convincing evidence that Wintroub violated a disciplinary rule, constituting a violation of DR 1-102(A)(1), and that he violated his oath of office as an attorney. He found, however, that there was not clear and convincing evidence that Wintroub engaged in conduct involving dishonesty, deceit, fraud, or misrepresentation. The referee's findings with respect to count II include the following:

> The greater weight of the evidence suggests that respondent may have been parking personal funds in the trust account for unexplained reasons. The greater weight of the evidence also shows that respondent was engaged in a kiting scheme by withdrawing fees before he deposited the insurance proceeds attributable to the fee. It is undisputed, however, that no client was actually injured, although the potential for injury was great.

COUNT III

On or about November 14, 2001, a lawyer in Wintroub's firm settled a claim on behalf of Francis Haiar and deposited the $30,000 insurance proceeds into the trust account. On or about January 16, 2002, Wintroub issued a check payable to Haiar drawn on the trust account in the amount of $19,581.37 as proceeds of the settlement. Between November 14, 2001, and January 16, 2002,

the balance of Wintroub's trust account fell below the settlement proceeds payable to Haiar.

Relator alleged that the foregoing conduct violated Wintroub's oath of office as an attorney, DR 1-102(A)(1) and (4), and DR 9-102(A). The referee found clear and convincing evidence that Wintroub failed to preserve the identity of client funds regarding the settlement proceeds obtained on behalf of Haiar, constituting a violation of DR 9-102(A). The referee further determined from this evidence that Wintroub violated a disciplinary rule, constituting a violation of DR 1-102(A)(1), and that he violated his oath of office as an attorney. The referee found no clear and convincing evidence, however, that Wintroub engaged in conduct involving dishonestly, deceit, fraud, or misrepresentation.

COUNT IV

On or about December 21, 2001, Wintroub or a member of his firm settled a case on behalf of Jamie North and deposited the $25,000 insurance check into the trust account. On or about January 3, 2002, Wintroub issued a trust account check to North in the amount of $16,432.09 as her share of the settlement proceeds. Between December 21, 2001, and January 3, 2002, the balance in Wintroub's trust account fell to $7,317.70. The referee found that Wintroub "appears to have issued three trust account checks to himself for his fee in the North matter," the first for $6,000, issued 5 days before the insurance proceeds were deposited in the trust account; the second for $7,000, issued 3 days before the deposit; and the third for $8,000, issued 3 days after the deposit. Relator alleged that these facts constituted violations of Wintroub's oath of office as an attorney, DR 1-102(A)(1) and (4), and DR 9-102(A). With respect to this count, the referee found clear and convincing evidence that Wintroub failed to preserve the identity of client funds regarding the North settlement proceeds, in violation of DR 9-102(A). As such, he found clear and convincing evidence that Wintroub violated a disciplinary rule, constituting a violation of DR 1-102(A)(1), and that he violated his oath of office as an attorney. However, the referee found there was not clear and convincing evidence that Wintroub had engaged in conduct involving dishonesty, deceit, fraud, or misrepresentation.

MITIGATION AND SANCTIONS

The referee correctly noted that commingling and misappropriation of client funds typically warrants disbarment, but that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. He found the following mitigating factors in this case: (1) Wintroub has not been the subject of other disciplinary actions, (2) he truly regrets his conduct and is remorseful, (3) he cooperated fully and completely with the inquiry, (4) the conduct occurred over a relatively isolated period of time, and (5) the conduct is inconsistent with Wintroub's record as an attorney over the 36-year period prior to 2001.

The referee then addressed Wintroub's contention that his use of prescription medications during the time period at issue was a mitigating factor to be considered. In this regard, the referee found that Wintroub began taking prescription medications on the advice of his physician three times per day in 1998 to reduce his stress and chronic anxiety. Over the next several years, Wintroub continued to take prescribed medications to control his anxiety, and the amount of medications taken would generally depend on his stress level. At times, he was taking as many as 16 pills in a single day.

Beginning in approximately August 1999, Wintroub began to exhibit behavior which his friends and coworkers found bizarre. This behavior included memory lapses, confusion, trouble concentrating and remembering, slurred speech, and mood disturbances. Wintroub was observed singing and throwing food at people during lunch at a local restaurant. When questioned about this behavior the following day, Wintroub had no recollection. Friends and coworkers also testified that during this time period, Wintroub failed to recognize traffic signals when driving, fell out of a booth at a local restaurant, and authored hostile interoffice memorandums. He also apparently believed that a longtime friend had accused him of kidnapping the friend's granddaughter. In addition, Wintroub began missing meetings and appointments, and on at least one occasion, he fell asleep during a meeting with a client. Wintroub's trust account records indicate that during this time period, he would often type the wrong date on a check,

sometimes being off by a month, sometimes by several months, and sometimes transposing the date and month.

After considering all of the evidence, the referee concluded that Wintroub's use of prescription medications was consistent with his doctors' recommendations for treating his chronic anxiety. He further concluded that the use of the prescription medications and the side effects caused by such use were mitigating factors. The referee found that Wintroub has ceased using the medications. The referee recommended that Wintroub be suspended from the practice of law for a period of 1 year, with credit given for the period of his "voluntary temporary suspension." The referee further recommended that upon readmission, Wintroub should be subject to a period of probation for a period of not less than 2 years.

During the pendency of this appeal, the bill of exceptions was amended by agreement of the parties and leave of this court to include two documents which were not considered by the referee. The first document is entitled "Monitoring Contract Substance Abuse Recovery" and dated January 15, 2004, and is signed by Wintroub and the director of the Nebraska Lawyers Assistance Program. The second document is an affidavit signed by Wintroub on March 4, 2004, attesting to his compliance with the conditions of the monitoring contract, which conditions include ongoing counseling, participation in a 12-step program, and weekly contact with an attorney monitor. Wintroub further states that he has not taken any of the medications which had previously been prescribed for him since January 2003, when he suffered a grand mal seizure and was advised by his physician that the medications were the likely cause of his behavior problems and impairment of his cognitive abilities.

EXCEPTIONS

Both parties filed exceptions to the referee's report. Relator alleged that the referee erred in (1) finding there was not clear and convincing evidence that Wintroub's conduct violated DR 1-102(A)(4), i.e., dishonesty, deceit, fraud, and misrepresentation; (2) finding that Wintroub's excessive use of prescribed medications mitigates against the presumption of disbarment in this case; (3) finding that Wintroub should be given credit for the

time period of his "voluntary temporary suspension"; and (4) recommending a sanction that is too lenient.

Wintroub alleged that the referee erred in (1) concluding that Wintroub received $21,000 in fees and that he paid North $16,432.09 out of insurance proceeds totaling $25,000; (2) finding that he failed to preserve the identity of client funds regarding the settlement proceeds obtained on behalf of Gillam; (3) speculating that Wintroub "may have been parking personal funds in the trust account for unexplained reasons"; and (4) inferring that Wintroub was engaged in a "kiting scheme."

STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Counsel for Dis. v. Achola*, 266 Neb. 808, 669 N.W.2d 649 (2003). Disciplinary charges against an attorney must be established by clear and convincing evidence. *Id.*

ANALYSIS

WINTROUB'S EXCEPTIONS

Wintroub contends that the funds associated with the failed Gillam settlement were not client funds within the meaning of DR 9-102(A) because Gillam denied authorizing the settlement and therefore disclaimed any interest in the funds. We agree with the referee that this argument is without merit. The insurance company sent the funds to Wintroub, in his capacity as Gillam's attorney, based upon his representation that Gillam had agreed to the settlement. When he realized that she had not, Wintroub was obligated, in his capacity as her attorney, to return the funds to the insurance company, which he eventually did. He had no right to treat the funds as his own prior to making the refund. Thus, the referee properly considered this transaction in determining that Wintroub had committed the disciplinary violations alleged in count I of the formal charges.

Although Wintroub does not deny that the evidence submitted with respect to count II establishes the commingling of client funds with personal funds, he takes exception to the referee's findings, with respect to count II, that Wintroub "was engaged in a kiting scheme by withdrawing fees before he deposited the insurance proceeds attributable to the fee" and that Wintroub "may have been parking personal funds in the trust account for unexplained reasons." We conclude that there is clear and convincing evidence that Wintroub did in fact withdraw fees from his trust account before depositing settlement proceeds. However, Wintroub was not charged with engaging in a "kiting scheme," and there is no clear and convincing evidence that he did so. There is, however, clear and convincing evidence that Wintroub deposited personal funds in his trust account.

Wintroub takes exception to the findings of the referee, with respect to count IV, that Wintroub received $21,000 in fees and that he paid North $16,432.09 out of settlement proceeds totaling $25,000. It is not disputed that the North claim was settled for a total of $25,000 and that Wintroub disbursed $16,432.09 to North as net settlement proceeds. The record also reflects that Wintroub issued a trust account check to himself for $6,000, designated "FeeNorth" on the memorandum line; that he issued another check to himself for $7,000, designated "partialNorth"; and that he issued a third check to himself for $8,000, designated "North." While we acknowledge the mathematical inconsistency, we determine by clear and convincing evidence that the aforementioned checks drawn on Wintroub's trust account were issued as reflected above.

Relator's Exceptions

Relator takes exception to the referee's findings that there was not clear and convincing evidence that Wintroub engaged in conduct involving dishonesty, deceit, fraud, and misrepresentation, so as to constitute a violation of DR 1-102(A)(4) with respect to each of the four counts. Based upon our review of the record, we agree with the referee's findings in this regard. Relator's remaining exceptions involve the sanction recommended by the referee. We will address those issues *infra* in our independent determination of the appropriate sanction.

SANCTION

[3] We agree with the referee's determination that there is clear and convincing evidence that Wintroub violated DR 1-102(A)(1) and DR 9-102(A) with respect to count I; that he violated DR 1-102(A)(1) as well as DR 9-102(A) and (B) with respect to count II; that he violated DR 1-102(A)(1) and DR 9-102(A) with respect to count III; that he violated DR 1-102(A)(1) and DR 9-102(A) with respect to count IV; and that he violated his oath of office as an attorney with respect to all counts. We must therefore determine an appropriate disciplinary sanction. 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. Counsel for Dis. v. James, ante* p. 186, 673 N.W.2d 214 (2004).

[4,5] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (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 respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Villareal, ante* p. 353, 673 N.W.2d 889 (2004); *State ex rel. Counsel for Dis. v. Janousek, ante* p. 328, 674 N.W.2d 464 (2004). For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. James, supra*; *State ex rel. Counsel for Dis. v. Achola*, 266 Neb. 808, 669 N.W.2d 649 (2003).

[6] In the context of attorney discipline proceedings, "misappropriation" is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom. *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997). The evidence in this case establishes both misappropriation of client funds and commingling of personal funds with client funds.

[7,8] Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds

is disbarment. *State ex rel. Counsel for Dis. v. Rasmussen*, 266 Neb. 100, 662 N.W.2d 556 (2003). The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *State ex rel. Counsel for Dis. v. Janousek, supra.* In cases involving misappropriation and commingling of client funds, we have stated that mitigating factors overcome the presumption of disbarment only if they are extraordinary. *State ex rel. Counsel for Dis. v. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001). However, this court has not adopted a "bright line rule" that misappropriation of funds will always result in disbarment. *State ex rel. Counsel for Dis. v. Achola, supra.* In this as in any other disciplinary action, the determination of the appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *State ex rel Counsel for Dis. v. Janousek, supra*; *State ex rel. Counsel for Dis. v. Achola, supra.*

There are factors present in the instant case which we have considered as mitigating in prior disciplinary cases. It is undisputed that Wintroub cooperated throughout the course of the disciplinary proceedings and that he is genuinely remorseful about his conduct. See, *State ex rel. Counsel for Dis. v. Mills, ante* p. 57, 671 N.W.2d 765 (2003) (cooperation); *State ex rel. Counsel for Dis. v. Achola, supra* (remorse). It also appears to be undisputed that no client was actually injured by Wintroub's conduct and that any restitution was completed prior to the time disciplinary proceedings were commenced. See *State ex rel. Counsel for Dis. v. Achola, supra.* The record does not reflect any previous disciplinary action against Wintroub during the more than 30 years that he has practiced law in this state. The record includes several letters from employees and attorneys attesting to Wintroub's character and fitness as an attorney. See *id.*

These mitigating factors alone, however, are insufficient to overcome the presumption of disbarment in a case such as this involving numerous instances of misappropriation and commingling of client funds. Thus, the primary question in this action is whether Wintroub's impairment from use of prescription medications, combined with the mitigating factors previously listed, is so extraordinary as to overcome the presumption of disbarment. Wintroub argues that given the nature and degree of his impairment, the disciplinary violations were the result of mistake,

confusion, and negligence as opposed to dishonesty, fraud, deceit, or misrepresentation. Having the benefit of observing Wintroub's testimony and the other evidence offered on this point, the referee concluded that "there is too much evidence of respondent's confusion and gross negligence, and too much evidence of 36-years of spotless service for this referee to recommend disbarment."

Based upon our de novo review, we reach the same conclusion. Viewed in the context of Wintroub's long legal career, the time period at issue in this disciplinary proceeding was marked by aberrant personal and professional behavior. The record reflects that during this period, Wintroub suffered from concentration problems, slurred speech, memory lapses, disorientation, and mood disturbances. There is medical evidence that during this period, Wintroub's judgment and ability to function normally were significantly impaired by his lawful use of three different medications prescribed for stress and anxiety, some of which were to be taken on an "as needed" basis. We agree with the conclusion of the referee that the impairment was genuine and severe. The record reflects that Wintroub has recognized and confronted his impairment, has eliminated its cause, and has taken affirmative steps to prevent its recurrence.

Although it did not involve misappropriation or commingling of funds, our decision in *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002), provides a framework for assessing psychological impairment as a mitigating factor in a disciplinary case. In that case, we held that in order to establish depression as a mitigating factor, the respondent must show (1) medical evidence that he or she is affected by depression, (2) that the depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct. Here, we conclude that these requirements have been satisfied with respect to Wintroub's addiction to prescription medications. See, also, *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000).

[9,10] Although we conclude that there are sufficient mitigating factors in this case to overcome the presumption that a lawyer who misappropriates and commingles client funds should

be disbarred, we also conclude that Wintroub's conduct was of a nature as to warrant a substantial disciplinary sanction more severe than that recommended by the referee. Misappropriation of client funds by an attorney violates basic notions of honesty and endangers public confidence in the legal profession. *State ex rel. Counsel for Dis. v. Achola*, 266 Neb. 808, 669 N.W.2d 649 (2003). Misappropriation as the result of a serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of improper intent or deliberate wrongdoing. *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991). Although Wintroub was significantly impaired by his use of prescription medications, he was not totally without the ability to control his actions. While the mitigating factors in this case are sufficient to overcome the presumption that misappropriation and commingling of client funds warrants disbarment, the egregious conduct must nevertheless have a significant disciplinary consequence.

Wintroub has been suspended from the practice of law since December 30, 2002, a period of more than 15 months. We hereby enter a judgment of suspension retroactive to that date with no possibility of readmission prior to December 30, 2004. Upon application for reinstatement, Wintroub shall have the burden of proving that he has not practiced law during the period of suspension and that he has met the requirements of Neb. Ct. R. of Discipline 16 (rev. 2001). In addition, reinstatement shall be conditioned upon (1) the payment of all costs of this action, which are hereby taxed to Wintroub; (2) a showing of full compliance by Wintroub with all terms and conditions of his monitoring contract with the Nebraska Lawyers Assistance Program (NLAP) dated January 15, 2004, and any subsequent amendments thereto during the period of suspension; (3) a showing, confirmed by the office of the Counsel for Discipline, that there are no pending or unresolved disciplinary charges against Wintroub; (4) a showing that Wintroub has completed a course in law office management which includes instruction in proper bookkeeping procedures; (5) the submission by Wintroub and approval by this court of a probation plan, to be in effect for a period of not less than 2 years following readmission, whereby Wintroub's recovery program and his compliance with the Code of Professional Responsibility

would be monitored by an attorney monitor selected or approved by the director of the Nebraska Lawyers Assistance Program. Such plan should provide that the attorney monitor shall not be compensated for his or her duties, but he or she shall be reimbursed by Wintroub for actual expenses incurred. The plan of probation must also require that the attorney monitor will review any trust account maintained by Wintroub on a monthly basis during the period of probation and report any trust account irregularity or other disciplinary violation to the office of the Counsel for Discipline. At the end of the 2-year probationary period, it will be Wintroub's burden to show cause why the period of probation should not be extended for another year.

CONCLUSION

It is the judgment of this court that Wintroub be suspended from the practice of law, beginning on the date of his temporary suspension on December 30, 2002, and continuing until at least December 30, 2004, when he will be eligible to apply for readmission. Upon readmission, Wintroub shall be subject to a term of probation for not less than 2 years, in compliance with the terms as outlined above. Wintroub shall comply with disciplinary rule 16, and upon failure to do so, Wintroub shall be subject to punishment for contempt of this court. Accordingly, Wintroub is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION AND PROBATION.

CAROL LUDWICK, APPELLANT, V. TRIWEST HEALTHCARE ALLIANCE AND PHYSICIANS CLINIC, INC., APPELLEES.

678 N.W.2d 517

Filed April 29, 2004. No. S-02-200.

1. **Workers' Compensation: Appeal and Error.** 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 did 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 trial judge who conducted the original hearing.
3. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed 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: Words and Phrases.** Under the Nebraska Workers' Compensation Act, an "occupational disease" is a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed. "Injury" and "personal injuries" mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The terms "injury" and "personal injuries" include disablement resulting from occupational disease.
6. **Workers' Compensation: Time.** Under the Nebraska Workers' Compensation Act, an injury has occurred as the result of an occupational disease when violence has been done to the physical structure of the body and a disability has resulted. In other words, an occupational disease has caused an "injury," within the meaning of the act, at the point it has resulted in disability.
7. ____: ____. A worker becomes disabled, and thus injured, from an occupational disease at the point in time when a permanent medical impairment or medically assessed work restrictions result in labor market access loss.
8. **Workers' Compensation.** An employee's disability caused by an occupational disease is determined by the employee's diminution of employability or impairment of earning power or earning capacity.
9. **Workers' Compensation: Expert Witnesses.** It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, INBODY, and CARLSON, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed.

James E. Harris and Britany S. Shotkoski, of Harris Kuhn Law Firm, L.L.P., for appellant.

Joseph W. Grant, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellee TriWest Healthcare Alliance.

Kirk S. Blecha and Theresa A. Schneider, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee Physicians Clinic, Inc.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

PER CURIAM.

We granted Carol Ludwick's petition for further review of the decision of the Nebraska Court of Appeals in *Ludwick v. TriWest Healthcare Alliance*, No. A-02-200, 2003 WL 282588 (Neb. App. Feb. 11, 2003) (not designated for permanent publication). Ludwick contends the Court of Appeals erred in affirming the trial court's dismissal of her petition based on the appellate court's finding that Ludwick's latex allergy manifested itself in disability in 1992 and that subsequent reactions during her employment with the defendants were merely recurrences.

FACTUAL BACKGROUND

On March 9, 2001, Ludwick filed an amended petition alleging that she was entitled to workers' compensation benefits because "[o]n or about February 12, 1999, [her] symptomology and latex sensitization deteriorated and worsened to the extent that she could no longer safely perform her work duties and was required to cease her employment and pursue work where the risk of latex exposure would be diminished." Ludwick alleged that she suffered injuries as a result of an occupational disease arising out of and in the course of her employment with Physicians Clinic, Inc. (Physicians), and TriWest Healthcare Alliance (TriWest). Physicians and TriWest denied the allegations, and proceedings were held in the Workers' Compensation Court on June 15, 2001.

Ludwick was employed as a surgical nurse at Bergan Mercy Hospital (Bergan Mercy) from 1981 to 1993. During her time at Bergan Mercy, Ludwick was exposed to latex gloves and latex powder. She experienced rashes, hives, and wheezing symptoms, for which she received medical attention. Ludwick testified that her symptoms seemed to progressively worsen to the point where she was experiencing rashes, hives, and difficulty breathing at least once a month. In 1992, Ludwick had an anaphylactic-reaction to latex that required an epinephrine shot. Ludwick testified that she left Bergan Mercy in 1993 in order to take care of her children and to obtain employment where she would not be exposed to latex gloves because it was her

belief at that time that the powder in the latex gloves was causing her reactions.

From December 1994 to June 1997, Ludwick worked at Physicians as an office nurse. Ludwick was again exposed to latex which caused her to experience latex-related reactions. Ludwick sought medical treatment at Physicians for these reactions and was diagnosed with latex allergies on February 6, 1995. At that time, she was generally advised to avoid latex and began using vinyl gloves. Ludwick testified that she left Physicians to find another position where she would have a decreased exposure to latex.

Ludwick began working at TriWest on June 10, 1997, as a referral nurse, which involved working at a computer and telephone to authorize surgical procedures and did not involve any direct patient contact. Initially, Ludwick did not experience any latex-related problems. However, she began experiencing itching, hives, and difficulty breathing after TriWest moved into a new office building. The move to TriWest's new office building coincided with Ludwick's move into her new home. Ludwick testified that at the time TriWest moved to its new office building, she believed that her reactions may have been the result of problems with her new house. Ludwick testified that she does not know how much latex she was exposed to at TriWest, but that she had reactions "all the time," including four to five emergency room visits. On cross-examination, Ludwick conceded that three of these visits were attributed at the time to allergic reactions to food, not latex.

Ludwick resigned her position at TriWest on February 10, 1999. Initially, Ludwick testified that as a result of her health problems, she was on probation, and that she resigned because she thought she would be fired. On cross-examination, however, Ludwick acknowledged that three of the four documented reasons for her probation were not related to her health problems. The fourth reason was failure to give proper notice when taking time off.

From approximately 1993 continuing to the date of trial, Ludwick worked on an intermittent basis for Nurse Providers. After resigning from TriWest, Ludwick began working full time for Nurse Providers. This work involved providing patient care.

Although Ludwick attempted to limit her exposure to latex in this position, she was unable to avoid it entirely. At the time of trial, Ludwick was still employed by Nurse Providers on an "on-call basis."

At the time of trial in June 2001, Ludwick was also employed by Pediatric Associates as an office nurse, a position she had held since April of that year. Ludwick testified that Pediatric Associates has been able to accommodate her allergy problems, that she has only minor symptoms, and that although she is still exposed to latex and still has reactions, she is doing "better."

Dr. Ted Segura treated Ludwick for her allergies beginning in 1998. In a letter dated June 12, 2001, which was received in evidence at trial, he made recommendations for creating a latex-safe work environment for Ludwick. These recommendations included: avoiding the personal use of latex gloves, avoiding any environment in which powdered latex gloves are used, and avoiding intimate contact with latex items such as dental dams, condoms, balloons, and tourniquets. Despite these restrictions, Segura concluded that "[f]rom the standpoint of her latex allergy alone, Ms. Ludwick should be able to find a full-time position in a latex-safe environment."

Dr. Mary Wampler reviewed Ludwick's medical records. In a letter dated March 6, 2001, which was received at trial, Wampler concluded that Ludwick had developed "Type I" hypersensitivity to latex, or anaphylactic response, during her employment at Bergan Mercy. She stated that once an individual has progressed to this reaction to latex, no more aggravated reaction can occur because it is "as severe a reaction to latex [as] one can develop, short of death." Wampler thus opined that any symptoms Ludwick experienced after leaving Bergan Mercy were simply recurrences of the latex hypersensitivity and did not represent a worsening of her condition.

Jack Greene, a vocational rehabilitation counselor, stated in a report received at trial that Ludwick is able to continue employment as a registered nurse as long as she limits her exposure to latex. Greene opined, however, that Ludwick has experienced a 25-percent loss of earning capacity as a direct result of her hypersensitivity to latex, primarily because of her inability to work in a hospital environment.

The trial court, in its order filed August 22, 2001, dismissed Ludwick's petition, finding that she did not sustain an occupational disease during her employment with either Physicians or TriWest. Relying on Wampler's report, the trial court found that Ludwick's "last injurious exposure" to latex was prior to her employment at either Physicians or TriWest. Ludwick appealed to the workers' compensation review panel, and on January 18, 2002, the review panel affirmed the trial court's dismissal. In addition, the review panel ruled in favor of TriWest on its cross-appeal in which it contended that Ludwick failed to prove exposure to latex in the course of her employment with TriWest.

Ludwick appealed, and in an unpublished opinion, the Court of Appeals affirmed the dismissal without reference to TriWest's cross-appeal. *Ludwick v. TriWest Healthcare Alliance*, No. A-02-200, 2003 WL 282588 (Neb. App. Feb. 11, 2003) (not designated for permanent publication). The Court of Appeals determined that Ludwick's disability occurred in 1992 during her employment at Bergan Mercy, when she was forced to cease work and seek immediate medical attention, and that any subsequent reactions that occurred while she was in the employ of Physicians and TriWest were not causally connected to her disability. We granted Ludwick's petition for further review.

ASSIGNMENTS OF ERROR

Ludwick assigns, restated, that the Court of Appeals erred in (1) finding that Ludwick's disability, as opposed to her disease, occurred in 1992; (2) finding that Ludwick's acute allergic reactions caused by exposure to latex antigens in the workplace were a recurrence, as opposed to an aggravation, of her latex allergy disease; and (3) failing to apply the last injurious exposure rule.

In a purported cross-appeal asserted in its supplemental brief filed pursuant to Neb. Ct. R. of Prac. 2H (rev. 2002), TriWest assigns that the Court of Appeals erred when it failed to acknowledge and affirm the review panel's action sustaining TriWest's cross-appeal in which the review panel found that Ludwick failed to prove any exposure to latex during the course of her employment with TriWest. We do not reach this issue on appeal because TriWest did not petition for further review. See rule 2.

STANDARD OF REVIEW

[1] 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 did not support the order or award. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003); *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003); *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002).

[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 trial judge who conducted the original hearing. *Morris v. Nebraska Health System, supra*; *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

[3,4] Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Morris v. Nebraska Health System, supra*; *Zavala v. ConAgra Beef Co., supra*; *Frauendorfer v. Lindsay Mfg. Co., supra.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003); *Morris v. Nebraska Health System, supra*; *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002); *Vega v. Iowa Beef Processors, supra.*

ANALYSIS

BACKGROUND

Under the Nebraska Workers' Compensation Act, "[w]hen personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment," the employee is entitled to compensation unless willfully negligent at the time of receiving the injury. Neb. Rev. Stat. § 48-101 (Reissue 1998). The central issue in this case is whether Ludwick sustained a compensable injury caused by an

occupational disease arising out of and in the course of her employment with Physicians or TriWest.

[5] Under the Nebraska Workers' Compensation Act, an "occupational disease" is a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed. See Neb. Rev. Stat. § 48-151(3) (Cum. Supp. 2002). "Injury" and "personal injuries" mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. § 48-151(4). The terms "injury" and "personal injuries" "include disablement resulting from occupational disease." *Id.*

If an injury results in disability, the disabled employee is compensated under the schedule set forth in the act. See Neb. Rev. Stat. §§ 48-109 (Reissue 1998) and 48-121 (Cum. Supp. 2002). If the employee is totally disabled, he or she is compensated based on a fixed percentage of the wages received at the time of the injury. See § 48-121(1). If the employee is partially disabled, except for scheduled member injuries, he or she is compensated for his or her loss of earning power. See § 48-121(2) and (3).

[6] Thus, under the Nebraska Workers' Compensation Act, an injury has occurred as the result of an occupational disease when violence has been done to the physical structure of the body and a disability has resulted. See § 48-151(4). In other words, an occupational disease has caused an "injury," within the meaning of the act, at the point it has resulted in disability. See *id.* The resulting disability—assuming that a timely claim has been made—is compensated pursuant to the schedule set forth in the act. See §§ 48-109 and 48-121.

Date of Disability

The above illustrates that it is crucial in occupational disease cases to determine the date of disability, because until that date, the employee has suffered no compensable injury. The term "disability," however, is not expressly defined in the act. In cases involving injuries resulting from accidents, we have generally stated that disability is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. See *Minshall v. Plains Mfg. Co.*, 215 Neb. 881, 341 N.W.2d 906

(1983). In occupational disease cases, however, we have referenced the concept of disability slightly differently, stating that disability results at the point when "the injured worker is no longer able to render further service." *Morris v. Nebraska Health System*, 266 Neb. 285, 291, 664 N.W.2d 436, 441 (2003). See, also, *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995); *Osteen v. A.C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981); *Hauff v. Kimball*, 163 Neb. 55, 77 N.W.2d 683 (1956). We take this opportunity to clarify that the concept of disability is the same in both accident and occupational disease cases. To do so, it is necessary to examine the historical development of our occupational disease law.

We held in *Hauff v. Kimball, supra*, that the date of injury in cases of occupational disease was the time that disability first occurred.

> "Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be 'injured' only when the accumulated effects of the substance manifest themselves, which is when the employee becomes disabled and entitled to compensation; and the 'date of injury,' within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred . . . ."

Hauff v. Kimball, 163 Neb. at 61, 77 N.W.2d at 687. We reaffirmed that holding in *Osteen v. A.C. and S., Inc., supra*. We also held in *Osteen* that the amount of the plaintiff's award was limited to the statutory maximum in effect at the time the plaintiff stopped working, because "in the case of an occupational disease such as this one, the ' "date of injury," within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred . . . .' " 209 Neb. at 292, 307 N.W.2d at 521, quoting *Hauff v. Kimball, supra*.

We next addressed the date of injury for occupational diseases in *Hull v. Aetna Ins. Co., supra*. In *Hull*, a dentist became unable to work in his profession due to contact dermatitis, and in order to determine which of two successive workers' compensation insurers was liable for the dentist's disability, we were required to determine the date of injury. *Hull* utilized the "rendering further

service" language for the first time, stating that "the date that determines liability is the date that the employee becomes disabled from rendering further service." 247 Neb. at 719, 529 N.W.2d at 789, citing *Lowery v. McCormick Asbestos Co.*, 300 Md. 28, 475 A.2d 1168 (1984). An examination of *Lowery* provides some context for this formulation of the rule:

> "Occupational disease cases typically show a long history of exposure without actual disability, culminating in the enforced cessation of work on a definite date. In the search for an identifiable instant in time which can perform such necessary functions as to start claim periods running, establish claimant's right to benefits, determine which year's statute applies, and fix the employer and insurer liable for compensation, the date of disability has been found the most satisfactory. Legally, it is the moment at which the right to benefits accrues; as to limitations, it is the moment at which in most instances the claimant ought to know he has a compensable claim; and, as to successive insurers, it has the one cardinal merit of being definite, while such other possible dates as that of the actual contraction of the disease are usually not susceptible to positive demonstration."

300 Md. at 39-40, 475 A.2d at 1174. See 9 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 153.02[6][a] (2003). Notably, in *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995), the employee dentist experienced problems with contact dermatitis from 1987 to 1991. His reaction at one point in 1988 was so significant that it affected his fingers and hands and caused him to miss almost 1 week of work. On March 13, 1989, he was treated by a physician who recommended that he cease practicing dentistry. Although he reduced his hours to 10 per week, he did not completely abandon his dental practice until 1991. On these facts and applying the above rule, we found that the occupational disease manifested itself to the level of disability on March 13, 1989, and thus that that was the date of injury.

Subsequently, the Court of Appeals discussed *Hull* in *Ross v. Baldwin Filters*, 5 Neb. App. 194, 557 N.W.2d 368 (1996). In *Ross*, the plaintiff suffered from a skin condition that doctors linked to her employment as early as 1989. It was not until 1994, however, that the condition began to interfere with her ability to

work and a doctor recommended that she quit her job. Referencing *Hull*, the Court of Appeals found:

> This analysis is consistent with the definition and general treatment of the concept of "disability" under Nebraska workers' compensation laws. For example, "disability" within the meaning of Neb. Rev. Stat. § 48-128 (Reissue 1993), which addresses preexisting disabilities for the purpose of the Second Injury Fund, is defined as "an employee's diminution of employability or impairment of earning power or capacity." *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 909, 464 N.W.2d 343, 349 (1991). For the purpose of Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1993) (schedule of compensation), "disability" is defined "in terms of employability and earning capacity." *Minshall v. Plains Mfg. Co.*, 215 Neb. 881, 885, 341 N.W.2d 906, 909 (1983). [The plaintiff's] employability at Baldwin Filters first diminished in April 1994, when her condition had progressed to the point where her employment there had to cease.
>
> Thus, we conclude that the statute of limitations did not begin to run until April 1994 . . . .

Ross v. Baldwin Filters, 5 Neb. App. at 203, 557 N.W.2d at 373.

In *Jordan v. Morrill County*, 258 Neb. 380, 389, 603 N.W.2d 411, 418 (1999), and *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 558, 635 N.W.2d 405, 410 (2001), we described occupational disease cases as requiring "cessation of employment," as do repetitive trauma accident cases. Based on this language, the Court of Appeals concluded that the date of injury in both occupational disease and accidental injury cases was the same. See *Watson v. Omaha Pub. Power Dist.*, 9 Neb. App. 909, 622 N.W.2d 163 (2001). However, we recently clarified this aspect of our occupational disease law in *Morris v. Nebraska Health System*, 266 Neb. 285, 293, 664 N.W.2d 436, 442 (2003):

> *Jordan* and *Vonderschmidt* are inapplicable, as they are both repetitive trauma cases. This court has consistently analyzed repetitive trauma injuries as accidents within the meaning of Neb. Rev. Stat. § 48-151(2) (Reissue 1998), rather than occupational diseases. . . . Accordingly, our discussion in *Vonderschmidt* of the "discontinuation of

> employment" standard was framed in the context of establishing an identifiable point in time when an accident occurs "suddenly and violently" within the meaning of § 48-151(2). However, such an inquiry is unnecessary in an occupational disease case and, as such, has no application to the issues presented by this case. Any suggestion in either *Jordan* or *Vonderschmidt* that the "discontinuation of employment" standard is the same for both repetitive trauma and occupational disease cases is dicta and contrary to this state's line of occupational disease case law.

We further held in *Morris*:

> When considered collectively, *Hauff* [*v. Kimball*, 163 Neb. 55, 77 N.W.2d 683 (1956)], *Osteen* [*v. A.C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981)], and *Hull* [*v. Aetna Ins Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995)] set forth the rule that in an occupational disease context, *the "date of injury" is that date upon which the accumulated effects of the disease manifest themselves to the point the injured worker is no longer able to render further service. It is on that date that the occupational disease is said to manifest itself to the level of disability* permitting recovery for an occupational disease pursuant to the Nebraska Workers' Compensation Act.

(Emphasis supplied.) 266 Neb. at 291, 664 N.W.2d at 441.

[7,8] Thus, as recently as *Morris*, we continued to use the "no longer able to render further service" language when referring to "disability" in the occupational disease context. Read literally, this language implies that an employee must be permanently and totally disabled in order to be compensated for an occupational disease. However, as the above discussion of our occupational disease case law reveals, the phraseology means no such thing. Rather, there is no requirement in either our case law or the act that an employee be *totally* disabled in order for the date of injury to be established in an occupational disease case. An employee is "injured," for purposes of the act, on the date when the right to compensation accrues, even if the disability is only partial in nature. We therefore now clarify that the "no longer able to render further service" phraseology in our occupational disease case law refers to nothing other than the date of disability, partial or

total, as that term is commonly understood in workers' compensation law. We hold, restated, that a worker becomes disabled, and thus injured, from an occupational disease at the point in time when a permanent medical impairment or medically assessed work restrictions result in labor market access loss. See, *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002); *Jorn v. Pigs Unlimited, Inc.*, 255 Neb. 876, 587 N.W.2d 558 (1998). An employee's disability caused by an occupational disease is determined by the employee's diminution of employability or impairment of earning power or earning capacity. See, *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003); *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

APPLICATION

In the instant case, the Court of Appeals cited *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999), and *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001), for the proposition that cessation of employment is a requirement for recovery of workers' compensation benefits regardless of whether an injury arises from an accident or an occupational disease. *Ludwick v. TriWest Healthcare Alliance*, No. A-02-200, 2003 WL 282588 (Neb. App. Feb. 11, 2003) (not designated for permanent publication). The court reasoned that because Ludwick was required to cease work temporarily and seek medical attention for an anaphylactic reaction to latex during her employment with Bergan Mercy in 1992, her injury, and thus her disability, occurred on that date and not during her subsequent employment at Physicians or TriWest, when the symptoms recurred. In light of *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003), this was an incorrect application of *Jordan* and *Vonderschmidt* to Ludwick's claim that she sustained a disability caused by an occupational disease. However, we agree with the ultimate determination of the Court of Appeals that Ludwick's injury and disability occurred in 1992.

Although no formal work restrictions were imposed upon Ludwick until Segura's recommendations in 2001, Wampler's letter clearly reveals that Ludwick suffered permanent medical impairment as early as 1992, while she was employed at Bergan

Mercy. This medical opinion, combined with the opinion of the vocational rehabilitation expert that Ludwick sustained a 25-percent loss of earning capacity primarily because of her inability to work in a hospital setting because of her hypersensitivity to latex, establishes the onset of her disability in 1992. The remaining question, therefore, is whether her exposures at Physicians and TriWest were merely recurrences or were aggravations of her injury. See *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

In this case, the single judge found Wampler's opinion to be credible. Wampler opined that Ludwick's latex hypersensitivity developed during her employment at Bergan Mercy in 1992 and that any reaction after that was recurrent. Wampler specifically concluded that Ludwick's condition could not and did not worsen after her employment at Bergan Mercy. Based on this evidence, the single judge concluded that Ludwick was not entitled to compensation from Physicians or TriWest.

[9] It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe. *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000). Findings of fact may be reversed by this court only if they are clearly erroneous. *Id.* Based upon Wampler's testimony that Ludwick's latex hypersensitivity occupational disease was not causally related to any latex exposure at either Physicians or TriWest, it was not clearly erroneous for the single judge to find that Physicians and TriWest, the defendants in this case, are not liable for workers' compensation benefits.

CONCLUSION

Ludwick's claim for compensation has been brought against employers who are not liable for her compensation benefits. The judgment of the Court of Appeals affirming the judgment of the Workers' Compensation Court is therefore affirmed.

AFFIRMED.

McCORMACK, J., not participating.

KIMBERLEY FAYE GANGWISH, APPELLANT AND CROSS-APPELLEE, V. PAUL ALLAN GANGWISH, APPELLEE AND CROSS-APPELLANT.

678 N.W.2d 503

Filed April 29, 2004. No. S-02-274.

1. **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.
2. **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.
3. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and 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.
5. **Property Division.** The purpose of a property division is to distribute the marital assets equitably between the parties.
6. ____. Under Neb. Rev. Stat. § 42-365 (Reissue 1998), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
7. ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
8. **Divorce: Courts: Property Division.** The manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court's ability to determine how the property should be divided in an action for dissolution of marriage.
9. **Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.
10. **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.
11. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child.
12. **Child Support: Rules of the Supreme Court.** The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective incomes.

13. ____: ____. In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation.
14. **Child Support: Rules of the Supreme Court: Words and Phrases.** The Nebraska Child Support Guidelines provide that in calculating the amount of support to be paid, a court must consider the total monthly income, defined as the income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages.
15. **Child Support: Taxation.** Income for the purpose of child support is not necessarily synonymous with taxable income.
16. **Corporations: Courts: Equity.** Ordinarily, a corporation is regarded as a separate entity, distinct from the members who compose it; however, equity allows a court to disregard the corporate veil when necessary to do justice.
17. **Parent and Child: Child Support.** Support of one's children is a fundamental obligation which takes precedence over almost everything else.

Appeal from the District Court for Buffalo County: TERESA K. LUTHER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

Heather Swanson-Murray, of Yeagley Law Offices, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

I. NATURE OF CASE

Kimberley Faye Gangwish appeals from the decree dissolving her marriage to Paul Allan Gangwish, and Paul cross-appeals. At issue in this appeal are the trial court's decisions with respect to the property division, the child support determination, and an attorney fees award.

II. FACTUAL AND PROCEDURAL BACKGROUND

On November 5, 1988, Kimberley and Paul were married in Hastings, Nebraska. In the following years, three children were born to the marriage, currently ages 8, 11, and 13. Prior to their marriage, Paul worked for Gangwish Seed Farms, Inc., a family corporation, which had been founded by his father. In 1994, Paul stopped working for Gangwish Seed Farms and began to pursue

his own farming operation. To do so, Paul and Kimberley formed P.G. Farms, Inc., of which they are the sole and equal shareholders. Essentially, P.G. Farms is the corporate body through which Paul conducts his farming operation. Paul is considered an employee of P.G. Farms.

Prior to, and throughout the marriage, Kimberley has worked as a physician's assistant. During the marriage, however, Kimberley's employment arrangement changed and she became an independent contractor. In an effort to reduce Kimberley's tax liability, Paul and Kimberley formed K.F.G., Inc. Thereafter, whenever Kimberley would receive a paycheck, she would deposit the check into K.F.G.'s corporate account. Currently, Kimberley works nearly full time, earning $40 per hour.

On May 30, 2000, Kimberley filed a petition to dissolve the marriage, seeking custody of the children, child support, exclusive use of the family residence, and equitable division of the property. Finding the parties' marriage to be irretrievably broken, the trial court ordered the marriage to be dissolved. In addition, the court granted custody of the children to Kimberley, subject to reasonable visitation by Paul, and ordered Paul to pay child support in the amount of $1,567 per month. Paul was also ordered to maintain health insurance on the children, pay 66 percent of day-care expenses, and pay 66 percent of any unreimbursed medical, dental, optical, and orthodontia expenses.

As to the distribution of the parties' property, Kimberley was awarded, inter alia, (1) household furnishings and equipment, (2) two accounts at First State Bank of Shelton, (3) her retirement plans, (4) 14 shares of Gangwish Seed Farms; and (5) all shares of stock in K.F.G. Paul, on the other hand, was awarded, inter alia, (1) household furnishings and equipment; (2) two accounts at First State Bank of Shelton; (3) all shares of stock in P.G. Farms; (4) all shares of stock in Gangwish Seed Farms, minus the 14 shares awarded to Kimberley; (5) all shares of stock in another corporation, Platteland, Inc.; and (6) 320 acres of real estate in Buffalo County. To equalize the property settlement, the court ordered Paul to (1) pay a number of debts owed by the parties and their corporations, and to hold Kimberley harmless on the same, and (2) pay Kimberley $471,871.50. Paul was also ordered to pay $10,000 of Kimberley's legal fees.

On January 16, 2000, Kimberley moved for a new trial. In her motion for new trial, Kimberley alleged, inter alia, that (1) the court erred in its division of assets and debts, (2) the decision to grant the family home to Paul was contrary to the best interests of the children, (3) the court erred in its asset evaluation, and (4) the award of child support was not in accord with the Nebraska Child Support Guidelines. After a hearing, Kimberley's motion was denied. Thereafter, Kimberley filed a timely notice of appeal, and Paul cross-appealed.

III. ASSIGNMENTS OF ERROR

Kimberley assigns, restated, that the trial court erred in (1) failing to award Kimberley the family home, (2) failing to add to Paul's income the depreciation expenses taken by P.G. Farms for purposes of determining child support, and (3) not deviating upward from the child support guidelines.

In his cross-appeal, Paul assigns, renumbered and restated, that the trial court erred in (1) failing to adequately account for the student loans Kimberley brought into the marriage; (2) failing to give Paul a credit for the personal, premarital funds he used to make a downpayment on the parties' first home; (3) awarding shares of Gangwish Seed Farms stock to Kimberley; (4) calculating Paul's child support obligation; and (5) awarding attorney fees to Kimberley.

IV. STANDARD OF REVIEW

[1] 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. *Olson v. Sherrerd,* 266 Neb. 207, 663 N.W.2d 617 (2003).

[2] 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. *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003).

[3] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Claborn v. Claborn, ante* p. 201, 673 N.W.2d 533 (2004).

V. ANALYSIS

The parties' assignments of error fall into three categories: property division, child support, and award of attorney fees to Kimberley.

1. Property Division

(a) The Marital Residence

During oral argument, Kimberley withdrew her first assignment of error relating to the trial court's award of the family home to Paul. Therefore, we will not discuss this previously assigned error.

(b) Kimberley's Student Loans

At the time of the parties' marriage, Kimberley owed $12,399.43 in student loans. During the marriage, Kimberley's loans were paid off with marital funds. However, in its decree, the trial court accounted for only $7,000 of the $12,399.43 debt that Kimberley brought into the marriage. Paul argues the court erred by failing to deduct the remaining $5,399.43 from Kimberley's award.

[4] We agree that Kimberley's award should have been reduced by the total student loan debt that she brought into the marriage because that debt was paid off with marital assets. However, we do not believe this mistake constitutes an abuse of judicial discretion when it is placed in the context of the property division as a whole. 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 the division of property. *Longo, supra.* A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and 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. *Nelson v. Nelson, ante* p. 362, 674 N.W.2d 473 (2004).

Here, the marital estate totaled well over $1 million and the alleged mistake constitutes less than one-half of 1 percent of this

total. Under these circumstances, we cannot say the court's error deprived Paul of a substantial right or a just result.

(c) Paul's Premarital Funds

Shortly before their marriage, in 1988, the parties purchased a home in Grand Island, Nebraska. At trial, Paul testified that he paid $10,619.93 in personal, premarital funds for the downpayment on the home. He also presented evidence, in the form of check stubs from a check register, of his $10,619.93 contribution. The warranty deed for the house lists both Paul and Kimberley as grantees. After the parties were married, they purchased a new home and moved to Shelton, Nebraska. Thereafter, they found a buyer for their home in Grand Island and applied the proceeds from that sale to the payments on their new home.

In 1998, the parties decided to build their current residence at the site of P.G. Farms' farming operation in rural Buffalo County. To do so, they sold their residence in Shelton and loaned the proceeds from that sale to P.G. Farms, from which P.G. Farms paid for the construction of their new, and current, residence. On appeal, Paul argues that the court erred by not giving him a credit for the $10,619.93 in personal, premarital funds that he expended for the downpayment on the parties' first home in Grand Island.

[5-7] The purpose of a property division is to distribute the marital assets equitably between the parties. Neb. Rev. Stat. § 42-365 (Reissue 1998); *Claborn v. Claborn, ante* p. 201, 673 N.W.2d 533 (2004). Under § 42-365, the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Mathews v. Mathews, ante* p. 604, 676 N.W.2d 42 (2004). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002).

On a number of occasions, we have examined similar factual circumstances. For example, in *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000), we modified a property settlement to

credit the husband for making the downpayment on the parties' first marital home. In doing so, we recognized that when the husband made the downpayment, he used separate funds and was not yet married. *Id.* Therefore, because property which a party brings into the marriage is generally excluded from the marital estate, we determined that the husband was entitled to a credit for the downpayment he made on what became the parties' marital home. *Id.* Similarly, in *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001), we determined that a husband who owned the parties' residence prior to the parties' marriage was entitled to receive a credit for the amount of equity in the house at the time of the parties' marriage. See, also, *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003) (husband entitled to credit for downpayment he made on his business, when downpayment was made with separate funds, prior to his marriage).

[8] We note that in neither case did the husband and wife have joint title to the subject property prior to their marriage. However, we conclude that this is a distinction without a difference. In *Schuman, supra*, the husband inherited a sizeable amount of money from his mother during his marriage. After receiving the money, the husband took part of it and applied it toward the downpayment on an acreage that he and his wife took in joint title. During the dissolution action, the husband, claiming the deposit was paid for with separate property, sought a credit for the amount of money he expended on the downpayment. *Id.* The district court determined that the inherited money he used for the downpayment became marital property when the acreage was placed in joint tenancy with his wife and refused to give him a credit. *Id.* We reversed, concluding that the manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court's ability to determine how the property should be divided in an action for dissolution of marriage. *Id.* Because the husband proved that $19,000 of the $20,000 downpayment for the acreage came from his separate funds, i.e., his inheritance, we determined he was entitled to a credit in that amount. *Id.*

Similarly, in the instant case, the fact that the parties' home was jointly titled does not alter the fact that Paul provided documentary evidence to establish that he contributed $10,619.93 of personal funds toward its purchase prior to the parties' marriage.

Under these circumstances, Paul proved that he made a sizeable contribution to what became a joint asset from his personal funds, and normally, he would be entitled to a credit in that amount. See *Heald, supra* (property which party brings into marriage is generally excluded from marital estate). To rule otherwise would be to presume that Paul's expenditure of personal, premarital funds was, in essence, a gift of $10,619.93 to Kimberley. This we will not do. See *Schuman, supra* (disapproving *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996)).

[9] Nonetheless, Paul is not entitled to a credit for the personal, premarital funds he expended on the parties' first home. The burden of proof to show that property is nonmarital remains with the person making the claim. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). At trial, Paul testified that the proceeds from the sale of the parties' first home were used to make payments on their second home. Paul also testified that the parties loaned the proceeds from the sale of their second home, as well as some personal funds, to P.G. Farms and that P.G. Farms paid for the construction of their current residence. Essentially, Paul claims that when the parties sold their first home, his separate, premarital contribution was used, along with the remaining proceeds from the sale, to make the payments on the parties' second home. When the parties sold their second home, Paul claims his separate, premarital contribution was loaned, along with the remaining proceeds from the sale, to P.G. Farms.

Paul, however, did not present evidence that his premarital contribution retained its status as separate property after the parties sold their first home. More significantly, even if we were to assume Paul could trace his personal, premarital interest from the parties' first home to their second, Paul presented no evidence to document how his separate interest in the proceeds from the second home were in fact loaned to P.G. Farms. In fact, outside of Paul's testimony, the record is devoid of evidence which establishes that *any* of the proceeds from the sale of the parties' second home were in fact loaned to P.G. Farms. In the absence of such evidence, we cannot say that the trial court abused its discretion by not giving Paul a credit for his premarital contribution toward the downpayment on the parties' first home. See *Rezac v. Rezac*, 221 Neb. 516, 378 N.W.2d 196 (1985) (noting problems

with tracing premarital property through disposition and reinvestment during marriage).

(d) Gift of Stock

During the parties' marriage, Leland Gangwish, Paul's father, gifted shares of Gangwish Seed Farms stock to both Paul and Kimberley. On December 29, 1994, Paul and Kimberley each received a certificate for eight shares of Gangwish Seed Farms stock. On August 23, 1996, Kimberley transferred her eight shares to Paul. On December 30, 1996, Paul and Kimberley each received a certificate for six shares of Gangwish Seed Farms stock. On April 22, 1997, Kimberley transferred her six shares to Paul. Leland testified that it was his desire to give all 28 shares to Paul, but out of concern for the tax consequences, he chose to gift half of the shares to Kimberley, with the intent that she would transfer them to Paul at a later time. Both Paul and Kimberley were aware of Leland's intent when he made the gifts.

In its decree, the trial court awarded Kimberley 14 shares of Gangwish Seed Farms and the remainder to Paul. The shares were not assigned a value in the decree. On appeal, Paul argues that the trial court abused its discretion by awarding Kimberley 14 shares of his family's corporate stock because it was Leland's intention that Paul gain ownership of all 28 shares.

[10] Our review of the trial court's decree suggests that the court determined that all 28 shares were marital property and simply allocated half to each party. 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. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). Such exceptions include property accumulated and acquired through gift or inheritance. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

We agree the evidence showed that Leland wanted Paul to obtain eventual possession of all 28 shares of stock in Gangwish Seed Farms. However, the fact remains that Leland gave only 14 shares to Paul. Therefore, Paul is entitled to receive, as separate property, only the 14 shares of stock that he received from Leland as a gift. As to the 14 shares given to Kimberley, upon transferring ownership of the shares to Paul, they lost their status as a gift

and became part of the marital estate. Because no value was assigned to the shares, we conclude that the parties should divide these 14 remaining shares equally. On remand, the trial court is ordered to amend its decree to award Kimberley seven shares of stock in Gangwish Seed Farms and the remainder to Paul.

2. Child Support

In its decree, the trial court ordered Paul to pay child support in the amount of $1,567 per month. On appeal, Kimberley contends that this amount is too low. Specifically, Kimberley argues that the court should have (1) added to Paul's income the depreciation expenses taken by P.G. Farms and (2) deviated upward from the child support guidelines. Paul, on the other hand, argues that P.G. Farms is a separate corporate entity and that the court erred by adding P.G. Farms' income and/or depreciation expenses onto his income for purposes of determining child support.

The record shows that the trial court relied on the parties' federal joint tax return for 2000 in establishing Kimberley's gross income for child support purposes. The tax return reported that K.F.G. had an income of $50,880 in 2000, or a monthly income of $4,240. Using worksheet 1, the trial court stated that Kimberley's monthly income was $4,240, or $50,880 annually. Neither Kimberley nor Paul questions the court's determination of Kimberley's income.

As for Paul, the court stated that his monthly income was $10,208, or $122,497 annually. Both parties agree that it is unclear how the court arrived at this amount. The court may have used the parties' 2000 federal income tax return which claimed $122,424 in total income from both parties. However, this number includes, among other sources of income, K.F.G.'s earnings, e.g., Kimberley's income. The record does show that P.G. Farms paid Paul $6,000 in salary and that Paul received $1,500 in director fees from Platteland, Inc. The parties' joint tax return also shows they received income from other sources, such as rental income and capital gains. However, as Paul notes, even if these additional sources of income were attributed to Paul, his total monthly income would be substantially less than $10,208. Therefore, it is reasonable to conclude that the trial court, in calculating Paul's income, included some amount of income from P.G. Farms.

(a) Paul's Income

On appeal, Kimberley contends that the court should have added the depreciation expenses taken by P.G. Farms to Paul's income. Paul, on the other hand, argues that P.G. Farms is a separate corporate entity and that, therefore, neither P.G. Farms' income nor its depreciation expenses are relevant to his income for child support purposes.

[11-13] The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child. *Claborn v. Claborn, ante* p. 201, 673 N.W.2d 533 (2004). The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective incomes. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation. *Claborn, supra.*

[14,15] The Nebraska Child Support Guidelines provide that in calculating the amount of support to be paid, a court must consider the total monthly income, defined as the income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages. *Marcovitz v. Rogers, ante* p. 456, 675 N.W.2d 132 (2004); Nebraska Child Support Guidelines, paragraph D. In the past, we have not set forth a rigid definition of what constitutes "income," but have instead relied on a flexible, fact-specific inquiry that recognizes the wide variety of circumstances that may be present in child support cases. *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001). Thus, income for the purpose of child support is not necessarily synonymous with taxable income. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003); *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000); *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999).

[16] We take a flexible approach in determining a person's "income" for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature. Thus, a court is allowed, for example, to add "in-kind"

benefits derived from an employer or third party to a party's income. See, *Workman, supra*; *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998); *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994). Likewise, we believe that a party's income, for purposes of determining child support, does not necessarily stop at the corporate structure of a closely held corporation. Although, ordinarily, a corporation is regarded as a separate entity, distinct from the members who compose it, equity allows a court to disregard the corporate veil when necessary to do justice. See *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). As noted previously, "justice," in child support determinations, is the best interests of the child. *Claborn, supra.*

Thus, we determine that under the appropriate factual circumstances, equity may require a trial court to calculate a party's income by looking through the legal structure of a closely held corporation of which the party is a shareholder. Stated otherwise, equity may demand that a court consider as income the earnings of a closely held corporation of which a party is a shareholder. The real question, however, is deciding what type of factual scenario justifies casting aside the corporate identity to place corporate income on the shareholder's side of the ledger. While the following is by no means meant to be exclusive, the facts of the instant case provide such an example:

The record establishes that throughout its existence, P.G. Farms has been used to pay for many of the parties' living expenses. For example, not only does P.G. Farms own the home in which the parties lived, it also paid for many of the costs of home ownership, including utilities, real estate taxes, homeowners insurance, yard care, and pool maintenance. In addition, P.G. Farms purchased the family's groceries and a number of the household furnishings, including a theater system, a washer and dryer, and bar stools. As Paul testified, "my salary from PG Farms is $6,000 a year. But there's other benefits from the company that we have had since the company was established that I would call a benefit in lieu of salary."

As mentioned previously, Kimberley and Paul were the sole and equal owners of P.G. Farms. In its decree, the trial court awarded Kimberley half of the value of P.G. Farms' assets. However, the court awarded Paul all of the shares of P.G. Farms'

stock, thereby making him the sole owner of P.G. Farms. Thus, where P.G. Farms was once used to supplement the parties' income by paying for a number of the family's living expenses, P.G. Farms' considerable revenue stream will now inure solely to the benefit of Paul.

In addition, the evidence reveals that throughout the parties' marriage, Paul was in sole control of the parties', as well as P.G. Farms', financial decisions. Therefore, the decision to treat P.G. Farms as the family's corporate piggy bank was Paul's. Likewise, the decision to pay Paul a salary of $6,000, while building value in the corporation, was Paul's. We note these facts not to question Paul's business decisions, but to show that Paul had, and continues to have, the ability to earn considerably more income than the $6,000 he receives from P.G. Farms. Moreover, the amount of salary and/or benefits in lieu of salary that Paul receives from P.G. Farms is, and will remain, Paul's decision.

[17] In cases such as these, a trial court should not only add "in-kind" benefits derived from an employer to a party's income, see *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001), but should also take into consideration the party's actual earning capacity. Nebraska Child Support Guidelines, paragraph D. See, also, *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001) (noting importance of determining party's actual earning capacity in child support cases); *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991) (same). The need to examine a party's earning capacity is "especially true when it appears that the parent is capable of earning more income than is presently being earned." *Rauch v. Rauch*, 256 Neb. 257, 264, 590 N.W.2d 170, 175 (1999). Moreover, while we do not doubt that building equity in a corporation in lieu of taking salary can be a wise business decision, the "support of one's children is a fundamental obligation which takes precedence over almost everything else." *Id.* at 263-64, 590 N.W.2d at 175. Here, it would simply be inequitable for Paul's children to suffer because of his decision to build value in P.G. Farms by depressing his salary. See *id.* See, also, *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003); *Gammel v. Gammel*, 259 Neb. 738, 612 N.W.2d 207 (2000); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

We note that our resolution of this matter is not unique. A number of courts have determined that perquisites supplied by a business to an employee, or a closely held corporation to a shareholder, should be considered as income for purposes of determining child support. See, *Mascaro v. Mascaro*, 569 Pa. 255, 803 A.2d 1186 (2002); *Clark v. Clark*, 172 Vt. 351, 779 A.2d 42 (2001); *Heisey v. Heisey*, 430 Pa. Super. 16, 633 A.2d 211 (1993); *Com. ex rel. Gutzeit v. Gutzeit*, 200 Pa. Super. 401, 189 A.2d 324 (1963). In addition, when a sole or majority shareholder uses the closely held corporation to pay for numerous personal expenses, courts have been willing to pierce the corporate veil and treat the corporation's income as the shareholder's own. See, *Morgan v. Ackerman*, 964 S.W.2d 865 (Mo. App. 1998); *Palazzo v. Palazzo*, 9 Conn. App. 486, 519 A.2d 1230 (1987); *Hurd v. Hurd*, 397 So. 2d 133 (Ala. Civ. App. 1980). Similarly, when a party is the sole or majority shareholder of a closely held corporation and determines his or her own salary, courts have been willing to pierce the corporate veil for the purpose of determining the party's income for child support. See, *Bleth v. Bleth*, 607 N.W.2d 577 (N.D. 2000); *Ochs v. Nelson*, 538 N.W.2d 527 (S.D. 1995); *Mitts v. Mitts*, 39 S.W.3d 142 (Tenn. App. 2000); *Morgan, supra*; *Isanti County v. Formhals*, 358 N.W.2d 703 (Minn. App. 1984); *Com. ex rel. Maier v. Maier*, 274 Pa. Super. 580, 418 A.2d 558 (1980). Simply put, courts throughout the nation have been unwavering in their attempt to reach an equitable outcome when it comes to determining a party's income for child support.

In sum, the court was within its discretion to look to P.G. Farms to determine Paul's income for child support purposes. However, we remain unable to determine how the trial court arrived at $10,208 as Paul's net monthly income. In any event, such a determination is a factual matter best left to the discretion of the trial court, and because we remand for a new determination of Paul's income, we need not dwell on this issue any further.

During the hearing on Kimberley's motion for a new trial, the trial court made it clear that it did not include P.G. Farms' depreciation expenses when determining Paul's monthly income. The record shows that in 1999, P.G. Farms had a gross income of over $1.08 million and took a $189,700 writeoff for depreciation.

Among other deductions, P.G. Farms' depreciation writeoff left it with a taxable income of $48,589. As noted above, Kimberley contends that the court should have included P.G. Farms' depreciation expenses when determining Paul's income.

Paragraph D of the Nebraska Child Support Guidelines, which discusses the proper treatment of depreciation expenses, was amended effective September 1, 2002. However, we must turn to the provision in effect at the time the dissolution action was filed. That provision states, "If a party is self-employed, depreciation claimed on tax returns should be added back to income or loss from the business or farm to arrive at an annualized total monthly income." Nebraska Child Support Guidelines, paragraph D. Thus, under usual circumstances, before we could add claimed depreciation to Paul's income, we would need to determine if Paul should have been considered as self-employed. See, *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003); *Gammel v. Gammel*, 259 Neb. 738, 612 N.W.2d 207 (2000).

These, however, are not the usual circumstances. In the instant case, equity compels us to disregard the corporate entity, of which Paul is the sole shareholder, to determine Paul's true income. Thus, the measure of Paul's income is driven, in large part, by the profitability of his closely held corporation, P.G. Farms. Therefore, it is imperative that the court determine P.G. Farms' true income. To that end, corporate income, much like individual income, at least for the purposes of child support, is not necessarily synonymous with taxable income.

Under these circumstances, we determine that depreciation expenses must be considered in determining P.G. Farms' income. Otherwise, Paul would be allowed to benefit from his choice to build equity in P.G. Farms by taking depreciation and lowering profits. See, *Gase, supra*; *Gammel, supra*. Obviously, such a situation would work against the best interests of Paul's children because Paul would have a tax incentive to keep P.G. Farms' income as low as possible. Thus, the depreciation reported on P.G. Farms' tax returns must be added back to its income. See *Gammel, supra* (noting that for child support purposes, Nebraska Child Support Guidelines treat depreciation as book figure which does not involve any cash outlay or reduce actual dollar income and, therefore, should not be allowed as deduction).

In sum, we determine that the court did not abuse its discretion by looking to P.G. Farms to determine Paul's income. However, we conclude that the court abused its discretion by failing to add P.G. Farms' depreciation expenses to P.G. Farms' income before looking to P.G. Farms' income to determine Paul's income. Therefore, we reverse, and remand for a new determination of Paul's income. On remand, when determining Paul's income, the trial court should consider, in addition to looking to Paul's reported income, (1) the in-kind benefits, e.g., perquisites, that Paul receives from P.G. Farms; (2) P.G. Farms' depreciation expenses; and (3) with due regard for business realities, the amount of P.G. Farms' income which should equitably be attributed to Paul.

(b) Upward Deviation

The trial court determined that after deductions, Paul and Kimberley had a monthly net income of $10,132.69, or $121,592.26 annually. Kimberley contends that the court should have deviated upward from the child support guidelines. Because we remand for a new determination of Paul's income, we need not decide if the trial court erred in failing to deviate upward from guidelines.

3. Attorney Fees

Paul argues the trial court erred in ordering him to pay Kimberley $10,000 in attorney fees. In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Mathews v. Mathews, ante* p. 604, 676 N.W.2d 42 (2004). As noted previously, Paul was awarded a sizeable amount of the marital assets, including all the shares of stock in P.G. Farms, household goods and furnishings, and 320 acres of land in Buffalo County. In addition, as the sole shareholder of P.G. Farms, Paul will continue to reap the benefit of its substantial income stream. Thus, under these circumstances, we cannot say the trial court abused its discretion by awarding Kimberley $10,000 in attorney fees.

VI. CONCLUSION

For the foregoing reasons, the trial court's property division is affirmed with respect to ownership of the marital residence, the

accounting of Kimberley's student loans, and the accounting of Paul's premarital funds. With respect to the division of shares in Gangwish Seed Farms, we conclude that the trial court abused its discretion and remand with directions to award Kimberley seven shares of stock in Gangwish Seed Farms and the remainder to Paul. As to child support, we conclude that the trial court erred in its determination of Paul's income, and remand for a new income determination in accordance with this opinion. Finally, we conclude that the trial court did not abuse its discretion by ordering Paul to pay Kimberley $10,000 in attorney fees.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
DANIEL E. SMITH, APPELLANT.
678 N.W.2d 733

Filed April 29, 2004. No. S-02-1482.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Lesser-Included Offenses.** The test adopted by the Nebraska Supreme Court to determine whether one crime is a lesser-included offense of another is a statutory elements test in which a court looks to the statutory elements of each crime rather than the particular facts of a specific case.
4. ____. In order to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
5. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
6. **Criminal Law.** The crime proscribed by Neb. Rev. Stat. § 28-311.01 (Reissue 1995) does not require that the recipient of the threat be terrorized.
7. **Criminal Law: Intent.** The crime proscribed by Neb. Rev. Stat. § 28-311.01 (Reissue 1995) does not require an intent to execute the threats made.

8. **Assault: Intent.** Neb. Rev. Stat. § 28-310(1)(b) (Reissue 1995) renders unlawful a promise to do another person bodily harm which is made in such a manner as to intentionally cause a reasonable person in the position of the one threatened to suffer apprehension of being so harmed.

Petition for further review from the Nebraska Court of Appeals, HANNON and INBODY, Judges, and BUCKLEY, District Judge, Retired, on appeal thereto from the District Court for Hall County, TERESA K. LUTHER, Judge. Judgment of Court of Appeals affirmed.

Jerry J. Fogarty and John C. Jorgensen, Deputy Hall County Public Defenders, for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Daniel E. Smith seeks further review of the Nebraska Court of Appeals' decision affirming his convictions for terroristic threats and use of a deadly weapon to commit a felony. The sole issue presented is whether the district court should have instructed the jury upon third degree assault under Neb. Rev. Stat. § 28-310(1)(b) (Reissue 1995) as a lesser-included offense of terroristic threats under Neb. Rev. Stat. § 28-311.01(1)(a) (Reissue 1995).

BACKGROUND

On June 3, 2002, Smith and his wife, Tamera Smith (Tamera), were living in Grand Island, Nebraska, with their 15-year-old son. When Tamera came home from work that evening, Smith asked her what she would like for supper. Tamera told Smith that he should decide and, because he had been home all day, that he should be able to have supper ready when she arrived home from work. Smith was angered by her comments, and an argument ensued. During the argument, Smith went to the kitchen and got an 8-inch chef knife from a butcher block. With

the knife in hand, Smith then began to go toward Tamera, who retreated to the bathroom. At the same time, Tamera called out to her son, saying that he should call the police, which he did.

As Tamera was holding the bathroom door closed and attempting to lock it, Smith yelled that he was going to kill her. Smith then stabbed the knife into the door. The knife went through the door and emerged on the other side just above Tamera's head. Smith continued to bang on the door, eventually breaking through it and into the bathroom. Smith then began to push Tamera backward (he no longer held the knife) while Tamera pleaded with him to consider their children. Smith again threatened to kill Tamera, but she was eventually able to get past Smith and ran into her bedroom. Tamera then attempted to reason with Smith, telling him that they could discuss the situation like adults. However, Smith remained angry, went back into the kitchen and got another knife from the butcher block. Tamera was able to escape from the house and ran next door to the neighbor's house. Soon thereafter, two Grand Island Police Department officers arrived at the Smith home and took Smith into custody. At trial, Smith admitted to stabbing the knife through the bathroom door but was unable to remember exactly what he said during the incident. He further testified that he had no intention of terrorizing Tamera and that he "just wanted to make her stop."

Smith was charged with one count of terroristic threats in violation of § 28-311.01(1)(a), a Class IV felony, and one count of use of a deadly weapon to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1995), a Class III felony. A jury trial was held. During the jury instruction conference, Smith objected to the district court's failure to instruct the jury that third degree assault under § 28-310(1)(b) was a lesser-included offense of terroristic threats. The objection was overruled. The jury returned guilty verdicts against Smith on both counts. He was sentenced to 36 months of intensive supervision probation.

Smith asserted several errors on appeal, including that the jury should have been instructed upon third degree assault as a lesser-included offense of terroristic threats. The Court of Appeals affirmed his conviction. *State v. Smith*, No. A-02-1482, 2003 WL 22769284 (Neb. App. Nov. 25, 2003) (not designated for permanent publication). We granted Smith's petition for further review.

ASSIGNMENT OF ERROR

Smith's sole assignment of error is that the district court failed to instruct the jury upon third degree assault as a lesser-included offense of terroristic threats.

STANDARD OF REVIEW

[1,2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id.*

ANALYSIS

[3] The test adopted by this court to determine whether one crime is a lesser-included offense of another is a statutory elements test in which a court looks to the statutory elements of each crime rather than the particular facts of a specific case. *State v. Putz, supra*; *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993) (abandoning cognate evidence approach for determining what constitutes lesser-included offenses in favor of statutory elements approach). Smith invites us to utilize the old cognate evidence test in this and future cases. We have declined such invitations since *State v. Williams* was decided, see *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997), and do so again here.

[4,5] In order to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. *State v. Williams, supra*. Otherwise stated, a lesser-included offense is one which is fully embraced in the higher offense. *Id.* Once it is determined that an offense is a lesser-included one, a court must examine the evidence to determine whether it justifies an instruction on the lesser-included offense by producing a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser offense. *State v. Williams, supra*. Consequently, a court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for

acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Williams, supra.*

Nebraska's terroristic threats statute, § 28-311.01, provides in relevant part: "(1) A person commits terroristic threats if he or she threatens to commit any crime of violence: (a) With the intent to terrorize another." A person commits third degree assault in relevant part if he or she "[t]hreatens another in a menacing manner." § 28-310(1)(b). Each crime shares one element: a threat. See *State v. Schmailzl*, 243 Neb. 734, 502 N.W.2d 463 (1993) (collecting cases describing meaning of words "threat" and "threaten" in § 28-311.01(1)).

In addition to a threat, § 28-311.01(1)(a) requires that the threat to commit a violent crime be made "[w]ith the intent to terrorize another." Section 28-310(1)(b) requires that the threat be made "in a menacing manner." Our prior cases have explained "intent to terrorize another" and "menacing" in greater detail.

[6,7] In *State v. Schmailzl, supra*, we stated that § 28-311.01(1)(a) prohibits a threat to commit a violent crime when the threat is made with the intention of causing "a state of intense fear in another." *State v. Schmailzl*, 243 Neb. at 741, 502 N.W.2d at 467. In the same opinion, we also equated the intent to terrorize another with the "production of anxiety in another." *Id.* at 742, 502 N.W.2d at 468. Thus, the intent to terrorize another is an intent to produce intense fear or anxiety in another. However, a critical feature of the statute for purposes of our analysis here is that it merely requires the *intent* to terrorize another. It does not require that the recipient of the threat be actually terrorized, and it does not require an intent to execute the threats made. See *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990).

[8] As used in § 28-310(1)(b), "menacing" includes a showing of an intention to do harm. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995). Comprehensively stated, "'§ 28-310(1)(b) renders unlawful a promise to do another person bodily harm which is made in such a manner as to intentionally cause a reasonable person in the position of the one threatened to suffer *apprehension* of being so harmed.'" (Emphasis supplied.) *State v. Kunath*, 248 Neb. at 1014, 540 N.W.2d at 591, quoting *In re Interest of Siebert*, 223 Neb. 454, 390 N.W.2d 522 (1986).

The distinction between the intent required by each statute leads us to conclude that § 28-310(1)(b) is not a lesser-included offense of § 28-311.01(1)(a). Section § 28-311.01(1)(a) requires an intent to terrorize another and is not concerned with the result produced by an individual's threat. *State v. Saltzman, supra.* On the other hand, § 28-310(1)(b) is violated when a person acts in a manner that intentionally causes a reasonable person in the position of the one threatened to feel apprehension of being bodily harmed. *State v. Kunath, supra.* Simply put, a violation of § 28-311.01(1)(a) need not produce a result in the victim, while a violation of § 28-310(1)(b) must cause a reasonable person to suffer apprehension of being bodily harmed. Thus, we conclude that a person can commit the greater offense of terroristic threats under § 28-311.01(1)(a) without simultaneously committing third degree assault under § 28-310(1)(b). To the extent that *State v. Powers*, 10 Neb. App. 256, 634 N.W.2d 1 (2001), suggests otherwise, it is disapproved.

CONCLUSION

The Court of Appeals did not err in upholding the district court's refusal to instruct the jury upon third degree assault under § 28-310(1)(b) as a lesser-included offense of terroristic threats under § 28-311.01(1)(a). As a crime focused upon an individual's intent to terrorize another, it is possible to violate § 28-311.01(1)(a) without committing the crime of third degree assault under § 28-310(1)(b), which occurs when an individual causes a reasonable person to suffer apprehension of being bodily harmed. We affirm.

AFFIRMED.

RUBEN ROJAS AND FABIOLA ROJAS, APPELLANTS, V. SCOTTSDALE INSURANCE COMPANY, APPELLEE.

678 N.W.2d 527

Filed April 29, 2004. No. S-03-557.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing 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: 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 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 further proceedings as it deems just.
3. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Ralph E. Peppard for appellants.

Robert F. Bartle, of Bartle & Geier Law Firm, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Ruben Rojas and Fabiola Rojas filed a petition in the district court for Douglas County against Scottsdale Insurance Company (Scottsdale) seeking a judgment in the amount of their dwelling insurance policy limits. The insured real property had been damaged by fire, but Scottsdale refused payment on the basis of a policy endorsement which provided that Scottsdale would not be liable for loss occurring while the insured property was vacant or unoccupied. In its answer, Scottsdale alleged that coverage was denied because the property had been unoccupied for more than 60 days prior to the fire. Both parties moved for summary judgment. The district court determined that the denial of coverage was proper. The district court denied the Rojases' motion but sustained Scottsdale's motion and dismissed the Rojases' petition. The Rojases appeal. We affirm.

STATEMENT OF FACTS

The following facts are derived from the evidence admitted from the summary judgment proceedings: In early 2001, the Rojases purchased a piece of improved real property in Omaha, Nebraska, in a tax foreclosure sale. The Rojases intended to and

did use the property as rental property. The Rojases applied to Scottsdale for an insurance policy covering the property on February 12, 2002, and Scottsdale subsequently issued a policy titled "Dwelling Policy." The policy included "Occupancy Endorsement" No. UTS-32g, which provided as follows:

> It is a condition of this policy that the described building must be occupied at the inception date of the policy. It is a further condition of this policy that any vacancy or unoccupancy of the described building after the inception date of the policy must be reported to the Company within thirty (30) days.
>
> The Company shall not be liable for loss occurring while a described building, whether intended for occupancy by owner or tenant, is vacant, or unoccupied for more than sixty (60) consecutive days immediately before the loss.

The terms "vacancy," "vacant," "unoccupancy," and "unoccupied" are not defined in the policy.

Although not controlling to our determination, we note that the policy also contained a provision regarding coverage with respect to glass or safety glazing material. This provision stated that the policy covered loss caused by the breakage of glass or safety glazing material. The glass provision stated that such coverage did not include loss "if the dwelling has been vacant for more than 30 consecutive days immediately before the loss" and specified that "[a] dwelling being constructed in [sic] not considered vacant."

The Rojases evicted the tenants of the property on March 21, 2002. After the eviction, the Rojases began making repairs and improvements to the property. According to the evidence, from March 21 until July 8, the Rojases or their workers were present on the property approximately 3 days per week to make improvements.

On July 8, 2002, the property was extensively damaged by fire. The parties do not dispute that the damage to the property exceeded the insurance policy limits of $35,000. The Rojases filed a claim with Scottsdale under the policy. Scottsdale denied the claim on the basis of the occupancy endorsement. In correspondence to the Rojases' counsel, Scottsdale stated that "[a] dwelling under renovation does not constitute occupancy."

The Rojases filed a petition against Scottsdale on October 25, 2002, seeking judgment in the amount of the $35,000 policy limit plus damages for bad faith denial. Scottsdale answered, asserting that coverage was not provided because the premises had remained "unoccupied" for more than 60 days prior to the fire.

The Rojases subsequently filed a motion for summary judgment. The Rojases claimed the property was not vacant. In arguing in favor of summary judgment, the Rojases relied in part on the coverage provision regarding "Glass Or Safety Glazing Material" which stated that "[a] dwelling being constructed in [sic] not considered vacant." The district court rejected the Rojases' arguments and overruled their motion for summary judgment. Scottsdale also filed a motion for summary judgment. Following a hearing, the district court concluded that there was no genuine dispute between the parties regarding the material underlying facts and that "the plain meaning of the language of the policy and its endorsements excludes the premises from coverage when there is no one actually residing in the premises." We understand the district court's ruling to mean that it agreed with Scottsdale that the evidence showed no genuine issue as to the material fact that the property had been unoccupied for more than 60 days prior to the fire. The district court sustained Scottsdale's motion for summary judgment and dismissed the Rojases' petition on April 24, 2003. The Rojases appeal.

ASSIGNMENT OF ERROR

The Rojases assert that the district court erred in denying their motion for summary judgment and sustaining Scottsdale's motion for summary judgment because the court erred in its interpretation of the occupancy endorsement provision of the insurance contract.

STANDARDS OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004).

[2] 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 further proceedings as it deems just. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, *ante* p. 158, 673 N.W.2d 15 (2004).

[3] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

ANALYSIS

Introduction.

In rejecting the Rojases' motion for summary judgment and sustaining Scottsdale's motion for summary judgment, the district court determined that the policy endorsement in this case "excludes the premises from coverage when there is no one actually residing in the premises." The court further determined that the sporadic presence of the Rojases and their workers to make renovations did not rise to the level of residency. We determine that the district court did not err as to either the law or the facts in determining that there was no coverage because the property was in effect "unoccupied" for more than 60 days prior to the fire. The court therefore did not err in denying the Rojases' motion for summary judgment and sustaining Scottsdale's motion for summary judgment.

The resolution of this appeal requires us to explain the terms "vacant" and "unoccupied" in the policy Scottsdale issued to the Rojases as a matter of law and then to determine on the record presented whether the property was either "vacant" or "unoccupied" under such definitions at the time of the fire as a matter of fact. It has been stated, and we agree, that "[t]he interpretation of the words 'vacant' and 'unoccupied' as used in an insurance policy is a question of law, but whether the subject dwelling was

vacant or unoccupied at the time of the loss is a question of fact." *Lundquist v. Allstate Ins. Co.*, 314 Ill. App. 3d 240, 245, 732 N.E.2d 627, 631, 247 Ill. Dec. 572, 576 (2000). In our analysis, after first noting that the terms "vacant" and "unoccupied" are phrased in the disjunctive in the policy, we consider as a question of law the meaning of the policy terms "vacated" and "unoccupied" and then consider with reference to the undisputed facts in the record whether the district court correctly determined that the property in this case was unoccupied at the time of the fire.

Policy Language is Disjunctive.

The occupancy endorsement provides that Scottsdale "shall not be liable for loss occurring while a described building, whether intended for occupancy by owner or tenant, is vacant, or unoccupied for more than sixty (60) consecutive days immediately before the loss." We note that the occupancy endorsement provides in the disjunctive that Scottsdale is not liable if the property is either "vacant, or unoccupied." Because of this, if the property was either vacant or unoccupied, there would be no coverage. See *Alcock v. Farmers Mut. Fire Ins. Co.*, 591 S.W.2d 126, 128 (Mo. App. 1979) (" 'vacant' and 'unoccupied' " language in policy "is clearly in the disjunctive, indicating that either a condition of vacancy or unoccupancy extending for a period of sixty days constitutes a defense to a policyholder claim"). In the instant case, the district court found that the property was unoccupied.

Question of Law: Meaning of Policy Terms "Vacant" and "Unoccupied."

The terms "vacant" and "unoccupied" are not defined in the policy. The terms are not synonymous. 6 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 94:135 (1997). In defining "vacant," Black's Law Dictionary notes that "[c]ourts have sometimes distinguished *vacant* from *unoccupied*, holding that *vacant* means completely empty while *unoccupied* means not routinely characterized by the presence of human beings." Black's Law Dictionary 1546 (7th ed. 1999). In an earlier edition, Black's defined "vacant" as follows: " 'In fire policy insuring dwelling, term "vacant" means empty, without inanimate objects, deprived

of contents; a thing is vacant when there is nothing in it; "vacant" means abandoned and not used for any purpose.' " Black's Law Dictionary 1548 (6th ed. 1990). The same edition defined "unoccupied," in part, as follows:

> Within fire policy exempting insurer from liability in case dwelling is "unoccupied," means when it is not used as a residence, when it is no longer used for the accustomed and ordinary purposes of a dwelling or place of abode, or when it is not the place of usual return . . . .

Id. at 1538. Courts have similarly defined the two terms. For example, the U.S. Court of Appeals for the Seventh Circuit, interpreting Illinois law, stated that the terms "vacant" and "unoccupied" are not synonymous and noted that "vacant" focuses on the lack of animate or inanimate objects, while "unoccupied" focuses on the lack of animate objects. *Myers v. Merrimack Mut. Fire Ins. Co.*, 788 F.2d 468, 471 (7th Cir. 1986). The Court of Appeals of Oregon recently noted that " ' "a house may be unoccupied, and yet not be vacant . . . a dwelling is 'unoccupied' when it has ceased to be a customary place of habitation or abode." ' " *Schmidt v. Underwriters at Lloyds of London*, 191 Or. App. 340, 345, 82 P.3d 649, 652 (2004) (quoting *Schoeneman v. Hartford Fire Ins. Co.*, 125 Or. 571, 267 P. 815 (1928)).

Although denial of coverage would be warranted if the property was either vacant or unoccupied for the requisite time, the Rojases nevertheless point to the policy provision relating to broken glass wherein a dwelling under construction is "not considered vacant." The Rojases argue that because the property was undergoing renovation, it was "under construction" and was not vacant under the broken glass provision and should similarly not be considered vacant under the occupancy endorsement. This argument is unavailing for several reasons, the most important being that coverage was properly controlled and denied under the occupancy endorsement, and, based on the evidence, the trial court properly found as a matter of fact that the property was unoccupied. Under the controlling disjunctive language of the occupancy endorsement, denial of coverage was proper where the property was unoccupied, regardless of whether or not it was vacant.

Question of Fact: Was Property Either "Vacant" or "Unoccupied"?

The uncontroverted evidence in this case establishes that the Rojases evicted the tenants of the property on March 21, 2002, and that the property was damaged by fire on July 8. The evidence regarding use of the property in the 60 consecutive days immediately before July 8 is that from March 21 until July 8, the Rojases or their workers were present on the property approximately 3 days per week to make improvements. The only reasonable factual inference from the evidence is that after the tenants were evicted on March 21, no one occupied the property. That is, from March 21 to July 8, there was a lack of habitation by human beings and a lack of use for the accustomed and ordinary purposes of a dwelling or place of abode and, therefore, the property was unoccupied.

For completeness, we note that the Rojases also argue in the alternative that the property was "occupied" during the requisite time because they or their workers were present approximately 3 days per week making improvements. In this regard, we note that other courts have rejected such an assertion under similar facts. See, generally, *Vennemann v. Badger Mut. Ins. Co.*, 334 F.3d 772 (8th Cir. 2003) (sporadic nighttime visits and remodeling projects did not convey appearance of residential living).

We make special note of the fact that the property was used and insured as a "dwelling," and we determine that this attribute of the policy is relevant to the factual determination of whether the property was vacant or unoccupied. In *Vennemann*, the U.S. Court of Appeals for the Eighth Circuit noted that coverage should be considered "[i]n light of the reasons for the inclusion of [an occupancy clause] in a homeowner's insurance policy," 334 F.3d at 774, and that the focus is on "the presence or absence of objects or activities customary for the property's intended use," *id.* at 773. In *Langill v. Vermont Mut. Ins. Co.*, 268 F.3d 46, 48 (1st Cir. 2001), the U.S. Court of Appeals for the First Circuit noted that the coverage determination is "helped by reflecting on the reasons underlying vacancy [or occupancy] exclusions." The court in *Langill* stated that those reasons include the concern that when a building is not in use, it is more likely that potential fire hazards will go undiscovered and that a fire in a vacant or unoccupied

building will burn for a longer period and cause greater damage before being detected. *Id.* The court in *Langill* stated, "When we consider the nature of the hazard sought to be guarded against, the sustained presence of a resident, particularly in the hours of darkness, appears logically as the critical factor where the premises are a dwelling." 268 F.3d at 49.

The policy in this case was titled "Dwelling Policy," and it is undisputed that the parties understood the policy was to provide insurance for a dwelling. The reasonable and ultimate inference from the evidence presented by the parties is that no one was using the property as a place of residence from the time the tenants were evicted on March 21, 2002, until the fire occurred on July 8. Therefore, the district court did not err when it determined that the property was "unoccupied" under the terms of the occupancy endorsement for more than 60 days immediately before the loss and, therefore, coverage was properly denied. Scottsdale was entitled to judgment as a matter of law.

CONCLUSION

This appeal is resolved by reference to the law, the evidence, and the ultimate inference from the evidence. The district court did not err as to the law or in its determination that the property was "unoccupied" within the meaning of the occupancy endorsement for more than 60 days immediately before the fire on July 8, 2002, and that therefore, Scottsdale was not liable for the loss. The district court did not err in denying the Rojases' motion for summary judgment and in sustaining Scottsdale's motion for summary judgment and dismissing the petition. We therefore affirm the district court's judgment.

AFFIRMED.

GERRARD, J., not participating.

JACQAUS L. MARTIN, APPELLANT, V.
HONORABLE BERNARD J. McGINN, JUDGE,
DISTRICT COURT FOR LANCASTER COUNTY, ET AL., APPELLEES.
678 N.W.2d 737

Filed April 29, 2004. No. S-03-689.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Appeal dismissed.

Jacqaus L. Martin, pro se.

No appearance for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Jacqaus L. Martin appeals from an order of the Lancaster County District Court dismissing his petition pursuant to Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2002) for failure to pay fees, costs, or security within the time allowed by the statute.

SCOPE OF REVIEW

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

FACTS

This matter was previously before us in *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003) (*Martin I*). That appeal concerned an order of the district court which (1) denied Martin's application to proceed in forma pauperis on the grounds that the action was frivolous and (2) dismissed Martin's petition for declaratory, injunctive, and equitable relief.

With respect to the denial, we stated:

> A district court's denial of in forma pauperis status under § 25-2301.02 is reviewed de novo on the record based on

> the transcript of the hearing or the written statement of the court. . . . From our de novo review of the transcript, we conclude that Martin's application to proceed in forma pauperis was properly denied. The transcript does not support his motion.

(Citations omitted.) *Martin I*, 265 Neb. at 406, 657 N.W.2d at 219. Accordingly, we affirmed that portion of the district court's order which denied Martin's application to proceed in forma pauperis.

However, we found the district court's dismissal of Martin's petition to be in error. Citing § 25-2301.02(1), we noted in *Martin I* that if an objection to an application to proceed in forma pauperis is sustained, the party filing the application has 30 days to proceed with an action or appeal upon payment of fees, costs, or security. Because the district court had failed to allow Martin this 30-day period, we reversed that portion of the court's order which dismissed the petition and remanded the cause.

On April 8, 2003, we issued an alias mandate requesting the district court to enter judgment in accordance with *Martin I*. The mandate was file stamped by the clerk of the district court on April 9. The district court signed the order for entry of judgment pursuant to the mandate on April 11, and the order was file stamped on April 16.

The district court issued two orders that are relevant to this appeal. The first order, dated May 22, 2003, dismissed Martin's petition pursuant to § 25-2301.02(1) for failure to pay fees, costs, or security within the time allowed by the statute. Therein, the district court found (1) that the mandate from this court in *Martin I* was file stamped by the clerk of the district court on April 16, (2) that 30 days had passed since judgment was entered on the mandate, and (3) that Martin had not paid the fees, costs, or security within the required time.

The second order was issued by the district court on June 3, 2003. At that time, the matter was before the district court with regard to the notice of appeal filed by Martin from the May 22 order. The district court noted that on May 22, it had denied Martin's second application to proceed in forma pauperis, which was filed on May 3. The district court then concluded that Martin's application to proceed in forma pauperis on appeal should be denied for the reason that the action was frivolous.

Martin's notice of appeal was filed in the district court on June 4, 2003. Attached to the notice of appeal were the application to proceed in forma pauperis, the affidavit in support thereof, and the inmate accounting sheets that had previously been filed in the district court on May 3.

ASSIGNMENTS OF ERROR

Martin assigns the following restated errors to the May 22, 2003, order of the district court: (1) The court failed to consider the affidavit attached to his application to proceed in forma pauperis before dismissing the action, and (2) the court failed to allow the cause to progress after remand.

ANALYSIS

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

Pursuant to Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002), an appellant must file his or her notice of appeal and deposit with the clerk of the district court the docket fee required by Neb. Rev. Stat. § 33-103 (Reissue 1998) within 30 days of the entry of the order from which the appeal is taken. Martin has filed a notice of appeal, an application to proceed in forma pauperis, an affidavit in support thereof, and inmate accounting sheets.

When the district court denied his application to proceed in forma pauperis on appeal on June 3, 2003, Martin had 30 days in which to file a docket fee with the clerk of the district court. See §§ 25-1912 and 25-2301.02(1). Since the record indicates that Martin did not file a docket fee, he did not perfect his appeal and we lack jurisdiction. Under the facts of this case, the notice of appeal and docket fee were mandatory and jurisdictional. See, § 25-1912(4); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996). Since we lack jurisdiction in this matter, the appeal must be dismissed.

CONCLUSION

For the reasons stated herein, Martin's appeal is dismissed.

APPEAL DISMISSED.

JUDY LOUISE HOSACK, APPELLEE, V. MAX GALEN HOSACK, APPELLANT.

678 N.W.2d 746

Filed May 7, 2004. No. S-02-1405.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Divorce: 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.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, 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.
4. **Supreme Court: Courts: Appeal and Error.** Upon granting further review which results in the reversal of a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.
5. **Divorce: Property Division: Pensions.** In dissolution actions, district courts have broad discretion in valuing pension rights and dividing such rights between the parties.
6. ____: ____: ____. Although Neb. Rev. Stat. § 42-366(8) (Reissue 1998) requires that any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party be included as part of the marital estate, the plain language of the statute does not require that such assets be valued at the time of dissolution.
7. **Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
8. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, 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, 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.
9. **Alimony.** Disparity in income or potential income may partially justify an award of alimony.
10. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
11. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
12. ____. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and HANNON and CARLSON, Judges,

on appeal thereto from the District Court for Saunders County, MARY C. GILBRIDE, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Paul M. Conley for appellant.

James H. Hoppe and Timothy W. Curtis for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

In a petition for further review, Max Galen Hosack asserted that the Nebraska Court of Appeals erred in finding that it lacked jurisdiction to review a judgment of the Saunders County District Court. We granted Max's petition for further review.

SCOPE OF REVIEW

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

[2] 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. *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

[3] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, 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. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003).

FACTS

On February 12, 2002, Judy Louise Hosack filed a petition for dissolution of her marriage to Max. On October 15, the district court signed and the clerk of the district court filed a journal entry which stated:

> Having considered all matters properly before it, the court now finds, concludes and rules as follows:

1. **Dissolution**. The marriage between the parties is irretrievably broken and the dissolution sought herein should be granted.

2. **Property Division**. The parties have reached a division of the marital estate and have divided their property in accordance with that division agreement. The court approves the property settlement . . . .

3. **Retirement Funds**. Each of the parties has a retirement account . . . . The court finds that each party is entitled to one half of the retirement of the other . . . . The court requires that counsel provide a QDRO [qualified domestic relations order] to be made a part of the decree to be drafted herein.

8. **Alimony**. . . .

. . . .

In this case, the parties have been married for 31 years. [Judy] is presently in her mid-fifties and worked at various times throughout the marriage, but mostly at minimum wage employment. . . . During the marriage, she raised the couple's three children. There is a significant disparity in the earning capacity of the parties.

. . . [Max] should pay alimony to [Judy] until she reaches age 62 in the monthly amount of $575.00.

9. **Miscellaneous Matters**. 1) [Judy] can retrieve her belongings from [Max's home] by giving him at least 48 hours telephone notice. 2) [Max] shall continue health insurance coverage for [Judy] for 6 months after the entry of the decree. 3) [Judy] is awarded $750.00 towards [sic] her attorney's fees, to be paid by [Max] no later than December 30, 2002.

10. **Motion**. Counsel shall advise the court, by written motion, if the court failed to rule on any material issue presented. If no motion is filed within 10 days from the date of this order, all matters not specifically ruled upon are deemed denied.

11. **Decree**. [Judy's counsel] shall prepare the decree and provide it to [Max's counsel] for review no later than October 31, 2002. The decree shall be presented to the Court for signature no later than November 15, 2002.

A decree was signed by the district court on November 14, 2002, and it was filed by the clerk of the district court. The decree provided that Max was awarded the residence in Exeter, Nebraska, subject to any liens and encumbrances thereon. It stated that the court approved the division of property, finding it fair, reasonable, and not unconscionable. Each party was awarded that property currently in his or her possession, including any vehicles subject to existing liens. Each party was directed to pay any debts in his or her individual name and to hold the other harmless for the payment thereof. Fifty percent of Judy's retirement benefits at Square D and 50 percent of Max's retirement benefits at Kawasaki were awarded to each party. The court retained jurisdiction to enter any necessary qualified domestic relations orders to effectuate the division of the retirement benefits of the parties. The decree awarded Judy attorney fees of $750 to be paid by Max no later than December 30. It directed that Max pay alimony to Judy in the amount of $575 per month commencing on November 1, 2002, and terminating when Judy reaches the age of 62. The decree also stated that alimony would terminate upon the death of either party or Judy's remarriage. Max was directed to maintain Judy on his health insurance program through Kawasaki for 6 months from and after the date of the court's decree. The decree also stated: "To the extent there is any conflict between this Decree and any attachment or other document incorporated herein by reference, the language of this Decree shall supersede and control." Max filed his notice of appeal on December 4.

COURT OF APPEALS' DECISION

Before the Court of Appeals, Max assigned the following restated errors: The district court erred (1) in considering retirement plan benefits as assets separate from the marital estate for purposes of equitable distribution; (2) in distributing retirement plan benefits without requiring a definitive accounting of their value and considering the relation of that value to the value of the entire marital estate; (3) in accepting as fair and reasonable the parties' division of marital property absent inclusion of the retirement plan benefits; (4) in failing to consider all statutory and judicially mandated factors in determining whether and how

much alimony should be awarded; (5) in failing to consider equitable factors other than disparity of income, which resulted in an alimony award that unfairly deprived Max of a substantial right or just result in a matter submitted for disposition through the judicial system; (6) in awarding alimony against the greater weight of the evidence that the statutory criteria did not support the court's decision; and (7) in awarding alimony where the general equities of the parties did not support the court's decision.

On May 30, 2003, the Court of Appeals dismissed the appeal for lack of jurisdiction pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001). The Court of Appeals found that the October 15, 2002, journal entry was a proper entry of judgment under Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002) and that the notice of appeal filed on December 4 was not timely. On June 9, Max filed a motion for rehearing, which was overruled by the Court of Appeals on September 3. Max filed a timely petition for further review in this court, and we granted his petition.

PETITION FOR FURTHER REVIEW

In Max's petition for further review, he assigned as error (1) the Court of Appeals' determination that the October 15, 2002, journal entry was intended to be a final determination; (2) the Court of Appeals' conclusion that Max's notice of appeal was untimely filed and that the court lacked jurisdiction to hear the appeal; and (3) the Court of Appeals' conclusion that the October 15 journal entry was not inconsistent with the decree dated November 14, which contained further findings and orders.

ANALYSIS

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003). The Court of Appeals dismissed this appeal for lack of jurisdiction on the basis that the notice of appeal was not timely filed. Thus, the first question we must consider is whether this court has jurisdiction.

Section 25-1301 provides in part: "(1) A judgment is the final determination of the rights of the parties in an action." Therefore, we must determine in accordance with § 25-1301 which action by the district court finally determined the rights of the parties:

the journal entry filed on October 15, 2002, or the decree filed on November 14.

The Court of Appeals relied, in part, on *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986), in which the trial court announced its decision on December 4, 1984. At that time, the trial court found that the mortgagors were in default on a note and mortgage and that the bank had a first lien on the land described in the petition, except for one 80-acre parcel of land. The decision was typed in the court's trial docket on that date. On January 25, 1985, a more formal statement of the decision, entitled "Decree," was signed by the trial court. This second decision conformed to the earlier decision in all respects except that it did not exclude the parcel of land excluded in the first decision.

This court concluded that the December 1984 pronouncement and docket entry finally determined the rights of the parties and constituted the rendition of a decree and that the signing and filing of the more formal statement of the court's decision also constituted the rendition of a decree. However, the second decree contradicted the first decree in part. We held:

> Under such a circumstance the notice of appeal was timely with respect to that portion of the January decree which contradicted the December decree but untimely with respect to those portions of the January decree which confirmed the earlier decree. Thus, we have jurisdiction with respect to the [appellants'] first assignment of error, which deals with that portion of the second decree which contradicts the first decree, but not with respect to the second assignment of error, which deals with those portions of the first and second decrees which are consistent with each other.

Id. at 451, 384 N.W.2d at 298.

In the case at bar, the journal entry filed on October 15, 2002, left certain matters unresolved. Via the journal entry, counsel was directed to advise the district court by written motion if the court had failed to rule on any material issue presented. If no motion was filed within 10 days, then all matters not specifically ruled upon were to be deemed denied. The journal entry contemplated that the decree was to be prepared for opposing counsel's review by October 31 and for signature no later than November 15. We conclude that the journal entry was not the final determination of

the rights of the parties in this action. See § 25-1301. Thus, the Court of Appeals erred when it found that the journal entry was a proper entry of judgment and dismissed the appeal for lack of jurisdiction.

We take this opportunity to disapprove of the practice of a trial court's filing a journal entry which describes an order that is to be entered at a subsequent date. As we noted in *McElhose*, 222 Neb. at 452, 384 N.W.2d at 298, "the confusion presented by this case can be avoided if trial courts will, as they should, limit themselves to entering but one final determination of the rights of the parties in a case." The filing of both a journal entry and a subsequent order creates the potential for confusion. Instead, the trial court should notify the parties of its findings and intentions as to the matter before the court by an appropriate method of communication without filing a journal entry. The trial court may thereby direct the prevailing party to prepare an order subject to approval as to form by the opposing party. See commentary to Canon 3(B)(7) of the Nebraska Code of Judicial Conduct. Only the signed final order should be filed with the clerk of the court.

In this case, the journal entry of October 15, 2002, was not a final order which would start the time for filing a notice of appeal. Thus, the Court of Appeals erred in dismissing the appeal for lack of jurisdiction, and its decision is reversed.

[4] Upon granting further review which results in the reversal of a decision of the Court of Appeals, this court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach. *DeBose v. State, ante* p. 116, 672 N.W.2d 426 (2003). We therefore consider whether the district court abused its discretion in its division of retirement plan benefits and in its order requiring Max to pay alimony.

Retirement Plan Benefits

Max asserts on appeal that the district court should not have considered the parties' retirement plan benefits to be assets separate from the marital estate. He claims the court erred (1) by distributing the benefits without requiring a definitive accounting of their value and considering the relation of that value to the entire marital estate and (2) by accepting the division of property as fair and reasonable absent inclusion of the retirement plan benefits.

[5] 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. *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, 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. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003). In dissolution actions, district courts have broad discretion in valuing pension rights and dividing such rights between the parties. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002).

In this case, the journal entry noted that each party had a retirement account and that although the present value of the accounts was not adduced at trial, it appeared that Judy's monthly retirement payment would be minimal. In the decree, the district court awarded each party half of the other party's retirement plan benefits.

At trial, Max testified that he had been employed at Kawasaki for 27 years and that he earned approximately $20 per hour. He stated that he did not know the amount of retirement plan benefits he had accumulated, but that all of the benefits had been accumulated during the marriage. Max agreed that an equal division would occur if he received half of Judy's retirement plan benefits and she received half of his benefits.

[6] We have held that although Neb. Rev. Stat. § 42-366(8) (Reissue 1998) requires that any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party be included as part of the marital estate, the plain language of the statute does not require that such assets be valued at the time of dissolution. The expression "at the time of dissolution" in § 42-366(8) qualifies the date at which the marital estate is divided but does not provide that pension-type property must be valued on such date. *Tyma v. Tyma, supra.*

[7] The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Tyma v. Tyma, supra.* Max has not provided any support for his argument that the division of

the retirement plan benefits was unfair or unreasonable. The marriage was of long duration, as the parties were married more than 30 years. During the marriage, Judy was primarily responsible for raising the parties' three children. All of Max's retirement plan benefits were earned during the marriage. Thus, we find that the district court did not abuse its discretion in dividing the retirement plan benefits.

ALIMONY

[8,9] Max objects to the alimony award of $575 per month that he was ordered to pay to Judy. In dividing property and considering alimony upon a dissolution of marriage, 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, 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. *Claborn v. Claborn, ante* p. 201, 673 N.W.2d 533 (2004). Disparity in income or potential income may partially justify an award of alimony. *Id.*

The district court found a significant disparity in the earning capacity of the parties. The court noted that Judy was currently in her mid-50's and had worked at various times throughout the marriage, usually at minimum wage jobs. Although she was able to work at the time of the dissolution, it was likely to be at minimum wage. Our de novo review of the record shows that Judy, a high school graduate, was employed throughout most of the marriage and that the maximum amount she had earned was $7.50 per hour.

[10-12] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Id.* In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id.* The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. *Id.* As to the award of alimony, the district court did not abuse its discretion.

CONCLUSION

For the reasons set forth herein, we reverse the decision of the Court of Appeals and remand the cause with directions that the Court of Appeals affirm the judgment of the district court as to the division of the retirement plan benefits and the award of alimony.

REVERSED AND REMANDED WITH DIRECTIONS.

THE COUNTY OF SARPY, NEBRASKA, A BODY CORPORATE AND POLITIC, APPELLANT, V. THE CITY OF GRETNA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

678 N.W.2d 740

Filed May 7, 2004. No. S-02-1473.

1. **Demurrer: Pleadings: Appeal and Error.** In 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 the conclusions of the pleader.
2. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
3. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.
4. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
5. **Actions: Parties: Standing.** The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
6. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.
7. ____: ____: ____. The litigant must have some legal or equitable right, title, or interest in the subject of the controversy.
8. **Standing: Parties: Annexation.** Persons who are not residents, property owners, taxpayers, or electors of an annexed area generally do not have standing to challenge the annexation.
9. **Counties: Statutes.** A county is a creature of statute, and its power to act must originate from statute.
10. **Counties: Legislature.** Because a county's governmental function is the product of the Legislature's will, it is a legally protectable interest that a county is capable of defending from an allegedly improper infringement.

11. **Standing: Counties: Annexation.** If a county alleges that a city, through an unlawful annexation plan, has encroached upon its governmental function, it has alleged an injury sufficient to give it standing to challenge the annexation plan.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded for further proceedings.

Tamra L.W. Madsen, Deputy Sarpy County Attorney, for appellant.

John K. Green for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

The City of Gretna sits entirely within the borders of Sarpy County, Nebraska. Pursuant to two municipal ordinances, Gretna purported to annex sections of two state highways which extend from Gretna's borders. Sarpy County filed suit, claiming that Gretna was without authority to annex the land. The district court determined that Sarpy County lacked standing to bring the action and sustained Gretna's demurrer. The question on appeal is whether Sarpy County has standing to contest the allegedly unlawful annexations.

FACTUAL AND PROCEDURAL HISTORY

Sarpy County is a political subdivision located in eastern Nebraska. Gretna is a municipal corporation organized and operating under the laws of the State of Nebraska as a city of the second class. Gretna is located entirely within Sarpy County.

On July 31, 2001, Gretna's city council adopted ordinances Nos. 740 and 741. Generally speaking, the ordinances proposed to annex certain lands adjoining Gretna's borders. Specifically, ordinance No. 740 proposed to extend Gretna's corporate limits southward to include Nebraska State Highway 6/31 from its intersection with Capehart Road in south Gretna to a point one-half mile north of Fairview Road. Ordinance No. 741 proposed to extend Gretna's corporate limits eastward to include Nebraska State Highway 370 from its intersection with 204th Street to the midline of the intersection of 180th Street.

On June 20, 2002, Sarpy County filed a petition in the district court challenging the annexations. Sarpy County claimed that the annexations were illegal, null, and void because (1) none of the property sought to be annexed was urban or suburban as required under Neb. Rev. Stat. § 17-405.01 (Reissue 1997); (2) none of the property sought to be annexed was adjacent or contiguous to the existing boundaries of Gretna, except for the narrow strips of the highways which are the subjects of the ordinances; (3) the sole purpose of the annexations was to increase revenue; (4) Sarpy County already provided the annexed property with all necessary benefits and services; (5) Gretna usurped the authority of Sarpy County to govern its affairs in the areas of zoning and planning; and (6) Gretna's purpose was to extend its sphere of influence in the area, rather than to serve the public interest as required by law.

Gretna filed a demurrer, and then an amended demurrer, to Sarpy County's petition. The district court sustained Gretna's amended demurrer; however, the record does not reveal on what basis. Thereafter, Sarpy County filed an amended petition. In response, Gretna filed a motion to make more definite and certain, and to strike. This motion was partially granted by the district court. Sarpy County then filed a second amended petition. Again, Gretna filed a demurrer. In its demurrer, Gretna asserted that (1) Sarpy County does not have legal capacity to sue, (2) there is a defect of parties, (3) the petition does not state facts sufficient to constitute a cause of action, and (4) the district court does not have subject matter jurisdiction over the action. The district court determined that Sarpy County lacked standing to bring the action and sustained Gretna's demurrer. The court also determined that Sarpy County could not correct the defect and dismissed the action. Sarpy County filed a timely notice of appeal.

ASSIGNMENT OF ERROR

Sarpy County assigns two errors, more properly restated as one: The district court erred in determining Sarpy County lacks standing to contest the annexations by Gretna.

STANDARD OF REVIEW

[1] In 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 the conclusions of the pleader. *Arthur v. Microsoft Corp., ante* p. 586, 676 N.W.2d 29 (2004).

[2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *Adam v. City of Hastings, ante* p. 641, 676 N.W.2d 710 (2004).

ANALYSIS

As an initial matter, we note that we need not concern ourselves with the legality of the annexations. Nor do we need to determine, as Sarpy County suggests, whether its petition states a cause of action. Instead, the sole issue before us is whether Sarpy County has standing to contest the allegedly illegal annexations of property by Gretna. We conclude that it does.

[3,4] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy. *Id.* Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Id.* Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Id.*

[5-7] The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Id.* In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *Id.* The litigant must have some legal or equitable right, title, or interest in the subject of the controversy. *Id.*

Essentially, Sarpy County argues that it pled facts sufficient to establish standing. In 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 the conclusions of the pleader. *Arthur v. Microsoft Corp., supra.*

We note that Sarpy County's second amended petition was redacted to comport with the district court's order granting, in part, Gretna's motion to strike. Because Sarpy County did not assign this ruling as error, we rely only on Sarpy County's operative, second amended petition to determine whether Sarpy County pled facts sufficient to establish standing. See *Billups v. Troia*, 253 Neb. 295, 570 N.W.2d 706 (1997) (in absence of plain error, appellate court considers only claimed errors which are both assigned and discussed).

Over the last 50 years, our jurisprudence with respect to a party's standing to challenge an annexation of territory has developed considerably. In *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952), resident property owners sued the City of Omaha in an attempt to enjoin the annexation of their land. The issue of the property owners' standing arose, and we determined that an action to enjoin an annexation could be maintained by (1) a municipality that was scheduled to be annexed to another municipality or (2) a person who owned or was a voter in the territory scheduled to be annexed. *Id.*

This enumeration of real parties soon proved to be too rigid, however, and in *Sullivan v. City of Omaha*, 183 Neb. 511, 162 N.W.2d 227 (1968), we determined that the list of real parties with standing to sue, announced in *Wagner*, was not exclusive. Instead, we determined that the focus of the standing inquiry should be on whether the "person has a personal, pecuniary, and legal interest which is adversely affected by an annexation ordinance." 183 Neb. at 513, 162 N.W.2d at 229. See, also, *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992). If so, that individual has a sufficient interest upon which to contest the validity of the ordinance. *Sullivan v. City of Omaha, supra.*

[8] In *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), *disapproved in part, Adam v. City of Hastings, ante* p. 641, 676 N.W.2d 710 (2004), we restricted the class of persons who could have a personal, pecuniary, and legal interest which is adversely affected by an annexation ordinance. We determined that persons who are not residents, property owners, taxpayers, or electors of an annexed area generally do not have standing to challenge the annexation. *Id.* Moreover, we noted that in order to have standing, a party must also allege a special injury that is

personal in nature: "a party seeking to restrain an act of a municipal body [relative to annexation] must show some *special injury peculiar to himself* aside from a general injury to the public." (Emphasis supplied.) *SID No. 57*, 248 Neb. at 495, 536 N.W.2d at 64. See, also, *Sullivan v. City of Omaha, supra.*

Thus, with regard to a party's standing to challenge an annexation, the current state of our law can be described in the following manner: At the broadest level, every party must show (1) a personal, pecuniary, and legal interest that has been affected by the annexation and (2) the existence of an injury to that interest that is personal in nature. Persons who have the requisite personal, pecuniary, and legal interest include residents, property owners, taxpayers, and electors of the annexed area. Conversely, as a general rule, persons who are not residents, property owners, taxpayers, or electors of the annexed area do not have the requisite personal, pecuniary, and legal interest.

Again, we note, as we did in *Sullivan v. City of Omaha, supra*, that the aforementioned list of enumerated parties is not exclusive. The touchstone of the inquiry remains whether a party has a personal, pecuniary, and legal interest in the controversy. In this regard, we have determined on a number of occasions that parties outside of the enumerated list have a sufficient interest upon which to base standing. For example, we have determined that plaintiffs whose land is outside the annexed area but whose land would fall within the annexing city's zoning authority if the challenged annexation of nonplaintiff land was permitted have (despite not being residents, property owners, taxpayers, or electors of the annexed area) the requisite personal, pecuniary, and legal interest upon which to base standing. See, *Johnson v. City of Hastings, supra*; *Piester v. City of North Platte*, 198 Neb. 220, 252 N.W.2d 159 (1977); *Sullivan v. City of Omaha*, 183 Neb. 511, 162 N.W.2d 227 (1968).

In the instant case, it is obvious that Sarpy County is not a resident, property owner, taxpayer, or elector of the annexed highways, and Sarpy County did not plead, nor does it contend, otherwise. Nonetheless, Sarpy County argues that it pled facts sufficient to show that it has a personal, pecuniary, and legal interest that has been adversely affected by the annexations. Specifically, Sarpy County contends it has standing because (1)

it has lost approximately $38,000 in revenue from rezoning applications, building permit fees, platting fees, and other zoning fees that it once collected but are now being collected by Gretna; (2) it provides law enforcement services on the annexed roadways; (3) of the numerous dedicated roads and streets that it maintains within the areas to be included in the newly created extraterritorial zoning jurisdiction of Gretna; and (4) the annexations have allowed Gretna to usurp Sarpy County's right to zone what was formerly in Sarpy County's zoning jurisdiction.

Of the few courts that have examined whether a county has standing to challenge a city's annexation plan, the majority have determined that a county has standing. See 1 Sandra M. Stevenson, Antieau on Local Government Law § 3.10[3] (2d ed. 1999). However, they have done so under varying rationales. For example, courts have determined that a county which owns property within the annexed area has standing to challenge the annexation. See, *Bd. of Co. Com'rs of Laramie v. Cheyenne*, 85 P.3d 999 (Wyo. 2004); *City of Tampa v. Hillsborough County*, 504 So. 2d 10 (Fla. App. 1986). Courts have also determined that an alleged loss of revenue from taxes or fees serves as a sufficient injury upon which a county can base standing. See, *Harrison County v. City of Gulfport*, 557 So. 2d 780 (Miss. 1990); *Bd. of Cty. Com'rs v. City & Cty. of Denver*, 714 P.2d 1352 (Colo. App. 1986); *City of Sunrise v. Broward County*, 473 So. 2d 1387 (Fla. App. 1985). Still other courts have determined that the loss of territorial integrity and/or the ability to zone serves as a sufficient injury upon which a county can base standing. See, *Denver v. Miller*, 151 Colo. 444, 379 P.2d 169 (1963); *New Castle County v. City of Wilmington*, No. 7788, 1984 WL 19831 (Del. Ch. Dec. 28, 1984) (unpublished opinion).

While the stated rationales may vary, the underlying logic of these cases is that an annexation alters the normal relationship, i.e., power structure, between the two governmental entities. Stated otherwise, these courts have recognized that when a city annexes land within a county's borders, the city infringes upon, in a variety of ways, a county's governmental function. Obviously, this is an intended consequence of annexation. After all, the purpose behind annexations is for the city to replace, at least in some respects, the governmental function of the county in the annexed

area. However, this does not mean a county is without a legally protectable interest.

[9-11] A county is a creature of statute, and its power to act must originate from statute. See, *Guenzel-Handlos v. County of Lancaster*, 265 Neb. 125, 655 N.W.2d 384 (2003); *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, 264 Neb. 358, 648 N.W.2d 277 (2002). Because a county's governmental function is the product of the Legislature's will, it is a legally protectable interest that a county is capable of defending from an allegedly improper infringement. Therefore, we hold that if a county alleges that a city, through an unlawful annexation plan, has encroached upon its governmental function, it has alleged an injury sufficient to give it standing to challenge the annexation plan.

As listed above, Sarpy County has alleged that the unlawful annexations have altered and/or deprived it of its statutory authority to act in and around the annexed area. Relevant to Sarpy County's allegations, we note that under Nebraska law, county boards have been given zoning authority. See Neb. Rev. Stat. §§ 23-114 et seq. and 23-164 et seq. (Reissue 1997, Cum. Supp. 2002 & Supp. 2003). In conjunction with this power, county boards have also been given the authority to set a reasonable schedule of fees for the issuance of zoning permits. See § 23-114.04. Additionally, county boards have been given the authority to supervise and control the public roads within the county's borders. See, Neb. Rev. Stat. § 39-1402 (Reissue 1998); *Art-Kraft Signs, Inc. v. County of Hall*, 203 Neb. 523, 279 N.W.2d 159 (1979); *Brym v. Butler County*, 86 Neb. 841, 126 N.W. 521 (1910).

Thus, Sarpy County has alleged that Gretna, through an unlawful annexation, has encroached upon certain aspects of its governmental function. Stated otherwise, Sarpy County has properly alleged that the annexations have adversely affected a personal, pecuniary, and legal interest. Moreover, the alleged injury is undoubtedly unique to Sarpy County. Therefore, Sarpy County is not resigned to sit idly by if it has a good faith belief that Gretna, through an allegedly unlawful annexation plan, would deprive it of the power granted to it by statute.

CONCLUSION

For the foregoing reasons, we conclude that Sarpy County has standing to challenge Gretna's allegedly unlawful annexations.

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WASHINGTON MUTUAL BANK, FA, APPELLANT, V. ADVANCED CLEARING, INC., APPELLEE.

679 N.W.2d 207

Filed May 7, 2004. No. S-03-054.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing 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 the 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.
3. **Actions: Breach of Warranty.** One of the elements of a cause of action for breach of warranty is reasonable reliance.
4. **Negligence: Fraud: Liability.** Liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information.
5. **Actions: Negligence.** One of the elements of a cause of action for negligent misrepresentation is justifiable reliance on the part of the plaintiff.
6. **Summary Judgment: Appeal and Error.** 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.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

T. Randall Wright, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellant.

Patrick B. Griffin, Suzanne M. Shehan, and Stephen J. Pedersen, of Kutak Rock, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Washington Mutual Bank, FA (Washington Mutual), filed suit against Advanced Clearing, Inc., alleging breach of warranty and negligent misrepresentation. The Douglas County District Court sustained a motion for summary judgment filed by Advanced Clearing, and Washington Mutual appeals.

SCOPE OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004).

[2] In reviewing a summary judgment, an appellate court views the evidence in the 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. *Id.*

FACTS

Washington Mutual is a bank that has its principal place of business in Seattle, Washington. Advanced Clearing is a clearing broker for Ameritrade Holding Corporation and its affiliates, subsidiaries, and other correspondent brokers. Advanced Clearing does business and has offices in Omaha, Nebraska. At all times relevant to this case, Yu Kiu Yu and Helen Suk Ching Lam held three accounts with Washington Mutual as joint tenants. Two of the accounts were certificates of deposit, and the other was a money market account.

On June 11, 1998, a "sight draft" was sent from Advanced Clearing to Washington Mutual. A sight draft is a request sent from one financial institution to another seeking the transfer of funds. The sight draft at issue requested that one of Yu and Lam's certificate of deposit accounts be liquidated and that the funds be transferred to Advanced Clearing. The sight draft contained signatures in the spaces provided for the account holders. Beside each of these signatures was a "Medallion Signature Guarantee Stamp" (Medallion Stamp) bearing the signature of Kurt Halvorson, who was president of Advanced Clearing at that time.

Katherine Munoz, a Washington Mutual employee, reviewed, approved, and processed the sight draft. On June 24, 1998, a check in the amount of $44,351.37 was drawn on Yu and Lam's account. The check was made payable to Advanced Clearing for the benefit of Yu and Lam. Shortly after the funds were received by Advanced Clearing, they were forwarded to another financial institution.

On December 4, 1998, Yu filed a forgery affidavit with Washington Mutual. Therein, he claimed that he did not sign or authorize the sight draft, nor did he receive any benefit from the proceeds of the resulting check. Yu asserted that he had discovered the unauthorized activity on November 28 and that his delay in ascertaining the situation was caused by his bank statements being sent to the wrong address. Lam made the same claims in a nearly identical forgery affidavit filed with Washington Mutual on January 12, 1999.

After an investigation into the disposition of the funds, Washington Mutual chose to honor these forgery affidavits. Washington Mutual reimbursed Yu and Lam in the amount of $46,449.97, which included the amount of the check, reimbursement of a penalty, and interest.

Washington Mutual subsequently sued Advanced Clearing, alleging breach of warranty and negligent misrepresentation. Advanced Clearing moved for summary judgment. After a hearing on the motion, the district court granted summary judgment in favor of Advanced Clearing. Washington Mutual filed a timely notice of appeal.

ASSIGNMENTS OF ERROR

Washington Mutual assigns the following restated errors to the order of the district court: (1) its finding that Washington Mutual could not have relied on the Medallion Stamp, (2) its finding that Washington Mutual did not in fact rely on the Medallion Stamp, and (3) its ruling that Advanced Clearing was entitled to summary judgment.

ANALYSIS

[3-5] Washington Mutual's cause of action is based upon breach of warranty and negligent misrepresentation. One of the elements of a cause of action for breach of warranty is reasonable

reliance. See *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 390 N.W.2d 536 (1986). Liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information. *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994). The Restatement (Second) of Torts § 552 at 126 (1977) provides: "One who . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information . . . ." Accordingly, one of the elements of a cause of action for negligent misrepresentation is justifiable reliance on the part of the plaintiff.

[6] This case comes to us following the entry of summary judgment in favor of Advanced Clearing. 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. *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002).

Munoz, the Washington Mutual employee who processed the sight draft, testified that she had no independent recollection of reviewing the document. She agreed that she would have reviewed the signature card of Yu and Lam before she approved any transfer of funds. Prior to approval, she would have determined that the signatures on the sight draft appeared similar to those on Yu and Lam's signature card.

Washington Mutual also offered the affidavit of David Volkman, which stated that Volkman was a tenured professor at the University of Nebraska at Omaha, where he served as the chair of the Department of Finance, Banking, and Law. His experience prior to appointment to his present position included serving as an assistant national bank examiner for the Office of the Comptroller of the Currency and as an account executive for a financial brokerage house. Volkman averred that he had reviewed the depositions of various parties involved in this case and that based upon his education and experience, it was his opinion that "Advanced Clearing inappropriately used [its Medallion Stamp] by not validating signatures on account transfer forms."

Volkman opined that, in general, the financial community believes that the intent of the Medallion signature guarantee program is to thwart fraudulent activities through forgery and to aid

transfer agents for all assets. According to Volkman, the financial community highly regards the Medallion signature guarantee program and is aggressive in maintaining the program's reputation by diligently verifying signatures before the stamp is affixed for all transferred accounts and all assets, not just equity and debt investments. He stated that this view was held by local financial institutions as well as government organizations, such as the Office of the Comptroller of the Currency and the Federal Reserve. In conclusion, Volkman stated that because of the use of signature verification for all assets and the high regard for and reliance on the Medallion signature guarantee program by the financial community, it was his opinion that Washington Mutual reasonably relied on the validity of the signatures on the sight draft.

Halvorson, the president of Advanced Clearing in June 1998, testified that Advanced Clearing placed the Medallion Stamp on documents other than those dealing with securities. The Medallion Stamp was placed on sight drafts directed toward financial institutions that did not participate in the automated customer account transfer system (ACATS). He stated that in such circumstances, the Medallion Stamp merely authenticated that the document came from the institution that affixed the Medallion Stamp. According to Halvorson, in this situation, the Medallion Stamp did not guarantee the validity of the signature.

Angel Peterson, an Advanced Clearing employee in the new account department, testified that Advanced Clearing used the Medallion Stamp on non-ACATS transfers. She characterized the sight draft at issue in this case as a non-ACATS form. It was her understanding that industry standards dictated that affixing a Medallion Stamp on non-ACATS transfer forms guaranteed that the form was complete and signed, but had nothing to do with the validity of the signature.

The district court concluded that Washington Mutual could not have reasonably relied upon the Medallion Stamp affixed by Advanced Clearing when processing the sight draft in question. It found that pursuant to Washington Mutual's written policies, a Medallion Stamp affixed to a sight draft could not be relied upon to guarantee signatures on bank transfers. Washington Mutual's Medallion Stamp policy provided: "The Medallion STAMP is not to be used as a signature for a Notary Acknowledgement,

Notary Jurat or an Endorsement Guarantee of a negotiable item (i.e., check, draft or collection item). . . . The Medallion Signature Guarantee Stamp should ONLY be used for securities transactions."

The district court also concluded that Washington Mutual did not, in fact, rely upon the presence of the Medallion Stamp on the sight draft it received from Advanced Clearing. The court found that since Munoz reviewed the signature card of Yu and Lam and independently determined that the signatures on the card were similar to those on the sight draft, Washington Mutual did not rely upon the presence of the Medallion Stamp on the document. The court therefore granted Advanced Clearing's motion for summary judgment.

Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004). In reviewing a summary judgment, an appellate court views the evidence in the 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. *Id.*

The question for our consideration is whether Washington Mutual could have reasonably or justifiably relied upon the Medallion Stamp affixed to the sight draft it received from Advanced Clearing. In determining the answer to this question, we examine the policies of Washington Mutual with regard to the *use* of a Medallion Stamp and the *acceptance* of a Medallion Stamp.

In its analysis, the district court focused primarily on Washington Mutual's policy regarding the *use* of a Medallion Stamp. According to Washington Mutual's online employee policy manual, its employees could affix a Medallion Stamp only on documents related to securities transactions. Thus, it is clear that Washington Mutual employees could not *use* the Medallion Stamp on a sight draft because it is not a securities transaction. Washington Mutual's policy manual also provided that the Medallion Stamp was not to be *used* to guarantee signatures in bank account transfers.

We are more persuaded by Washington Mutual's policy with regard to the *acceptance* of a Medallion Stamp. It was the policy of Washington Mutual for the processor of a sight draft to require a signature guarantee as a prerequisite to processing such a transaction. With respect to the *acceptance* of a Medallion Stamp as a signature guarantee when a Medallion Stamp was used by another institution, Washington Mutual's policy manual stated:

> **Presentation of a Medallion Signature Guarantee in Connection with Deposit Transaction**
>
> If an endorsement guarantee is required, a standard financial institution endorsement guarantee stamp must be presented. A Medallion Signature Guarantee S[t]amp is NOT ACCEPTABLE. Use of the Medallion Stamp in connection with deposit transactions is outside the scope of the STAMP program.
>
> — If an individual presents a Medallion Guarantee from another institution in this context, request an appropriate endorsement guarantee (not the Medallion Signature Guarantee STAMP).
>
> — DO NOT USE your financial center's Medallion Signature Guarantee Stamp as an endorsement guarantee for deposit transactions. Your financial center should have a standard endorsement guarantee stamp to accom[m]odate these types of requests.

Thus, the policy manual contemplated a situation wherein Washington Mutual would be presented with a Medallion Stamp from another financial institution in the context of a deposit transaction. In such a circumstance, Washington Mutual's policy did not permit the *acceptance* of the Medallion Stamp as an endorsement guarantee for deposit transactions.

Washington Mutual's policy with regard to sight drafts required that upon receipt of a sight draft, the processor was responsible for examining the document to determine whether it bore a signature guarantee stamp. The policy manual dictated that Washington Mutual would not accept a Medallion Stamp as a signature guarantee, and if such a stamp was presented, the correct procedure was to request an appropriate, standard financial institution endorsement guarantee stamp.

Even when viewing the evidence in the light most favorable to Washington Mutual and giving it the benefit of all reasonable inferences deducible from the evidence, we conclude that Washington Mutual's policy did not allow its employees to reasonably or justifiably rely on a Medallion Stamp as a signature guarantee in the transaction presented in this case. Thus, there is no genuine issue as to any material fact that prevents summary judgment in favor of Advanced Clearing.

Because we have concluded that Washington Mutual could not have reasonably or justifiably relied upon the Medallion Stamp, it is not necessary to address Washington Mutual's other assignments of error.

CONCLUSION

The order of the district court granting summary judgment in favor of Advanced Clearing is affirmed.

AFFIRMED.

BRENT CERNY, APPELLANT, V.
CEDAR BLUFFS JUNIOR/SENIOR PUBLIC SCHOOL,
SAUNDERS COUNTY DISTRICT NO. 107, APPELLEE.

679 N.W.2d 198

Filed May 7, 2004. No. S-03-085.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.
2. ____: ____. In actions brought pursuant to the Political Subdivisions Tort Claims Act, when determining the sufficiency of the evidence to sustain the trial court's 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.
3. **Trial: Expert Witnesses.** Determining the weight that should be given expert testimony is uniquely the province of the fact finder.
4. **Political Subdivisions Tort Claims Act: Appeal and Error.** In reviewing a judgment awarded in a bench trial under the Political Subdivisions Tort Claims Act, it is not the purview of an appellate court to reweigh the evidence.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

Larry C. Johnson, of Johnson & Welch, P.C., for appellant.

Stephen S. Gealy and Timothy E. Clarke, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

HENDRY, C.J., AND WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

I. NATURE OF CASE

This is the second appearance of this case before this court. Brent Cerny, appellant, filed a personal injury action against Cedar Bluffs Junior and Senior High School (the School), appellee, under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1991 & Cum. Supp. 1994). In his lawsuit, Cerny alleged that while participating in athletics as a student at the School, he sustained personal injuries as a result of the negligence of the School and its coaching staff. Following the initial bench trial, the district court for Saunders County found that the School's coaches were not negligent and dismissed the petition. Cerny appealed.

On appeal, we concluded that the district court had erred in determining the applicable standard of care and in discounting certain expert witness testimony when applying that standard of care. We reversed the district court's decision and remanded the cause for a new trial. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001) (*Cerny I*).

Following remand, a second bench trial was held. After the second trial, the district court found that certain conduct was required to meet the standard of care and that the conduct of the School's football coaching staff comported with the standard of care required of a reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement. As a result, in its journal entry filed January 6, 2003, the district court found no negligence on the part of the School and dismissed the petition. Cerny appeals. We affirm the district court's decision on remand.

II. STATEMENT OF FACTS

Initially, we note that pursuant to the parties' stipulation, much of the trial record from the first trial of this case was received into

evidence during the second trial. The following facts are established by that portion of the record which is before us now and which was before us in *Cerny I*, 262 Neb. at 67-69, 628 N.W.2d at 700-01, and are therefore reiterated from that opinion:

> In the fall of 1995, Cerny was a student at the School and a member of its football team. On the evening of Friday, September 15, 1995, he participated in a football game between Cedar Bluffs and Beemer high schools. Mitchell R. Egger was the head coach of the Cedar Bluffs team, and Robert M. Bowman was the assistant coach. Both held Nebraska teaching certificates with coaching endorsements.
>
> Cerny fell while attempting to make a tackle during the second quarter of the Beemer game, striking his head on the ground. Although he felt dizzy and disoriented after the fall, Cerny initially remained in the game but took himself out after a few plays. He returned to the game during the third quarter. Subsequently, during football practice on Tuesday, September 19, Cerny was allegedly injured again when his helmet struck that of another player during a contact tackling drill.
>
> There was conflicting evidence at trial regarding the symptoms experienced and communicated by Cerny during and after the Beemer game. Cerny testified that when he came out of the game, he told Egger and Bowman that he felt dizzy, disoriented, and extremely weak. Egger stated that Cerny complained of dizziness when he came off the field during the Beemer game. He also noted that Cerny was short of breath and had a tingling sensation in his neck. Egger stated that Bowman continued to monitor Cerny.
>
> Bowman testified that Cerny did not complain of a headache when he left the game, but did state that he felt fuzzy or dizzy, that he had some burning in his shoulder, and that he could not catch his breath. Bowman attributed Cerny's dizziness to hyperventilation, not a head injury. Bowman stated that when Cerny came out of the game, Cerny made normal eye contact with Bowman and Cerny's speech and movement appeared normal. After catching his breath, Cerny appeared to Bowman to be in a normal emotional state. However, Bowman did recommend to Egger

that Cerny should get medical attention, but to his knowledge, no medical personnel examined Cerny that evening.

When Cerny asked to re-enter the game during the third quarter, Bowman observed that he seemed completely normal, exhibiting neither confusion, disorientation, nor abnormal speech. Bowman also noted that Cerny did not complain of a headache. Egger allowed Cerny to re-enter the game after observing that his color looked good, his eyes looked clear, and his speech was normal.

Cerny testified that he had a headache continuously from Friday night until the practice on Tuesday. However, there is conflicting evidence as to whether he reported this to his coaches. Cerny testified he told Bowman he had a headache during the bus ride home after the Beemer game. However, Bowman testified that during the bus ride, he asked Cerny how he felt, and Cerny replied "I feel good, Coach" and did not complain of a headache. . . . Cerny testified that he told his coaches before the Tuesday practice that he had a nagging headache all weekend, but on cross-examination, he admitted that he did not remember if he had told the coaches that he was feeling bad before practice. Egger testified that he did not talk to Cerny before the Tuesday practice and permitted him to participate because "I thought he was okay, just—he was okay Friday. At least in our eyes he was okay."

Dr. Thomas A. McKnight, a family practice physician who has treated Cerny since September 1995, and Dr. Richard Andrews, a neurologist to whom Cerny was referred by McKnight, both expressed opinions that Cerny suffered a concussion during the Friday night game; that he was still symptomatic at the practice on the following Tuesday; and that during the practice, he suffered a closed-head injury with second concussion syndrome. Andrews testified that the second blow to the head sustained during the practice was "the principal cause of [Cerny's] traumatic brain injury, and the sequelae as [they exist] now."

Cerny filed a personal injury action against the School under the Political Subdivisions Tort Claims Act, and in his amended petition (petition) alleged that the School, acting through its

coaches, was negligent in a number of particulars, including "failing to adequately examine [Cerny] following his initial concussion . . . to determine the need for immediate qualified medical attention" and "allowing [Cerny] to return to play . . . without authorization from qualified medical personnel and without verifying it was safe to do so." The case was tried to the bench from June 28 to 30, 1999. On October 6, the district court entered judgment in favor of the School and dismissed Cerny's petition.

Cerny appealed the district court's decision. In *Cerny I*, we noted that determining the standard of care to be applied in a particular case is a question of law, and we concluded as a matter of law that in the instant case, "[t]he applicable standard of care by which the conduct of the School's coaching staff should be judged is that of a reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement." 262 Neb. at 77, 628 N.W.2d at 706. We further concluded that the district court erred in determining the applicable standard of care and in discounting certain expert witnesses' testimony when determining whether the coaches met the standard of care. Because the district court's errors were prejudicial to Cerny, we reversed the district court's decision and remanded the cause for a new trial. On remand, we instructed the district court that "in order to determine the existence of negligence, [it should] determine, as the finder of fact, what conduct was required by [the standard of care] under the circumstances of this case and whether Egger and Bowman acted in conformity therewith." *Id.*

Cerny's case came on for a second bench trial on April 11 and 12, 2002. As stated above, pursuant to the parties' stipulation, much of the record from the first trial was offered and received into evidence by the district court during the second trial. Certain documentary evidence was received into evidence at the second trial. Certain witnesses testified live. Cerny called several expert witnesses, including Christina Froiland, a certified athletic trainer and assistant professor of physical education, and Michael McCuistion, a certified athletic trainer. The School called John Stineman as its sole expert witness. Stineman, a Nebraska endorsed high school football coach, had recently retired after 30 years of coaching.

At the close of the trial, the district court took the matter under advisement. The district court filed its journal entry on January 6, 2003, in which it made findings and conclusions. In its journal entry, the district court summarized the expert witnesses' testimony. That summary, which is supported by the record, is repeated as follows:

> Christina Froiland . . . teaches a class entitled "Prevention and Care of Athletic Injuries." This class is required by the State of Nebraska for teachers seeking a coaching endorsement. Froiland testified the typical symptoms of a concussion include dizziness, headache, and disorientation, and are generally known in the coaching profession. She further testified that when an athlete exhibits such symptoms following an injury, the coach should not permit the athlete to return to competition until receiving clearance from a physician.
>
> . . . Michael McCuistion . . . testified regarding the recognition of symptoms of head injuries. . . . He testified that coaches must be aware of [the symptoms] and, when an athlete exhibits such symptoms, must take the athlete out of competition until a medical evaluation has been performed.
>
> . . . .
>
> . . . John Stineman . . . testified that he has 30 years [sic] experience as a coach of Nebraska high school football and that he has coached in many games, met and discussed football issues with other coaches and is aware of the practices and procedures utilized by coaches in the state with regard to player injury. . . . He stated that since the time of [Cerny's injury in 1995] and another head injury which occurred in a Nebraska high school football game at about the same time, high school football coaches have been more cognizant of the issues involving head injuries. He testified that there was little training or literature made available to Nebraska coaches on the issues of head injury prior to 1995, but since that time training and literature has [sic] been made more widely available to Nebraska's high school coaches. . . . He testified that in his opinion, the evaluation[s] made by coaches Egger and Bowman of [Cerny] on September 15, 199[5], were reasonable actions

> which would have been taken by a Nebraska endorsed coach . . . . He testified that a reasonable coach would have permitted [Cerny] to reenter the game.

Elsewhere in its journal entry, the district court set forth its findings regarding the conduct required of a reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement under the circumstances of this case. The district court found that based upon the evidence in the record, which included the testimony of Froiland, McCuistion, and Stineman, the conduct required of a person holding a Nebraska teaching certificate with a coaching endorsement in 1995, when a player has sustained a possible head injury, is as follows: (1) The coach must be familiar with the features of a concussion, (2) the coach must evaluate the player who appears to have suffered a head injury for the symptoms of a concussion, (3) the evaluation must be repeated at intervals before the player can be permitted to reenter a game, and (4) the coach must make a determination based upon the evaluation as to the seriousness of the injury and determine whether it is appropriate to let the player reenter the game or to remove the player from all contact pending a medical examination.

In its journal entry, the district court next considered whether the School's coaches had acted in conformity with the conduct required under the foregoing standard of care. In this regard, the district court found that the record demonstrated the following:

> Coach Bowman was familiar with the signs of a concussion. . . . Coach Bowman evaluated [Cerny] with respect to the signs of a concussion at intervals throughout the evening [and such evaluation] occurred while [Cerny] was resting and while he was up and about and while he was active in the game and after the game was over. The evaluation conducted by Coach Bowman revealed that the fuzziness complained of by [Cerny] had resolved within 15 minutes of his removing himself from the game. The record reveals that [Cerny] did not complain of any of the symptoms of a concussion.

Based upon these and other findings of fact, the district court determined that the coaches' decision allowing Cerny to reenter the game did not violate the applicable standard of care. The court stated that "the conduct of the coaches in this matter comported

with the standard of care required of reasonable [sic] prudent persons holding a Nebraska teaching certificate with a coach's endorsement. The court finds no negligence on the part of [the School]." The district court ordered the petition dismissed. Following dismissal of his petition, Cerny appealed.

III. ARGUMENTS ON APPEAL

Cerny makes various arguments on appeal. These arguments can be restated as follows: The district court erred (1) in its consideration of Stineman's testimony regarding the conduct required by the School's coaches to meet the standard of care, (2) in its finding of fact as to what conduct was required to meet the applicable standard of care, (3) in its finding of fact that the coaches' decision to permit Cerny to reenter the game did not violate the applicable standard of care, and (4) in its resolution of the question of fact that the School was not negligent.

IV. STANDARDS OF REVIEW

[1,2] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003). In actions brought pursuant to the Political Subdivisions Tort Claims Act, when determining the sufficiency of the evidence to sustain the trial court's 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. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001).

V. ANALYSIS

Cerny makes four arguments on appeal. We treat the first argument individually. Because the remaining three arguments challenge the district court's findings and resolutions of questions of fact, we treat the remaining arguments together below.

1. District Court's Consideration of Stineman's Testimony

Cerny first asserts that the district court erred in considering Stineman's testimony regarding the conduct required by the

School's coaches under the standard of care. Although Cerny concedes that Stineman is qualified as an expert witness, Cerny nonetheless objects to the weight accorded Stineman's testimony by the district court and claims that the district court erred in considering Stineman's testimony to the effect that the School's coaches' conduct was within the applicable standard of care. We reject this argument.

[3,4] We have recognized that determining the weight that should be given expert testimony is uniquely the province of the fact finder. *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998). We have further stated that in reviewing a judgment awarded in a bench trial under the Political Subdivisions Tort Claims Act, it is not the purview of an appellate court to reweigh the evidence. See *City of LaVista v. Andersen*, 240 Neb. 3, 480 N.W.2d 185 (1992).

As the finder of fact, the district court had the authority to determine what weight, if any, it would give to Stineman's testimony. See *Hawkins v. City of Omaha, supra*. It is apparent from the district court's journal entry that it evaluated all of the expert witnesses' testimony, as it was directed to do on remand. See *Cerny I*. It is also apparent from the district court's journal entry that the district court accorded weight to certain of Stineman's testimony, as it was permitted to do. Contrary to Cerny's argument, Stineman's testimony was not limited to anecdotal subject matter. To the contrary, Stineman's testimony was helpful to the finder of fact because aspects of his testimony related to the year 1995 in particular. It is not the function of this court to second guess the district court's decision with regard to the weight given to an expert's testimony or to reweigh that evidence in this appeal. See, *Hawkins v. City of Omaha, supra*; *City of LaVista v. Andersen, supra*. Accordingly, we conclude that Cerny's first argument is without merit.

2. District Court's Findings of Fact

For his remaining three arguments, Cerny asserts that the district court erred (1) in its finding of fact as to what conduct was required to meet the applicable standard of care, (2) in its finding of fact that the coaches' decision to permit Cerny to reenter the

game did not violate the applicable standard of care, and (3) in its resolution of the question of fact that the School was not negligent. Cerny is asserting on appeal that the evidence shows that Cerny's coaches, Mitchell Egger and Robert Bowman, acted negligently in failing to keep Cerny out of competition until after he had received clearance from a physician to play. Cerny thus claims that the district court erred in finding under the facts of this case that the conduct of Egger and Bowman, in allowing Cerny to return to play in the Beemer game, satisfied the standard of care. Because the record contains evidence supporting the district court's various findings of fact, we determine there is no merit to Cerny's arguments.

As noted above, in *Cerny I*, we set forth the standard of care to be applied in this case. We stated that determining the standard of care to be applied in a particular case is a question of law, and we concluded that in the instant case, "[t]he applicable standard of care by which the conduct of the School's coaching staff should be judged is that of a reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement." *Id.* at 77, 628 N.W.2d at 706. Under the law-of-the-case doctrine, the applicable standard of care that the School's coaches were required to meet in this case has been conclusively established. See *Houston v. Metrovision, Inc.*, *ante* p. 730, 677 N.W.2d 139 (2004).

On remand, we directed the district court to determine what conduct was required by the standard of care under the circumstances of this case, and to determine whether the conduct of Egger and Bowman in this case comported therewith. These determinations are findings of fact. See *Cerny I*, 262 Neb. at 75, 628 N.W.2d at 705 (stating "a finder of fact must determine what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with the standard").

In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong, *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003), and it is not the purview of the appellate court to reweigh the evidence. *City of LaVista v. Andersen*, 240 Neb. 3, 480 N.W.2d 185

(1992). In actions brought pursuant to the Political Subdivisions Tort Claims Act, when determining the sufficiency of the evidence to sustain the trial court's 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. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001).

(a) Conduct Required to Meet Standard of Care

As noted above, on remand, after reviewing the evidence, the district court found that the conduct required of a reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement in 1995, when a player has sustained a possible head injury, was (1) to be familiar with the features of a concussion; (2) to evaluate the player who appeared to have suffered a head injury for the symptoms of a concussion; (3) to repeat the evaluation at intervals before the player would be permitted to reenter the game; and (4) to determine, based upon the evaluation, the seriousness of the injury and whether it was appropriate to let the player reenter the game or to remove the player from all contact pending a medical examination.

With regard to the conduct required under the standard of care, we note that Froiland testified that an evaluation procedure similar to that found appropriate by the district court was "good advice for coaches to follow." Elsewhere in the record, there is ample evidence to support the district court's finding that the conduct outlined above was required to meet the standard of care, and such finding is not clearly wrong.

(b) Conformance With Standard of Care

In its evaluation of whether the coaches' conduct conformed to the standard of care, we note that the district court found that the evidence in the case showed that Bowman was familiar with the signs of a concussion. The district court found additional facts that showed that the coaches met the standard of care regarding evaluating Cerny at intervals and making their determination whether to permit Cerny to reenter the game.

The facts found by the district court include the following: The district court found that when Cerny removed himself from

the game, he told Bowman that he was fuzzy and had tingling in his neck. The district court found that Bowman talked to Cerny continuously for 5 to 6 minutes and observed that Cerny did not have a vacant stare, responded normally to conversation, did not appear to be disoriented or confused, and did not complain of nausea, headache, or blurred vision. The district court also found that the record demonstrated that Bowman observed and talked to Cerny approximately 15 minutes after his initial evaluation and that during this second observation, Bowman noted that Cerny was oriented, breathing normally, speaking coherently, and not complaining of headache, dizziness, vision problems, or nausea. The district court also found that Bowman observed Cerny on the sidelines during the third quarter and that Bowman noted that Cerny appeared to be "100% normal"; that his responses were appropriate; that he did not seem confused or disoriented; that his speech was not incoherent or slurred; that his emotions were appropriate; that he did not complain of dizziness, unsteadiness, nausea, or headache; and that he told the coach he felt "fine." Based upon the foregoing, the district court found that Bowman evaluated Cerny for symptoms of a concussion and that Cerny was evaluated at intervals. Further, the district court found that Cerny was properly allowed to reenter the game.

With regard to whether the conduct of the coaches met the standard of care, we note that the record contains Stineman's testimony, in which he stated that the evaluations and actions taken by Egger and Bowman regarding Cerny were reasonable for Nebraska endorsed coaches on September 15, 1995. According to Stineman, Bowman's evaluation of Cerny during the Beemer football game and Egger's decision to permit Cerny to reenter the game were the actions that would have been taken by a reasonable Nebraska endorsed football coach under similar circumstances in 1995.

Given its findings of fact summarized above, the district court determined, inter alia, that "the conduct of the coaches in this matter comported with the standard of care required of reasonable [sic] prudent persons holding a Nebraska teaching certificate with a coach's endorsement. The court finds no negligence on the part of [the School]."

Although we recognize that the record contains evidence that could controvert the district court's findings of fact, we are required to consider the evidence in a light most favorable to the School. See *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001). The district court's findings that the coaches' conduct met the standard of care and that the School was not negligent are supported by evidence and are not clearly wrong. Pursuant to our standard of review, we determine that there is sufficient evidence to sustain the district court's judgment.

Cerny's second, third, and fourth arguments are without merit. Further, we have considered all of Cerny's remaining arguments on appeal and determine that they are without merit.

VI. CONCLUSION

For the reasons stated above, the decision of the district court finding in favor of the School and dismissing Cerny's petition is affirmed.

AFFIRMED.

SODORO, DALY & SODORO, P.C., A NEBRASKA PROFESSIONAL CORPORATION, APPELLEE, V. KATHLEEN J. KRAMER, APPELLANT.

679 N.W.2d 213

Filed May 7, 2004. No. S-03-154.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the 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.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. **Limitations of Actions: Contracts: Termination of Employment.** Where services are rendered under a contract of employment which does not fix the term of service or the time for payment, the contract is continuous and the statute of limitations does not commence to run until the employee's services are terminated.
4. **Limitations of Actions.** A period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
5. **Pleadings.** The issues in a case are framed by the pleadings.

6. **Actions: Pleadings.** The essential character of an action and relief sought, whether legal or equitable, is determinable from its main object, as disclosed by the pleadings.
7. **Open Accounts: Actions.** An action on account or open account is appropriate where the parties have conducted a series of transactions for which a balance remains.
8. **Actions: Contracts: Words and Phrases.** An action on account is an action of assumpsit or debt for the recovery of money only for services performed, property sold and delivered, money loaned, or damages for the nonperformance of simple contracts, expressed or implied, when the rights of the parties will be adequately conserved by the payment and receipt of money.
9. **Actions.** An account stated is a new and independent cause of action founded on the agreed balance due upon the account rendered.
10. **Open Accounts: Contracts.** Openness of an account is indicated when further dealings between the parties are contemplated and when some term or terms of the contract are left open and undetermined.
11. **Open Accounts.** The critical factor in deciding whether an account is open is whether the terms of payment are specified by the agreement or are left open and undetermined.
12. **Open Accounts: Limitations of Actions.** In an action on an open account, where the dealing between the parties was continuous, each succeeding item is applied to the true balance, and the latest item of the account removes prior items from the operation of the statute of limitations.
13. **Debtors and Creditors: Limitations of Actions.** The mere entry of a credit by a creditor without the consent of the debtor is generally conceded to be without effect upon the statute of limitations.
14. ____: ____. For a part payment to remove the bar to recovery imposed by the statute of limitations, the payment must be made under circumstances which warrant a clear inference that the debtor recognizes and acknowledges the entire debt as the debtor's existing liability, and must demonstrate the debtor's willingness or obligation to pay the balance of the debt.
15. ____: ____. When a part payment amounts to a voluntary acknowledgment of the existence of the debt, the law implies a new promise to pay the balance.
16. **Open Accounts: Limitations of Actions.** The last item in an open account, for statute of limitations purposes, is the final underlying transaction which represents a legal indebtedness.
17. **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 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 further proceedings as it deems just.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded with direction to dismiss.

Jeffrey T. Palzer, of Kellogg & Palzer, P.C., for appellant.

Mary M. Schott, of Sodoro, Daly & Sodoro, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

This is an action for attorney fees incurred during lengthy and complicated divorce proceedings. See, *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997); *Kramer v. Kramer*, 1 Neb. App. 641, 510 N.W.2d 351 (1993) (appeals of underlying case). The question presented in this appeal is whether the statute of limitations on the law firm's action for attorney fees ran from the time that the law firm's employment by the client ended, or from the date on which the law firm received the client's appeal bond and credited that money to her account.

BACKGROUND

Kathleen J. Kramer, the defendant below and appellant in this court, employed the law firm of Sodoro, Daly & Sodoro (Sodoro) in February 1989 to represent her in her divorce proceedings. Specifically, Kramer hired Peter C. Bataillon, a Sodoro attorney. Kramer's final appeal was argued before this court on April 2, 1997, our decision was filed on May 23, and our mandate issued on June 5. The mandate was spread on the record by the Sarpy County District Court on June 10. In April, prior to our decision, Bataillon left Sodoro. Kramer continued to employ Bataillon with respect to her divorce and no longer employed Sodoro.

Sodoro records indicate that at the time Bataillon left the firm, Kramer owed Sodoro a balance of $16,995.02. The last charge in Kramer's account was a fee transaction dated April 4, 1997, for "preparation of correspondence to client regarding oral argument." The notation "PCB" next to the charge presumably referred to Bataillon. The final transactions in the account, however, were dated June 19 and were designated as "payment transactions." There were three separate transactions on that date. The first and second each were for the "return of unused portion of filing fee from court return of Supreme Court cost bond - clerk of Sarpy County District Court." The third was a "Reimbursement from St. Paul for expert witness return of Supreme Court cost bond - clerk of Sarpy County District Court." The three amounts,

totaling $188.50, were credited to Kramer's account balance. For convenience, we will refer to these transactions collectively as the "appeal bond." After these credits, Kramer's balance stood at $16,806.52. Sodoro records reveal no activity on the account after the June 19, 1997, credits.

Sodoro filed the petition in the instant case on June 7, 2001. The petition alleged, as pertinent, that Sodoro had rendered professional legal services to Kramer in her divorce action, that "various charges were made for these services and that the grand total for these legal services and expenses incurred was in the sum of $16,510.82," and that Kramer had failed to pay. Kramer's answer affirmatively alleged the defense of the statute of limitations. Kramer subsequently filed a motion for summary judgment based on her statute of limitations defense. Although the transcript does not contain an order disposing of that motion, it is apparent from later proceedings that the motion was denied. Sodoro then filed a motion for summary judgment. The district court determined, inter alia, that the statute of limitations on Sodoro's claim for fees began to run on June 19, 1997, when Sodoro received and accounted for the appeal bond. Finding no other issue of material fact, the district court entered summary judgment for Sodoro. Kramer appeals.

ASSIGNMENTS OF ERROR

Kramer assigns, consolidated and restated, that the district court erred in overruling her motion for summary judgment and sustaining Sodoro's because (1) Sodoro's action was barred by the statute of limitations and (2) there was a genuine issue of material fact as to the amount owed.

STANDARD OF REVIEW

[1,2] In reviewing a summary judgment, an appellate court views the evidence in the 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. *Misle v. HJA, Inc., ante* p. 375, 674 N.W.2d 257 (2004). Summary judgment is proper when the pleadings and evidence admitted at the hearing 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. *Id.*

Sodoro argues that " '[t]he point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.' " Brief for appellee at 5, quoting *Nebraska Popcorn v. Wing*, 258 Neb. 60, 602 N.W.2d 18 (1999), and citing *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). However, this level of deference does not apply to an appellate court's review of a grant of summary judgment; the governing standard of review for an order of summary judgment should be, and continues to be, one favorable to the nonmoving party. See *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003).

ANALYSIS

[3] The parties agree that the statute of limitations at issue in this case is Neb. Rev. Stat. § 25-206 (Reissue 1995), which provides that "[a]n action upon a contract, not in writing, expressed or implied . . . can only be brought within four years." Kramer relies on the rule that "where services are rendered under a contract of employment which does not fix the term of service or the time for payment, the contract is continuous and the statute of limitations does not commence to run until the employee's services are terminated." *In re Estate of Baker*, 144 Neb. 797, 803, 14 N.W.2d 585, 589 (1944). Accord, *Weiss v. Weiss*, 179 Neb. 714, 140 N.W.2d 15 (1966); *Phifer v. Estate of Phifer*, 112 Neb. 327, 199 N.W. 511 (1924). See, e.g., *Maksym v. Loesch*, 937 F.2d 1237 (7th Cir. 1991); *Jenney v. Airtek Corp.*, 402 Mass. 152, 521 N.E.2d 388 (1988). Kramer argues that Sodoro's service to her was terminated when Bataillon left the firm in April 1997 and that Sodoro's June 2001 filing against her was untimely.

Sodoro does not dispute that Bataillon left the firm more than 4 years before it filed suit against Kramer. However, Sodoro argues that receipt of the appeal bond and crediting that amount to Kramer's account was a "service" to Kramer sufficient to restart the statute of limitations.

[4-6] Sodoro contends that its receipt of the appeal bond and credit to Kramer's account was part of its employment relationship

with Kramer, such that the statute of limitations began to run at that time. Before disposing of this argument, however, it is necessary to consider more basic principles of law. A period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). Applying that proposition in the instant case requires us to determine the nature of Sodoro's cause of action. For that, we turn to the pleadings. The issues in a case are framed by the pleadings. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). The essential character of an action and relief sought, whether legal or equitable, is determinable from its main object, as disclosed by the pleadings. *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994).

For the reasons set forth below, we conclude that Sodoro's cause of action is best characterized as an action on an open account. An action on an open account is the appropriate cause of action under the circumstances presented, given that the action is based in contract, there have been a number of transactions between the parties, the terms of payment are not specified by the contract, and the central issue is the discrete legal effect of one of those transactions.

[7,8] " '[A]n action on account or open account is appropriate where the parties have conducted a series of transactions for which a balance remains.' " *Pipe & Piling Supplies v. Betterman & Katelman*, 8 Neb. App. 475, 482, 596 N.W.2d 24, 30-31 (1999), quoting 1 C.J.S. *Account, Action On* § 3 (1985).

> An "action on account" has been defined as an action of assumpsit or debt for the recovery of money only for services performed, property sold and delivered, money loaned, or damages for the nonperformance of simple contracts, expressed or implied, when the rights of the parties will be adequately conserved by the payment and receipt of money.

1 C.J.S., *supra*, § 2 at 605. See, also, *Moore v. Schank*, 148 Neb. 228, 27 N.W.2d 165 (1947); *Pipe & Piling Supplies, supra*.

Sodoro's petition, and the evidence submitted in support of its motion for summary judgment, establish a prima facie case for an action on an account. See, *Florist Supply of Omaha v. Prochaska*,

244 Neb. 776, 509 N.W.2d 209 (1993); *Moore, supra*; *Pipe & Piling Supplies, supra*. More important, however, is that Sodoro's argument presents a question which can be answered only by analyzing this case as an action on an account. Sodoro's argument on the statute of limitations issue is based solely on the June 19, 1997, account entry, and the account entry is the sole basis to be found in the record for concluding that Sodoro's action was timely filed. Sodoro's argument requires us to determine the legal effect of the June 19 account entry, and this determination can be made only within the context of an action on the account.

[9] At common law, the rules governing actions on accounts differed depending on whether the account was mutual, simple, open, or stated. See, generally, *State, Etc. v. Hintz*, 281 N.W.2d 564 (N.D. 1979) (explaining different types of accounts). However, Nebraska law has never distinguished among most of the various types of accounts. *T. S. McShane Co., Inc. v. Dominion Constr. Co.*, 203 Neb. 318, 278 N.W.2d 596 (1979). The primary distinction recognized by Nebraska law is between an open account and an account stated. The instant case does not involve an action on an account stated, which is a new and independent cause of action founded on the agreed balance due upon the account rendered. *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000). In such an action, the plaintiff must allege that the account was, in fact, stated and agreed to, although the failure to expressly allege the account stated may be waived by joining issue on the matter. *Id.* This case involves no such allegation.

[10,11] Instead, the instant case is an action on an open account. Openness is indicated when further dealings between the parties are contemplated and when some term or terms of the contract are left open and undetermined. See *T. S. McShane Co., Inc., supra*. The critical factor in deciding whether an account is open is whether the terms of payment are specified by the agreement or are left open and undetermined. See *id.* Here, the terms of payment are clearly open and undetermined.

[12-14] It is well established that in an action on an open account, where the dealing between the parties was continuous, each succeeding item is applied to the true balance, and the latest item of the account removes prior items from the operation

of the statute of limitations. See, *Wellnitz v. Muck*, 182 Neb. 22, 152 N.W.2d 1 (1967); *Lewis v. Hiskey*, 166 Neb. 402, 89 N.W.2d 132 (1958). However, not every entry in an account is an "item" that restarts the statute of limitations. In particular, the mere entry of a credit by a creditor without the consent of the debtor is generally conceded to be without effect upon the statute of limitations. See *id.* In this regard, Kramer calls our attention to Neb. Rev. Stat. § 25-216 (Reissue 1995), which provides that

> [i]n any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise . . . .

Based in part on § 25-216, we have consistently held that for a part payment to remove the bar to recovery imposed by the statute of limitations, the payment must be made under circumstances which warrant a clear inference that the debtor recognizes and acknowledges the entire debt as the debtor's existing liability, and must demonstrate the debtor's willingness or obligation to pay the balance of the debt. See, *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984); *T. S. McShane Co., Inc. v. Dominion Constr. Co.*, 203 Neb. 318, 278 N.W.2d 596 (1979); *Hejco, Inc. v. Arnold*, 1 Neb. App. 44, 487 N.W.2d 573 (1992).

[15] The theory underlying this rule is that when a part payment amounts to a voluntary acknowledgment of the existence of the debt, the law implies a new promise to pay the balance. See, *T. S. McShane Co., Inc. v. Dominion Constr. Co., supra*; *Hejco, Inc., supra*. But merely crediting Kramer's account for property returned by a third party does not support such an implication. See *T. S. McShane Co., Inc., supra* (credit for returned parts raised no inference that defendant assented to or acknowledged greater debt). Such a rule would, under many circumstances, permit parties to manipulate the statute of limitations by transferring funds or otherwise manipulating credit to the account.

Sodoro evidently recognizes that the circumstances here would not support a finding that the credit to Kramer's account was a

ratification of the debt. Instead, Sodoro states that it has never argued that crediting Kramer's account was a part payment that would have restarted the statute of limitations. While this may be the case, Sodoro may be missing the point: If the credit was not a part payment, then there is no other persuasive characterization under which the credit will serve to bring Sodoro's petition within the statute of limitations.

[16] It is the latest item of the account which removes prior items from the operation of the statute of limitations. See, *Wellnitz v. Muck*, 182 Neb. 22, 152 N.W.2d 1 (1967); *Lewis v. Hiskey*, 166 Neb. 402, 89 N.W.2d 132 (1958). Not every entry in an account is an "item," however. The last item in an open account, for statute of limitations purposes, is the final underlying transaction which represents a legal indebtedness. See *T. S. McShane Co., Inc., supra.* See, also, *Jordan v. United States*, 180 F. Supp. 950 (E.D. Wis. 1960); *Eagle Water Co. v. Roundy Pole Fence Co.*, 134 Idaho 626, 7 P.3d 1103 (2000); *Am. Homes v. Broadmoor Corp.*, 153 Mont. 184, 455 P.2d 334 (1969). This definition is consistent with the theory underlying the rule, i.e., that the statute restarts because each succeeding item is applied to the true balance of the open account. See, *Wellnitz, supra*; *Lewis, supra.* An item that incurs legal indebtedness implies a new promise to pay the entire balance, just as part payment does when the circumstances demonstrate the intent of the debtor to ratify the entire debt. See *T. S. McShane Co., Inc., supra.*

In this case, Kramer's account was credited due to the return of the appeal bond. Sodoro argues that since advancing the appeal bond was a service to the client, receiving and accounting for the bond is also a service to the client. There is little question that disbursing an attorney's private funds for the client's benefit (to the extent permitted by Canon 5, DR 5-103(B), of the Code of Professional Responsibility) is a proper charge on an account, and is an item that can serve to remove prior items from the statute of limitations. See *Sibley v. Rice*, 58 Neb. 785, 79 N.W. 711 (1899). But receiving an appeal bond, and crediting that amount to a client's account, does not incur legal indebtedness on the part of the client. In the instant case, although Sodoro claims to have performed a "service" to Kramer by receiving the bond, Sodoro did not *charge* Kramer for the performance of a service.

Instead, Sodoro simply credited Kramer's account for returned property—which, standing alone, would not restart the statute of limitations if Kramer had returned the property herself, much less when the property was returned by a third party. See *T. S. McShane Co., Inc. v. Dominion Constr. Co.*, 203 Neb. 318, 278 N.W.2d 596 (1979).

Simply stated, Sodoro's purported "service" to Kramer did not involve providing legal services, as it was only incidentally related to furthering the client's interest; accounting for the appeal bond primarily advanced Sodoro's interest in collecting compensation for services that had already been provided. See *Gamm, Greenberg & Kaplan v. Butts*, 508 So. 2d 633 (La. App. 1987). See, e.g., *Jordan, supra* (credit for overpayment on mutual account did not fix new liability of parties); *Eagle Water Co., supra* (credit for return of tractor was not "item" that commenced running of statute of limitations); *Am. Homes, supra* (credit for payment or for goods returned is not "item" in account for purposes of determining deadline for filing mechanic's lien); *T. S. McShane Co., Inc., supra.*

In short, we conclude that Kramer's employment of Sodoro ended in April 1997 and that Sodoro's receipt of the appeal bond and credit of that amount to her account did not restart the running of the statute of limitations on Sodoro's cause of action against Kramer. Kramer's first assignment of error has merit and is dispositive of this appeal. Kramer's statute of limitations defense was meritorious, and she was entitled to judgment in her favor as a matter of law.

CONCLUSION

Sodoro's petition states a cause of action on an open account and must be characterized as such. The last entry in that account, and the only entry that could bring Sodoro's petition within the 4-year statute of limitations on oral contracts, represents neither legal indebtedness nor a part payment from which the law can infer a new promise to pay the entire indebtedness. Thus, Sodoro's action is barred by the statute of limitations.

[17] 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 further proceedings as it deems just. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, *ante* p. 158, 673 N.W.2d 15 (2004). Given our reasoning above, it is apparent that Kramer is entitled to judgment as a matter of law based on the statute of limitations. Therefore, we reverse the judgment of the district court and remand the cause to the district court with direction to dismiss Sodoro's petition.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. KIRK R. MONJAREZ, RESPONDENT.

679 N.W.2d 226

Filed May 14, 2004. No. S-01-1424.

Original action. Judgment of suspension.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

On January 18, 2001, in case No. S-01-086, this court entered an order temporarily suspending respondent, Kirk R. Monjarez, from the practice of law in the State of Nebraska. A trustee was appointed whose duties generally encompassed the notification requirements outlined in Neb. Ct. R. of Discipline 16 (rev. 2001).

On January 29, 2002, amended formal charges containing five counts were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent. These amended formal charges form the basis of the instant case, case No. S-01-1424. Respondent's answer disputed the allegations. A referee was appointed. On March 26, 2003, this

court granted relator's motion to dismiss count III of the amended formal charges.

On January 15, 2004, the referee's hearing was held on the four remaining charges. Respondent, who was represented by counsel, testified. Documentary evidence offered by respondent was received in evidence.

The referee filed a report on February 12, 2004. With respect to the charges, the referee concluded that respondent's conduct had breached the following disciplinary rules of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); Canon 6, DR 6-101(A)(2) (inadequately preparing to handle legal matter); DR 6-101(A)(3) (neglecting legal matter); Canon 9, DR 9-102(A)(2) (failing to deposit client funds in trust account); and DR 9-102(B)(3) (failing to maintain client account records). Although respondent was charged with violating his oath of office as an attorney, see Neb. Rev. Stat. § 7-104 (Reissue 1997), the referee made no finding as to this allegation.

With respect to the discipline to be imposed, the referee recommended that respondent be suspended from the practice of law for a period of 3 years, retroactive to the date of his temporary suspension, followed by 1 year's probation on certain conditions. Neither relator nor respondent filed exceptions to the referee's report. Relator filed a motion for judgment on the pleadings under Neb. Ct. R. of Discipline 10(L) (rev. 2003). We grant the motion for judgment on the pleadings and impose discipline as indicated below.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 23, 1998. At all times relevant hereto, he has practiced in Douglas County, Nebraska.

At the outset of the referee hearing, respondent admitted to many of the allegations contained in the amended formal charges, and the referee based her report in part upon respondent's admissions.

The substance of the referee's findings may be summarized as follows: As to count I of the amended formal charges, the referee found that respondent had been hired by John Morse, Rory

Heaton, and Barry Ridout to represent them in a civil claim against the Mall of America. Respondent failed to record the amount of fees each of these clients had paid him to pursue the claim and did little work on the claim, ultimately withdrawing from his representation of these clients. Respondent refunded $800 to Heaton, an amount equal to the fees respondent believed he had been paid in total by these clients, and asked Heaton to distribute the funds to his coclaimants.

As to count II of the amended formal charges, the referee found that respondent had neglected an appeal to the Nebraska Court of Appeals on behalf of Duane and Vi Koenig. As a result, the Koenigs' appeal in case No. A-99-1170 was dismissed. The record reflects that a dispute exists between the Koenigs and respondent as to the amount of fees to which respondent is entitled in connection with this engagement. Additionally, the Koenigs had paid respondent in advance for their legal fees and expenses, and respondent failed to deposit these funds in his attorney trust account.

As indicated *supra* in this opinion, count III of the amended formal charges was dismissed on March 26, 2003.

As to count IV of the amended formal charges, the referee found that respondent had represented Napolean Garcia Villa in federal court in a criminal prosecution for conspiracy to distribute methamphetamine, including sentencing and filing of a notice of appeal to the U.S. Court of Appeals for the Eighth Circuit. After filing the appeal, however, respondent failed to prosecute the appeal, resulting in respondent's suspension of his right to practice before the Eighth Circuit.

Finally, as to count V of the amended formal charges, the referee found that respondent had been hired by Gerald and Linda Helm to represent them with regard to a motorcycle accident. Although the Helms paid respondent $1,206.50, respondent had little contact with the Helms and failed to file a lawsuit on their behalf. Respondent admitted he did not "finish" the case for the Helms.

In the referee's report filed February 12, 2004, she specifically found by clear and convincing evidence that respondent had violated the disciplinary rules as indicated above. The referee also found certain facts which she characterized as mitigating factors,

including respondent's having reported to relator another attorney's acts of misconduct and respondent's having demonstrated his willingness to admit his neglect with regard to his representation of the clients named in the amended formal charges.

With respect to the sanction which ought to be imposed for the foregoing violations, and considering the mitigating factors the referee found present in the case, the referee recommended that respondent's license to practice law should be suspended for a period of 3 years and that the suspension should be retroactive to January 18, 2001, the date on which respondent was temporarily suspended from the practice of law. The referee also recommended that following this suspension, the grant of respondent's application for reinstatement, if any, be conditioned on the terms which follow: respondent be placed on probation for a period of 1 year following reinstatement, during which period of time, respondent would be supervised by another attorney who would file quarterly reports with relator regarding respondent's progress; respondent submit the Koenigs' fee dispute to the Nebraska State Bar Association's Nebraska Legal Fee Arbitration Plan and agree to be bound by the result reached by the program; and respondent repay $1,206.50 to the Helms.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion for judgment on the pleadings under rule 10(L). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Janousek, ante* p. 328, 674 N.W.2d 464 (2004). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the amended formal charges are supported by clear and convincing evidence, and the motion for judgment on the pleadings is granted.

A proceeding to discipline an attorney is a trial de novo on the record. *Id.* To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *State ex rel. Counsel for Dis. v. Villarreal, ante* p. 353, 673 N.W.2d 889 (2004).

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1); DR 6-101(A)(2) and (3); and DR 9-102(A)(2) and (B)(3). The record also supports a finding by clear and convincing evidence that respondent violated his oath of office as an attorney, and we find that respondent has violated said oath.

We have stated that "[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances." *State ex rel. Counsel for Dis. v. Swanson, ante* p. 540, 551, 675 N.W.2d 674, 682 (2004). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by this court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension. See, also, rule 10(N).

With respect to the imposition of attorney discipline in an individual case, we have stated that "[e]ach attorney discipline case must be evaluated individually in light of its particular facts and circumstances." *Swanson, ante* at 549, 675 N.W.2d at 681. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Rokahr, ante* p. 436, 675 N.W.2d 117 (2004).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (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. *Id.*

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Janousek, supra.*

The evidence in the present case establishes among other facts that respondent has neglected several clients' legal matters,

failed to properly account for funds deposited in his attorney trust account, and failed to deposit certain client funds in his attorney trust account. As a mitigating factor, we note respondent's cooperation during the disciplinary hearing.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, this court finds that respondent should be suspended from the practice of law for a period of 40 months and that the suspension should be retroactive to the date of respondent's temporary suspension from the practice of law on January 18, 2001. Should respondent apply for reinstatement, his reinstatement shall be conditioned as follows: respondent shall be on probation for a period of 1 year following reinstatement during which period respondent shall be supervised by an attorney approved by relator, which attorney shall file quarterly reports with relator, summarizing respondent's progress and his adherence to the Code of Professional Responsibility; respondent shall make a showing that he has submitted the Koenigs' fee dispute to the Nebraska State Bar Association's Nebraska Legal Fee Arbitration Plan and has agreed to be bound by the result reached by the program; and respondent shall make a showing that he has refunded $1,206.50 to the Helms.

CONCLUSION

The motion for judgment on the pleadings is granted. It is the judgment of this court that respondent should be and is hereby suspended from the practice of law for a period of 40 months with such suspension to be retroactive to January 18, 2001, after which period, respondent may apply for reinstatement, subject to the terms outlined above. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001) and 10(P).

JUDGMENT OF SUSPENSION.

SHAWN STUKENHOLTZ, APPELLANT, V.
EDWARD L. BROWN, APPELLEE.
679 N.W.2d 222

Filed May 14, 2004. No. S-03-136.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
2. **Trial: Expert Witnesses.** It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question.
3. **Trial: Expert Witnesses: Hearsay.** A testifying expert may not merely act as a conduit for hearsay, and if the trial court in its discretion determines that the introduction of the expert's testimony will merely act as a conduit for hearsay, the trial court has discretion to refuse to admit the evidence.
4. **Evidence.** Opinion evidence which is unsupported by appropriate foundation is not admissible.

Appeal from the District Court for Otoe County: GEORGE A. THOMPSON, Judge. Affirmed.

Jeffrey J. Funke, of Hoch, Funke & Kelch, for appellant.

Michael G. Mullin, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Shawn Stukenholtz appeals the denial of her motion for a new trial after a jury awarded her $2,000 for damages she sustained in a motor vehicle collision. On appeal, she argues that the district court erred by refusing to allow a physician's assistant to testify about the cause of her injuries and the necessity of her medical bills. We affirm because Stukenholtz failed to provide foundation that the physician's assistant was familiar with the practice and treatments of medical doctors and a chiropractor so that he could reasonably rely on their reports to form an opinion.

BACKGROUND

Stukenholtz brought this action against the appellee, Edward L. Brown, alleging damages incurred from a motor vehicle

collision. At trial, Stukenholtz testified about the June 22, 1996, collision and her activities after the collision. She did not receive medical treatment at the scene, but later went to the hospital after she had tingling in her eyebrow and pain in her arm. She was treated by a physician's assistant, Douglas J. Langemeier, and returned home, but felt "achy" and "stiff" the next day.

Stukenholtz visited her doctor on June 28, 1996. She had pain in her neck and shoulder blades, and her whole body was sore. She saw the doctor again on July 25 because the tightening in her neck and back was getting worse. On August 30, she was referred to an orthopedic specialist.

On September 14, 1996, while leaning over a bathtub, Stukenholtz experienced a muscle spasm in her middle back to the top of her shoulder. She could not stand up because of the pain and was treated at the hospital.

From October 29, 1996, through March 1997, Stukenholtz saw Dion Higgins, a chiropractor, and received treatment from him for a cervical-thoracic strain. However, she continued to have some pain and headaches.

At trial, all of Stukenholtz' medical bills, including her chiropractic bills, were introduced into evidence. Brown stipulated that the expenses were fair and reasonable for like charges in the area, but disagreed that bills incurred after June 22, 1996, were from the collision.

At trial, Langemeier testified about Stukenholtz' injury complaints on the day of the collision. He also reviewed Stukenholtz' medical records from other doctors and specialists, including an orthopedist and Higgins, who treated Stukenholtz after she was seen by Langemeier. When Langemeier was asked for a diagnosis of Stukenholtz' injuries to a reasonable degree of medical certainty, Brown objected on foundation. He argued that a physician's assistant was not competent to testify to a reasonable degree of medical certainty and asked that the testimony be limited to personal opinion based solely on Langemeier's examination of Stukenholtz. The objection was sustained. Without objection, Langemeier then testified, based on reasonable medical certainty, that when he examined Stukenholtz on the day of the collision, she had sustained a rhomboid strain.

After Langemeier gave his opinion, in an offer of proof, Stukenholtz stated that had Langemeier been allowed to further testify, he would have testified to a reasonable degree of medical certainty, based on other medical specialists' reports, that Stukenholtz had received a cervical-thoracic strain. In addition, he would have testified the medical bills incurred from June 22, 1996, through March 1997 were reasonable, fair, and necessary and caused by the collision. Brown objected to the offer of proof, arguing that Langemeier was not competent to give an opinion based on reports of medical specialists and a chiropractor and that there was a lack of foundation.

Higgins testified about Stukenholtz' complaints when he saw her and about muscle spasms she had in her back. He later diagnosed her as suffering from a cervical-thoracic strain and noted an abnormal spine position. He testified that there were different causes for an abnormal spine position, such as muscle tension, repetitive motion, a car accident, or a slip and fall. He also stated that the problem was not always caused by traumatic injury. Higgins, however, testified that based on his experience and training, it was his opinion to a reasonable degree of medical certainty that Stukenholtz had a cervical-thoracic strain because of the June 22, 1996, motor vehicle collision.

The jury awarded Stukenholtz $2,000, and she moved for a new trial, arguing that the court erred by not allowing Langemeier to testify about the cause of her injuries, the necessity of treatment for the injuries, and the reasonableness of the medical expenses. The motion was overruled, and Stukenholtz appeals.

ASSIGNMENTS OF ERROR

Stukenholtz assigns that the court erred by not allowing Langemeier to testify about the cause of her injuries, the necessity of treatment for the injuries, and the reasonableness of the medical expenses.

STANDARD OF REVIEW

[1] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Carlson v. Okerstrom, ante* p. 397, 675 N.W.2d 89 (2004).

[2] It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question. *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001).

ANALYSIS

Stukenholtz contends that Langemeier should have been allowed to review the reports of physicians and a chiropractor and testify to a reasonable degree of medical certainty that Stukenholtz received a cervical-thoracic strain in her back from the collision. She also argues that Langemeier should have been allowed to testify that the medical bills incurred from June 22, 1996, through March 1997 were reasonable, fair, and necessary as a result of the collision. Brown argues there was insufficient foundation for Langemeier to give an opinion based on the records of medical doctors and a chiropractor who saw Stukenholtz after she was treated by Langemeier.

Neb. Rev. Stat. § 27-703 (Reissue 1995) provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[3,4] We have emphasized however, that a testifying expert may not merely act as a conduit for hearsay, and if the trial court in its discretion determines that the introduction of the expert's testimony will merely act as a conduit for hearsay, the trial court has discretion to refuse to admit the evidence. *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997). In addition, opinion evidence which is unsupported by appropriate foundation is not admissible. *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999).

Here, Stukenholtz failed to provide sufficient foundation to show that Langemeier was competent to use the reports of medical doctors and a chiropractor to form an opinion about the cause of the cervical-thoracic strain and the necessity of treatment.

Langemeier failed to show that he was familiar with the types of treatment of specialists such as an orthopedist and chiropractor.

There was no evidence that Langemeier was familiar with orthopedic or chiropractic practice, treatment, or diagnosis. Instead, the record contains evidence of Langemeier's general education and emergency room practice and a general statement in the offer of proof that he would testify to a reasonable degree of medical certainty based on the reports from other medical professionals. However, without further information about Langemeier's knowledge of the practice and treatments of the specialists, the court could not determine whether Langemeier could reasonably rely on reports from the professionals to form an opinion. Also, in the absence of foundation, Stukenholtz failed to show that Langemeier was competent to give an expert opinion on the issue whether her medical bills after June 22, 1996, were necessary and caused by the accident. See *State v. Mack*, 134 Ariz. 89, 654 P.2d 23 (Ariz. App. 1982).

Stukenholtz relies on two cases to argue that the court abused its discretion by denying Langemeier's testimony: *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), and *Gittins v. Scholl*, 258 Neb. 18, 601 N.W.2d 765 (1999). However, in those cases, the testifying experts were familiar with and could reasonably rely on the reports of other experts. For example, in *Pruett*, the expert based his opinion on data collected from his colleagues in the same medical field. In *Gittins*, a physician relied in part on reports from other medical doctors or less educated medical professionals and we stated that he was familiar with the treatment received from those providers. Here, however, Stukenholtz sought to offer opinion testimony based on reports from professionals outside of Langemeier's field without providing foundation that he was familiar with those specialties and the treatments provided.

Stukenholtz failed to provide foundation that Langemeier was competent to testify about what caused the cervical-thoracic strain and the necessity of the medical bills. She also failed to show that Langemeier would reasonably rely on the reports of medical professionals such as an orthopedist and chiropractor. Thus the court did not abuse its discretion when it excluded the testimony.

AFFIRMED.

ARTHUR AND KATHY INSERRA, HUSBAND AND WIFE, APPELLANTS, V. LOUIS AND BARBARA VIOLI, HUSBAND AND WIFE, APPELLEES.

679 N.W.2d 230

Filed May 14, 2004. No. S-03-469.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **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, 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 judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.
4. **Adverse Possession: Boundaries.** Proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description.
5. **Adverse Possession.** A claimant of title by adverse possession must show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and vacated, and cause remanded with directions.

Daniel L. Rock and George T. Blazek, of Ellick, Jones, Buelt, Blazek & Longo, for appellants.

Charles Jan Headley for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This is an action brought by Arthur and Kathy Inserra to quiet title to a platted tract of residential real estate located in Omaha, Nebraska. Abutting landowners Louis and Barbara Violi claimed title to a portion of the tract by adverse possession. The district court found in favor of the Violis, and the Inserras appeal.

FACTS

In March 1973, the Violis moved into a newly constructed home located on Lot 55, Block O, Deer Ridge, an addition to the City of Omaha, Douglas County, Nebraska. Lot 55 is bordered on the east by Lot 56. When the Violis moved in, the residence on Lot 56 was occupied by Dave Hunt and his family.

Hunt had installed sod in his yard that ran "pole to pole from the telephone cable box in the back to the white pole in the front." He had also planted trees right along this line. Due to these actions, Barbara Violi perceived the lot line between Lots 55 and 56 to run along this "pole to pole" line. In June 1973, the Violis installed sod on Lot 55 which extended to where Hunt had laid his sod on Lot 56. After that time, the Hunts took care of the property to the east of the pole-to-pole line and the Violis took care of the property to the west of that line.

In approximately 1975, the Hunts sold Lot 56 to John and Karen Tilley. At approximately the same time, the Violis installed L-shaped sections of split-rail fence at various points on what they understood to be the boundaries of their property. These fence sections were decorative in nature and did not provide enclosure. Sections of fence along the east border of the yard were placed on the perceived pole-to-pole lot line. The Violis planted flowers in the area surrounding the fences in the ensuing years. The Tilleys built a fence that extended from the front of their home and attached to one of the fence sections erected by the Violis.

In 1978, James and Judith Palzer purchased Lot 56 from the Tilleys. In approximately 1989, the Palzers installed a sprinkler system on Lot 56 that ran along the perceived pole-to-pole border between the two lots. Several years later, the Violis installed a sprinkler system in their yard that watered up to the pole-to-pole property line. The Palzers and the Violis generally mowed to the same pole-to-pole line established by the sod installation, although at times they would mow into the other's yard.

Soon after the Inserras purchased Lot 56 from the Palzers in 2001, they became involved in a dispute with the Violis over the correct boundary between their properties. The Inserras obtained a survey that established that a section of split-rail fence segment erected by the Violis was actually on Lot 56, and not on Lot 55. They subsequently filed this action to quiet title to Lot 56 in

accordance with the survey. The Violis answered and counterclaimed, asserting that they had been in actual, continuous, exclusive, notorious, and adverse possession of a portion of Lot 56 for over 10 years. They prayed for an order declaring them to be the owners in fee "of the premises now occupied by them up to the line denoted by the fence now located between the properties of the parties."

At trial, Barbara Violi identified various photographs depicting the split-rail fence and the poles referred to in her testimony. She testified that the line created by the split-rail fence "runs roughly back to that telephone box in the back" and "runs roughly up, points towards the utility pole" in the front. She testified that this was the area the Violis were claiming by adverse possession. On redirect examination, Barbara clarified that the area being claimed by adverse possession was "on the west side . . . the area of the true lot line between Lot 55 and 56" and on "the east side it would be the area . . . created by the pole-to-pole line." Louis Violi testified that the land being claimed was from pole to pole, but admitted that he had "not put a line down or anything else." Referring to a survey the Violis had obtained, Louis Violi indicated that the eastern boundary of the disputed property could be determined by extending the split-rail fence line toward the back of the lot. He further testified that the portion of Lot 56 which he was claiming by adverse possession was "from the telephone to the light pole."

In an order filed on April 2, 2003, the district court found that the Violis

> had actual and exclusive possession of the property located on Lot 56 from the center of each of the poles adjacent to Lot 55 and said possession exceeded a period of ten years. Their possession was notorious in that their physical actions in installing the sprinkler system, split rail fence and plantings were visible and conspicuous and, furthermore, their possession was hostile in that it was against all other claimants of the land.

The court thus dismissed the Inserras' petition and granted the Violis ownership "of the real property running from 'pole to pole' on center on Lot 56 immediately adjacent to Lot 55." The Inserras filed this timely appeal.

ASSIGNMENTS OF ERROR

The Inserras assign, restated, that the district court erred in (1) granting ownership of the disputed property to the Violis without an exact and definite legal metes and bounds description of the land and (2) finding that the Violis had met their burden of proving the extent of the property and actual, exclusive, open, notorious, and hostile possession thereof.

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity. *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003); *Burk v. Demaray*, 264 Neb. 257, 646 N.W.2d 635 (2002). 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, 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 judge heard and observed the witnesses and accepted one version of the facts rather than another. *K N Energy v. Cities of Alliance & Oshkosh*, 266 Neb. 882, 670 N.W.2d 319 (2003).

ANALYSIS

[3-5] The Inserras' principal argument on appeal is that the record does not include a description of the property claimed by the Violis sufficient to establish their claim to title by adverse possession. A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998). We have noted, however, that proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description. *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987). Thus,

> "'[a] claimant of title by adverse possession must further show the extent of his possession, the exact property which was the subject of the claim of ownership, that his

> entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description.' "

Id. at 539, 399 N.W.2d at 790, quoting *Pokorski v. McAdams*, 204 Neb. 725, 285 N.W.2d 824 (1979). Accord 2 C.J.S. *Adverse Possession* § 261 (2003). See *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981). This burden is not met where the metes and bounds of the area claimed would rest on speculation and conjecture. *Steinfeldt v. Klusmire*, 218 Neb. 736, 359 N.W.2d 81 (1984).

The western boundary of the portion of Lot 56 claimed by the Violis is the platted lot line between Lots 55 and 56. The location of the eastern boundary of the claimed tract, however, is problematic. This claimed boundary is repeatedly described in the record as extending from "pole to pole." The pole which the Violis claim as the northern terminus of this boundary is, according to their testimony, a "telephone box" located near the rear of the platted lots. The other pole located at the southern edge of the property is variously described in the testimony as a "light pole," a "white pole," and a "utility pole." Although these structures are separately shown in photographs included in the record, neither is depicted on any of the surveys which are included in the evidence. One of the surveys does depict a section of split-rail fence, approximately 8 feet in length, located "APPROX. 5' EAST" of the platted lot line. As shown on the survey, the section of fence is located at approximately one-third of the 137-foot distance between the front and rear of the property. The Violis testified that this section of fence is situated on the eastern boundary of the parcel they claim by adverse possession and that the full boundary can be determined by extending a line through the fence section to the front and rear of the property. Louis Violi described the parcel thus formed as a "pie-shaped piece" which is 6 to 8 feet wide at the front of the property.

The record does not include an exact legal description of the disputed tract or a survey depicting its boundaries. The Violis argue that no such description was required because they sufficiently described the parcel which they claim by reference to landmarks. This court rejected a similar argument in *Petsch v. Widger*, 214 Neb. 390, 397, 335 N.W.2d 254, 259 (1983), reasoning that the description of property claimed by adverse possession

"must not only be sufficient to found a verdict on but must also be 'exact' and 'definite.'" Citing *Layher v. Dove, supra.* The Violis argue that in *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998), we affirmed a judgment awarding title by adverse possession to platted residential property which, in our opinion, we described by reference to various landmarks. While that is true, the sufficiency of the description of the disputed property was not an assigned error in that case. Thus, our use of landmarks to describe the area in dispute cannot be deemed to imply either that such a description is legally sufficient or that the record before us in *Wahna* lacked a legally sufficient description.

Based upon our de novo review, we conclude that the Violis did not meet their burden of proving an exact and definite description of that portion of Lot 56 to which they claim title by adverse possession. Their testimony relating the eastern boundary of the disputed tract to existing structural landmarks provides at best an approximate location of the claimed boundary in relation to the known lot line. No specific boundary was proved because, as in *Steinfeldt v. Klusmire*, 218 Neb. 736, 739, 359 N.W.2d 81, 83 (1984), "[a]ny attempt to describe the area claimed in terms of metes and bounds would rest on speculation and conjecture." The issue is not, as the Violis argue, whether a surveyor could at some future date establish a boundary and legal description using the landmarks identified in their testimony. Rather, their adverse possession claim must fail because they did not produce such evidence at trial, as our case law requires. Thus, the record conclusively establishes that the Inserras hold title to Lot 56 in its entirety and are entitled to the relief sought in their petition.

CONCLUSION

Based upon the foregoing, we reverse and vacate the judgment of the district court and remand the cause with directions to enter judgment in favor of the Inserras for the relief sought in their petition.

REVERSED AND VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. JEFFREY LAKE DEVELOPMENT, INC., A NEBRASKA NONPROFIT CORPORATION, ET AL., APPELLEES.

679 N.W.2d 235

Filed May 14, 2004. No. S-03-701.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Demurrer: Pleadings.** In an appellate court's review of a ruling on a 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. **Pleadings: Judgments.** A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion.
4. **Pleadings: Judgments: Time.** In order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), and must seek substantive alteration of the judgment.
5. **Declaratory Judgments.** The remedy of declaratory judgment may be available to a litigant when a controversy exists as a result of a claim asserted against one who has an interest in contesting such claim, the controversy is between persons whose interests are adverse, the party seeking declaratory relief has a legally protectable interest or right in the subject matter of the controversy, and the issue involved is capable of present judicial determination.
6. **Declaratory Judgments: Pleadings: Justiciable Issues.** A court should refuse a declaratory judgment action unless the pleadings present a justiciable controversy which is ripe for judicial determination.
7. **Declaratory Judgments.** An action for declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain.
8. ____. A declaratory judgment action is not intended to adjudicate hypothetical or speculative situations which may never come to pass.
9. ____. A court should enter a declaratory judgment only where such judgment would terminate or resolve the controversy between the parties.
10. ____. A court should not grant declaratory relief for a party who simply is in a position of one expecting to be sued and who desires an anticipatory adjudication at the time and place of its choice of the validity of defenses it expects to raise.

Appeal from the District Court for Phelps County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Michael C. Klein, of Anderson, Klein, Peterson & Swan, for appellant.

Todd B. Vetter, of Fitzgerald, Vetter & Temple, and Steve Windrum for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

The Central Nebraska Public Power and Irrigation District (Central) filed this declaratory judgment action against Jeffrey Lake Development, Inc. (Jeffrey Lake), and other sublessees, seeking interpretation of the parties' rights under a lease agreement, including the notice required to terminate the agreement. The district court sustained the defendants' demurrers, finding that no justiciable controversy existed, and dismissed the petition.

SCOPE OF REVIEW

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

[2] In an appellate court's review of a ruling on a 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. *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003).

JURISDICTIONAL QUESTION

Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Cerny v. Longley, supra*. Jeffrey Lake and other defendants assert that we are without jurisdiction to consider this appeal because Central failed to timely perfect the appeal. Therefore, we address this jurisdictional question before considering the assignments of error set forth by Central.

Central filed its declaratory judgment action on December 31, 2002, asking the district court to construe the agreement between the parties. Jeffrey Lake and certain sublessees filed demurrers, alleging that the petition failed to state facts sufficient to constitute a cause of action. In an order filed on April

24, 2003, the district court sustained the demurrers and dismissed the petition, finding that the petition failed to state facts sufficient to constitute a cause of action because no justiciable controversy existed.

Central filed a motion for new trial on May 2, 2003, and the motion was overruled on June 9. Central filed its notice of appeal on June 18. The notice stated that Central was appealing from the judgment entered on April 23 (filed on April 24) and the order overruling Central's motion for new trial entered on May 29 (filed on June 9). The appeal was docketed in the Nebraska Court of Appeals.

Jeffrey Lake subsequently filed a motion for summary dismissal of the appeal, asserting that the Court of Appeals lacked jurisdiction because Central's notice of appeal was filed more than 30 days after the order dismissing the petition. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002). The Court of Appeals overruled the motion for summary dismissal and directed the parties to file briefs addressing whether a motion for new trial filed after a demurrer has been sustained tolls the time for filing a notice of appeal.

In overruling the motion for summary dismissal, the Court of Appeals relied on *Forrest v. Eilenstine*, 5 Neb. App. 77, 554 N.W.2d 802 (1996), where the court stated that a motion for new trial following the sustaining of a demurrer was not a proper motion for new trial. The Court of Appeals did not have the opportunity to address this issue because Central's appeal was moved to the docket of this court on December 2, 2003.

Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002) provides in relevant part:

> A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court. The former verdict, report, or decision shall be vacated and a new trial granted on the application of the party aggrieved for any of the following causes affecting materially the substantial rights of such party: . . . (6) that the verdict, report, or decision is not sustained by sufficient evidence or is contrary to law . . . .

In the case at bar, the district court sustained the defendants' demurrers and dismissed the petition. Since there was no verdict

by a jury or trial and decision by the district court, Central's May 2, 2003, motion was not a proper motion for new trial under § 25-1142, which tolls the time for filing a notice of appeal. This determination, however, does not end our jurisdictional review.

[3] We have stated that a postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion. See *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). Thus, we must determine whether Central's May 2, 2003, motion should be treated as a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), which tolls the time for filing a notice of appeal.

[4] In *Bellamy*, we held that "in order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under § 25-1329, and *must seek substantive alteration of the judgment*." (Emphasis supplied.) 264 Neb. at 789, 652 N.W.2d at 90. Central's motion filed May 2, 2003, stated: "COMES NOW the Plaintiff, The Central Nebraska Public Power & Irrigation District, and moves the Court to vacate the Order rendered hereon April 23, 2003, and to grant Plaintiff a new trial for the reason that the decision is contrary to law." Central argues that its motion was in fact a motion to alter or amend the judgment because it sought a substantive alteration of the judgment. The legal question before us is whether Central's motion should be treated as a motion to alter or amend the judgment, which tolls the time for filing an appeal. See *State v. Bellamy, supra*.

In federal courts, when the statutory basis for a motion challenging a judgment on the merits is unclear, the motion may be treated as a motion pursuant to Fed. R. Civ. P. 59(e). See, e.g., *U.S. v. Deutsch*, 981 F.2d 299 (7th Cir. 1992). A rule 59(e) motion seeks to alter or amend the judgment. In *Bellamy*, we noted that federal courts have held that a motion for reconsideration, if filed within 10 days of the entry of the judgment, is the functional equivalent of a motion to alter or amend a judgment brought pursuant to rule 59(e). See, also, *U.S. v. Deutsch, supra*. The *Deutsch* court noted a distinction between procedural motions (such as requests for an extension of time) or motions that begin collateral proceedings (such as a proceeding to obtain an award of costs or attorney fees), which do not fall under rule 59(e), and motions

which if granted would result in a substantive alteration in the judgment. See, also, *White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982). In *Norman v. Arkansas Dept. of Educ.*, 79 F.3d 748, 750 (8th Cir. 1996), the court stated: " '[A]ny motion that draws into question the correctness of the judgment is functionally a motion under [rule 59(e)], whatever its label.' " The court also pointed out that rule 59(e) was adopted to make clear that the district court possessed the power to rectify its own mistakes in the period immediately following the entry of the judgment.

Central's motion asked the district court to vacate its order dismissing Central's petition on the basis that the decision was contrary to law. Therefore, Central sought a substantive alteration of the order which can be treated as a motion to alter or amend the judgment pursuant to § 25-1329 in that the motion questioned the correctness of the judgment. See *Norman v. Arkansas Dept. of Educ., supra.* A timely motion under § 25-1329 tolls the time for filing a notice of appeal. See § 25-1912(3).

In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion described in § 25-1912(3). Central filed its notice of appeal on June 18, 2003, which was within 30 days after Central's motion was overruled on June 9. Therefore, we conclude that Central's notice of appeal was timely and that we have jurisdiction over this matter.

FACTS

We now consider the facts that are relevant to the merits of Central's appeal. In its petition for declaratory judgment, Central asked the district court to construe the agreement between the parties. Central stated that it "wishe[d] to terminate each of the leases, because the leases are of substantial rental value, and provide for no payment of rent to Central." Central contended that the agreement established a tenancy at will which could be terminated at any time by either party.

Central's petition asserted two alternative theories: It first argued that the tenancy was from year to year and, as such, could be terminated by agreement, either express or implied, or by notice given for 6 calendar months ending with the day of the

year on which the tenancy commenced. Central's second argument asserted that the tenancy was for a term of 31 years beginning May 1, 1980, and expiring on April 30, 2011, at which time the tenancy converts to a yearly tenancy which can be terminated with 6 months' notice.

The defendants demurred to the petition, asserting that it did not state facts sufficient to constitute a cause of action. The district court sustained the demurrers, finding that no justiciable controversy existed. The court noted that Central had pled that it "wishe[d]" to terminate the lease agreement, but that Central had not pled that it had taken any action to terminate the agreement. The court concluded that Central could not amend the petition to state facts sufficient to constitute a cause of action and dismissed the petition.

The district court also granted a motion for a change of venue should the cause be remanded for further proceedings. It noted that only 1 of the 185 defendants in the case resided in Phelps County.

ASSIGNMENTS OF ERROR

Central has assigned as error and argued that the district court erred in sustaining the defendants' demurrers, in finding that Central's petition did not present a justiciable controversy, and in finding that venue should be changed to Lincoln County.

ANALYSIS

DEMURRER

[5] This matter was previously before us in *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 262 Neb. 515, 633 N.W.2d 102 (2001). Central argues that our decision therein did not resolve the issue of what notice is necessary in order for Central to terminate the lease agreement and that, therefore, a justiciable controversy exists. Central relies on *Mullendore v. Nuernberger*, 230 Neb. 921, 925, 434 N.W.2d 511, 514-15 (1989), in which we stated:

> "The remedy of declaratory judgment may be available to a litigant when a controversy exists as a result of a claim asserted against one who has an interest in contesting such claim, the controversy is between persons whose interests are adverse, the party seeking declaratory relief has a legally

protectable interest or right in the subject matter of the controversy, and the issue involved is capable of present judicial determination."

Central claims that its petition for declaratory judgment met the criteria set forth in *Mullendore* because (1) the petition states that the parties disagree as to the term of the lease, (2) the parties have adverse interests, (3) Central has a legally protectable interest in the subject matter, and (4) the required notice is a controversy capable of present judicial determination. Central argues that it should not be required to issue a notice of termination of the lease in order for the dispute to be subject to resolution by an action for declaratory judgment. Central suggests that it would risk violating an injunction previously entered by a district court if it were to give notice of its intention to terminate the lease.

[6-8] A court should refuse a declaratory judgment action unless the pleadings present a justiciable controversy which is ripe for judicial determination. *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 518 N.W.2d 124 (1994). An action for declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain. *Id.* In *Ryder Truck Rental*, we stated it is not enough that there exists "[m]ere apprehension or the mere threat of an action or a suit . . . ." 246 Neb. at 253, 518 N.W.2d at 127. A declaratory judgment action is not intended "to adjudicate hypothetical or speculative situations which may never come to pass." *Id.* at 254, 518 N.W.2d at 127.

In *Ryder Truck Rental*, the truck rental company asked the trial court to determine liability before any action had been filed following a vehicular accident involving one of Ryder's trucks. The trial court did not know if the injured party would file an action against Ryder or in which state the suit might be filed. We noted that the type of claim the injured party might raise was unknown, and we held that the required element of controversy did not exist and might never so exist. In the case at bar, the district court did not know on what basis the parties might bring a future action. Central has not attempted to terminate the lease agreement, but merely stated in its petition that it "wishes" to do so.

[9,10] A court should enter a declaratory judgment "only where such judgment would terminate or resolve the controversy

between the parties." *Id.* at 254, 518 N.W.2d at 127. A court should not grant declaratory relief for a party "who simply is in a position of one expecting to be sued and who desires an anticipatory adjudication at the time and place of its choice of the validity of defenses it expects to raise." *Id.* at 256, 518 N.W.2d at 128. Similarly, a court should not grant such relief to one who expects to file a suit or may file a suit and who seeks advice from the court on how to initiate such action.

In an appellate court's review of a ruling on a 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. *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003). Accepting as true the facts pled by Central, we conclude that the district court did not err in sustaining the demurrers and dismissing the petition because there is no justiciable controversy between the parties at this time. In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001). We decline to render such an opinion.

VENUE

Central also asserts that the district court erred in finding that if the cause is remanded for further proceedings, venue is proper in Lincoln County rather than in Phelps County. Since we have determined that the district court did not err in dismissing the petition, no remand is necessary. We therefore decline to address any issues regarding the proper venue for commencement of an action.

MOTION FOR NEW TRIAL

Central has assigned as error that the district court erred in overruling its motion for new trial, but Central failed to argue this error in its brief. Therefore, it will not be considered on appeal. See *In re Estate of Matteson, ante* p. 497, 675 N.W.2d 366 (2004) (to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief of party asserting error).

CONCLUSION

For the reasons set forth herein, the district court was correct in its determination that a justiciable controversy did not exist between the parties. We therefore affirm the judgment of the district court, which sustained the defendants' demurrers and dismissed the action.

AFFIRMED.

HEADNOTES
Contained in this Volume