

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR, V.

JUDITH A. SPINDLER, RESPONDENT.

648 N.W.2d 319

Filed July 26, 2002. No. S-02-342.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

On March 29, 2002, formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, Judith A. Spindler. Respondent did not file an answer or any type of responsive pleading to the formal charges. On May 6, relator moved for judgment on the pleadings pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 2001).

FACTS

The substance of the formal charges may be summarized as follows:

Respondent was admitted to the practice of law in the State of Nebraska on September 8, 1982. She has practiced in Douglas County.

The formal charges are divided into six counts. Counts I through V involve respondent's conduct in the handling of five different clients' bankruptcy cases. The detailed facts underlying each of counts I through V are similar, and as respondent has not filed an answer or other responsive pleading disputing the same, are not repeated here. In summary, the formal charges allege that during the period from May to August 2000, respondent was contacted by five different clients, couples or individuals, to represent them in the filing of bankruptcy proceedings. Respondent met with each of the clients, was paid all or a portion of the agreed-upon attorney fee by the clients, promised to take certain action on behalf of the clients in the bankruptcy proceedings, and then failed to perform as promised. The clients each attempted numerous times, unsuccessfully, to contact respondent by telephone and

by mail. Thereafter, each of the clients filed a grievance with the Counsel for Discipline's office regarding respondent's conduct. Despite the filing of the grievances, respondent failed to refund all or even a portion of the fees advanced by the clients.

Based upon this conduct, the formal charges allege respondent had violated Canon 1, DR 1-102(A)(1) (disciplinary rule violation); Canon 2, DR 2-106(A) (excessive fee), DR 2-110(A)(2) (withdrawal from employment), and DR 2-110(A)(3) (refund of fees); Canon 6, DR 6-101(A)(3) (neglect); Canon 7, DR 7-101(A)(2) (failure to perform contract); and the attorney's oath of office.

Count VI involves respondent's failure to respond to written inquiries from the Counsel for Discipline's office regarding the grievances filed against respondent. Again, the detailed facts underlying count VI are not repeated here, as respondent has not filed an answer or other responsive pleading disputing the same. In summary, the formal charges allege that for each of the five grievances, respondent was sent a letter by the Counsel for Discipline's office, requesting an "appropriate written response within 15 working days." For each of the five grievances, respondent failed to submit a written response. Based upon this conduct, the formal charges allege respondent violated DR 1-102(A)(1) and (5) (engaging in conduct prejudicial to administration of justice); DR 6-101(A)(3) (neglect); Neb. Ct. R. of Discipline 3 and 9(E) (rev. 2001) (requiring response to grievance); and the attorney's oath of office.

ANALYSIS

Pursuant to rule 10(I) of the disciplinary rules, "[i]f no answer be filed [in response to formal charges] within the time limited therefor . . . the matter may be disposed of by the Court on its own motion or on a motion for judgment on the pleadings." We find that the requirements of rule 10(I) have been satisfied and see no reason why a judgment on the pleadings should not be granted. Based on the foregoing, this court finds by clear and convincing evidence that Spindler violated DR 1-102(A)(1) and (5), DR 2-106(A), DR 2-110(A)(2) and (3), DR 6-101(A)(3), DR 7-101(A)(2), disciplinary rules 3 and 9(E), and the attorney's oath of office. See Neb. Rev. Stat. § 7-104 (Reissue 1997).

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. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the 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.

With respect to the imposition of attorney discipline in an individual case, we have stated that “[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.” *Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). 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. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender’s present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002); *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Apker, supra*; *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

The evidence in the present case establishes, inter alia, that respondent’s conduct with respect to these matters violated several disciplinary rules and the attorney’s oath of office. No mitigating factors are apparent from the pleadings in this case.

Factors weighing against respondent include her retention of client funds in the absence of commensurate work and despite the initiation of disciplinary proceedings against her and her failure to respond to inquiries and requests for information from the Counsel for Discipline's office. We have stated that absent mitigating circumstances, the appropriate discipline for an attorney in cases of misappropriation and commingling of client funds is disbarment. *State ex rel. Counsel for Dis. v. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001). We have also stated that ignoring inquiries from the Counsel for Discipline's office is conduct we view "as a grave matter and as a threat to the credibility of attorney disciplinary proceedings." *Rothery*, 260 Neb. at 767, 619 N.W.2d at 593.

We have considered the formal charges, the allegations of which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court finds that respondent should be disbarred from the practice of law in the State of Nebraska.

CONCLUSION

The motion for the judgment on the pleadings is granted. It is the judgment of this court that respondent should be disbarred from the practice of law in the State of Nebraska, and we therefore order respondent disbarred 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 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001).

JUDGMENT OF DISBARMENT.

JONATHAN LUETHKE, APPELLEE, v.
RONALD SUHR ET AL., APPELLANTS.
650 N.W.2d 220

Filed August 9, 2002. No. S-00-396.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
2. **Attorney and Client: Compromise and Settlement.** The decision to settle a lawsuit belongs to the client; because the client bears the risk when settling or refusing to settle a dispute, it is the client, not the lawyer, who should assess whether the risk is acceptable.
3. ____: _____. The ordinary employment or retainer of a lawyer to represent a client with respect to litigation does not of itself give the lawyer the implied or apparent authority to bind the client by a settlement or compromise of the claim; and, in the absence of express authority, knowledge, or consent, the lawyer cannot do so.
4. ____: _____. A lawyer's execution of a settlement agreement without a client's knowledge or consent constitutes a breach of duty to the client.
5. ____: _____. Although lawyers retain apparent authority to make procedural and tactical decisions through the existence of the attorney-client relationship, a lawyer cannot settle a client's claim without express authority from the client.
6. ____: _____. Where there has been nothing beyond a mere employment or retainer of the lawyer to represent the client in a cause and the lawyer has acquired no other authority to enter into a settlement (such as acquiescence in open court), if the lawyer seeks to enter a settlement, the opposing party should ascertain whether the lawyer has received actual authority from the client to take such action.
7. **Attorney and Client: Compromise and Settlement: Appeal and Error.** Disputes over a lawyer's authority to settle a claim present factual questions for the trial court to decide, and a trial court's factual findings regarding settlement disputes will not be set aside unless such findings are clearly erroneous.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed, and cause remanded with directions.

Stephanie Frazier Stacy, of Baylor, Evnen, Curtiss, Gritmit & Witt, for appellants.

Michael A. Nelsen, of Hillman, Forman, Nelsen, Childers & McCormack, for appellee.

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

GERRARD, J.

NATURE OF CASE

Appellee, Jonathan Luethke, filed a personal injury lawsuit against the appellants, Ronald Suhr, Sandi Suhr, and Marci Kloppel, after an automobile injury accident involving Luethke and Kloppel. While trial was pending, the parties' counsel reached a settlement agreement; the settlement agreement was not reduced to writing, and subsequently, the appellants filed an amended answer and cross-petition to enforce the agreement. The district court bifurcated the proceedings between the settlement agreement enforcement claim and Luethke's personal injury cause of action. In a bench trial of the settlement enforcement claim, Luethke testified over the appellants' evidentiary objections that he did not give his attorney the authority to settle his claim. The district court concluded that because the attorney-client agency relationship regarding settlement agreements does not include apparent authority to settle, the appellants could not enforce the settlement agreement. The appellants appealed the judgment of the district court. The court has yet to try the personal injury claim.

FACTUAL BACKGROUND

On June 27, 1995, Luethke was injured in an automobile accident. Attorney Mary Wickenkamp filed suit on Luethke's behalf on July 14, 1997, alleging in the petition that Kloppel, driving a truck owned by Ronald Suhr and Sandi Suhr, negligently struck the rear of Luethke's vehicle while he waited to make a left-hand turn at the intersection of Nebraska Highway 15 and Waverly Road in Seward County. The appellants retained attorney Alan Plessman to represent them in the suit filed by Luethke.

On July 20, 1998, the day before a scheduled pretrial conference, Plessman faxed the following letter, in pertinent part, to Wickenkamp:

I hereby offer to pay to you and your clients and any subrogees or lienholders we have notice of, that sum of \$16,000.00, in exchange for a complete release of liability for our insureds and Continental Western Insurance Company; and a dismissal with prejudice of the pending suit, with all parties to bear their own costs and fees.

[The insurance company] gave me that authority to be accepted by you before 5:00 p.m. today. Thereafter it is withdrawn. So, if this is a deal, fax me back a note to that effect.

Later that same day, Wickenkamp responded in a faxed letter, in pertinent part:

I have not been able to make contact with my client by 5:00 to get positive authority to accept your offer of \$16,000. I am willing to recommend your offer to my client, but I need to meet with Jon to discuss it. As we have discussed before, this young man has a developmental disability and I need to make certain his decision in this matter is informed.

That same day, Plessman responded to Wickenkamp and extended the offer until 9 a.m. the following morning.

On July 21, 1998, Wickenkamp accepted Plessman's offer via faxed letter: "My client will accept the offer. . . . Thanks for your cooperation in getting this done. I will assume that we are not meeting today with the Judge [for pretrial conference] and will call his office this morning." The district court judge's docket notes for July 21, 1998, read: "'Case settled. Paperwork coming.'"

Plessman sent settlement documents to Wickenkamp on July 21, 1998, with a letter stating: "Enclosed are settlement papers, I need back after they're signed, along with directions on how to cut checks for payment of the \$16,000.00. Once I know that, I can get the drafts in a day or so." In a letter dated July 29, 1998, Wickenkamp responded:

Thank you for getting me the settlement documents so promptly. I've sent them on to my client. His uncle wants to review them with me and Jon as well. I'm on my way out of town and have a meeting with them set after I come back. Please understand it is not a problem. The uncle has been involved throughout this and just wants to make sure my client, who is somewhat disabled, understands everything. I do not anticipate any problem with the settlement, its just a matter of logistics. I will be in touch when I return.

The record provides no further correspondence between Plessman and Wickenkamp, and Plessman testified that the next

thing he received was Wickenkamp's motion to withdraw as counsel. Plessman never received executed settlement or dismissal documents.

On September 16, 1998, the district court judge filed a judge's note which asked: "'Counsel: The paperwork, please?'" Wickenkamp's deposition, read into the record in part and accepted as a whole as exhibit 2, reveals that she withdrew as counsel in October 1998 after having her professional employment terminated by Luethke. On November 3, the district court judge filed another judge's note asking, "'Mr. Plessman: What has become of the settlement we were told of back in July?'"

The district court granted the appellants leave to file an amended answer and cross-petition, which they subsequently filed, affirmatively stating that the parties had reached a settlement agreement and requesting that the court enforce that agreement. By this time, Luethke had retained his present counsel to replace Wickenkamp. The district court next granted the appellants' request to bifurcate the proceedings between Luethke's personal injury claim and the appellants' cross-petition to enforce the settlement agreement. The appellants hired substitute counsel for the settlement agreement bench trial because Plessman would testify at trial.

The appellants made a motion in limine prior to the start of the settlement enforcement hearing, seeking to prevent Luethke from testifying regarding the settlement agreement pursuant to Neb. Rev. Stat. § 7-107(2) (Reissue 1997). Section 7-107 states:

An attorney or counselor has power . . . (2) to bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court

The district court overruled the appellants' motion in limine.

Plessman testified regarding the correspondence between himself and Wickenkamp about the settlement agreement. The court received and admitted into evidence, without objection, Plessman's and Wickenkamp's correspondence and the settlement documents drafted by Plessman. Because Wickenkamp did not

appear to testify, the parties agreed to deem her unavailable and read parts of her deposition into the record. In her deposition, Wickenkamp verified that Luethke retained her as his attorney in this litigation, that she notified Plessman by letter that "My client will accept the offer," and that she withdrew as counsel in October 1998 after Luethke terminated her employment. Wickenkamp did not testify as to the content of her conversations with Luethke, invoking attorney-client privilege, but stated that she and Luethke had spoken during the timeframe of the letters between herself and Plessman regarding settlement negotiations.

The appellants moved for a directed verdict at the close of their evidence, arguing that the evidence demonstrated that a settlement agreement between the parties was reached and that the appellants were entitled to enforce that agreement. The district court overruled the motion. Over the appellants' objection, the court heard Luethke testify about his interactions with Wickenkamp regarding the settlement agreement. Luethke testified that although Wickenkamp originally anticipated receiving \$84,000 or \$64,000 for Luethke's case, she urged him to accept a settlement of \$16,500 because they were not making headway with the other numbers. Luethke stated that the only time he authorized Wickenkamp to settle the case for him was when she presented him with a \$64,000 offer; she, however, urged him to refuse the offer because she felt he could get more. Luethke testified that he never agreed to settle the case for \$16,000—not during a meeting alone with Wickenkamp and not during a subsequent meeting at his mother's house with Wickenkamp, his mother, himself, and his uncle Norman Schmitt present.

The court received testimony from Schmitt, also over the appellants' objection, regarding the meeting with Wickenkamp and their settlement agreement discussions. Schmitt testified that at no time during Wickenkamp's representation of Luethke did Schmitt understand her to have the authority to settle Luethke's case for \$16,000.

The district court's "Judgment on Defense of Settlement Agreement" concluded:

Upon consideration, I find in favor of plaintiff [Luethke]. Were we dealing with settlement negotiations between two non-lawyers, with one participant acting as the agent of yet

another non-lawyer, I would rule there was a binding settlement agreement.

While I fully appreciate Mr. Plessman's good faith belief he had a settlement agreement and also appreciate that I am causing some difficulty in the practice of lawyers concluding they have a settlement before they have obtained their respective clients' express commitments, I believe the law of attorney/client relationships properly does not include apparent authority in counsel to settle claims in the absence of the client's express commitment to the settlement. Lawyer/client relationship law does not allow for operation of the same apparent authority doctrine that it does in matters other than settlements. I wish I could reach the opposite conclusion, but I believe the wiser public policy and the law requires the ruling I make in this particular instance.

The district court supplemented its original order, expressly determining and directing that pursuant to the terms of Neb. Rev. Stat. § 25-705(6) (Supp. 1999), recodified as Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000), there is no just reason for delay and that judgment should be entered as a final judgment on the appellants' claim seeking enforcement of the settlement agreement. See *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

The appellants then filed an appeal of the judgment of the district court, and pursuant to our authority to regulate the caseloads of the appellate courts, we moved this appeal to our docket.

ASSIGNMENTS OF ERROR

The appellants assign, consolidated and restated, that the district court erred in (1) failing to direct a verdict in the appellants' favor at the close of the appellants' evidence; (2) receiving into evidence, over objection, testimony pertaining to the settlement agreement; (3) misapplying, misinterpreting, and disregarding Nebraska agency law; and (4) concluding that attorneys do not have apparent authority to bind their clients to settlement agreements.

SCOPE OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion

reached by the trial court. *In re Grand Jury of Douglas Cty.*, 263 Neb. 981, 644 N.W.2d 858 (2002).

ANALYSIS

This appeal requires us to consider when, and under what circumstances, a lawyer may bind his or her client to a settlement agreement entered into without express authority from the client. In order to answer this question, we must review a few well-settled principles unique to the practice of law and derived from the nature of the attorney-client relationship.

[2] Nebraska law is clear that the decision to settle a lawsuit belongs to the client; because the client bears the risk when settling or refusing to settle a dispute, it is the client, not the lawyer, who should assess whether the risk is acceptable. *Wood v. McGrath, North*, 256 Neb. 109, 589 N.W.2d 103 (1999). Additionally, the Code of Professional Responsibility, Canon 7, EC 7-7, dictates the boundaries of an attorney's authority to settle claims without the client's express authority as follows:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his or her own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer. As typical examples in civil cases, it is for the client to decide whether to accept a settlement offer

We observed and noted these ethical considerations in *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985).

[3,4] Thus, as a general rule, in this state and in a vast majority of other jurisdictions, lawyers may enter settlement agreements only when the client expressly authorizes the lawyer to do so. The ordinary employment or retainer of a lawyer to represent a client with respect to litigation does not of itself give the lawyer the implied or apparent authority to bind the client by a settlement or compromise of the claim; and, in the absence of express authority, knowledge, or consent, the lawyer cannot do so. A lawyer's execution of a settlement agreement without a client's knowledge or consent constitutes a breach of duty to the client; and it may constitute a fraud upon the court. See 7A C.J.S.

Attorney & Client § 214 a. (1980). See, also, e.g., *Malave v. Carney Hosp.*, 170 F.3d 217 (1st Cir. 1999) (construing federal law); *Garabedian v. Allstates Engineering Co.*, 811 F.2d 802 (3d Cir. 1987) (apparently construing Pennsylvania law); *Blanton v. Womancare Inc.*, 38 Cal. 3d 396, 696 P.2d 645, 212 Cal. Rptr. 151 (1985); *Cross v. Dist. Court In & For 1st Jud. Dist.*, 643 P.2d 39 (Colo. 1982); *Dillon v. City of Davenport*, 366 N.W.2d 918 (Iowa 1985); *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996); *Hallock v. State*, 64 N.Y.2d 224, 474 N.E.2d 1178, 485 N.Y.S.2d 510 (1984); *Midwest Federal v. Dickinson Econo-Storage*, 450 N.W.2d 418 (N.D. 1990); *NEET v. Silver Street Partnership*, 148 Vt. 99, 528 A.2d 1117 (1987); *Hays v. Fischer*, 161 Ariz. 159, 777 P.2d 222 (Ariz. App. 1989); *Kazale v. Kar-Lee Flowers*, 185 Ill. App. 3d 224, 541 N.E.2d 219, 133 Ill. Dec. 382 (1989); *Townsend v. Square*, 643 So. 2d 787 (La. App. 1994); *Gojcaj v Moser*, 140 Mich. App. 828, 366 N.W.2d 54 (1985); *Schumann v. Northtown Ins. Agency, Inc.*, 452 N.W.2d 482 (Minn. App. 1990); *Southwestern Bell Yellow Pages v. Dye*, 875 S.W.2d 557 (Mo. App. 1994); *Amatuzzo v. Kozmiuk*, 305 N.J. Super. 469, 703 A.2d 9 (1997); *Royal v. Hartle*, 145 N.C. App. 181, 551 S.E.2d 168 (2001); Annot., 90 A.L.R.4th 326 (1991).

The appellants argue, however, that under Nebraska agency law, Wickenkamp can bind Luethke to a settlement because she acted with apparent authority in her correspondence with Plessman. The appellants cite Nebraska cases where a lawyer acted with apparent authority and, under agency law, bound the client to the lawyer's action. None of these cases, however, involved a lawyer's binding a client to a settlement agreement without that client's express authority. From the nature of the attorney-client relationship itself, a lawyer derives authority to manage the conduct of litigation on behalf of a client, including the authority to make certain procedural or tactical decisions. See, Code of Professional Responsibility, EC 7-7; *Brennan v. School Dist. No. 21*, 235 Neb. 948, 458 N.W.2d 227 (1990). That authority, however, is hardly absolute. Equally rooted in the law is the principle that without a grant of authority from the client, a lawyer cannot compromise or settle a claim (see Code of Professional Responsibility, EC 7-7), and settlements negotiated by lawyers without authority from their clients are generally not binding. A

narrow exception to this rule occurs when a lawyer settles a claim in excess of actual authority, but *in the presence of his or her client*, generally in open court, and the client remains silent regarding the terms of the settlement. See, e.g., *Hallock, supra*. See, also, *Navajo Tribe v. Hanosh Chevrolet-Buick*, 106 N.M. 705, 749 P.2d 90 (1988); *In re Gibson-Terry and Terry*, 325 Ill. App. 3d 317, 758 N.E.2d 459, 259 Ill. Dec. 336 (2001); *Nelson v Consumers Power Co*, 198 Mich. App. 82, 497 N.W.2d 205 (1993). No such circumstance is present in the instant case.

[5,6] We hold, therefore, that although lawyers retain apparent authority to make procedural and tactical decisions through the existence of the attorney-client relationship, a lawyer cannot settle a client's claim without express authority from the client. In other words, where there has been nothing beyond a mere employment or retainer of the lawyer to represent the client in a cause and the lawyer has acquired no other authority to enter into a settlement (such as acquiescence in open court), if the lawyer seeks to enter a settlement, the opposing party should ascertain whether the lawyer has received actual authority from the client to take such action. A party who enters a settlement agreement without verifying the opposing counsel's actual authority to settle does so at his or her peril.

The appellants argue that preventing lawyers from binding clients to settlement agreements without express authority would create problems in agency law and, in general, disrupt the practice of law. We have, however, already determined that lawyers have apparent authority to manage the conduct of litigation on behalf of a client, including the authority to make many procedural or tactical decisions, without express client consent. See *Brennan, supra*. Deciding that lawyers need express authority in the limited situation of *out-of-court* settlements will not, as the appellants argue, eviscerate the apparent authority of attorneys and agency law principles. In fact, several district courts already have rules which specifically require that in order to be recognized or considered by the court, agreements between parties to a suit, other than those made in open court or otherwise recorded by a court reporter, must be reduced to writing and signed by the parties. See, e.g., Rules of Dist. Ct. of First Jud. Dist. 1-2 (rev. 1995); Rules of Dist. Ct. of Second Jud. Dist. 2-3 (rev. 1995);

Rules of Dist. Ct. of Fifth Jud. Dist. 5-3B (rev. 2001); Rules of Dist. Ct. of Seventh Jud. Dist. 7-3 (rev. 1995).

[7] Jurisdictions that require express client authority for a lawyer to settle generally maintain that in the event of a dispute over the lawyer's authority to settle, it is a factual question for the trial court to determine and will not be disturbed absent an abuse of discretion. See *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996). See, also, *Kansas City Laborers Pension F. v. Paramount Indus.*, 829 F.2d 644 (8th Cir. 1987) (concluding that under federal law, district court abused discretion in failing to conduct hearing on whether attorney had actual authority to consent to settlement). We agree that disputes over a lawyer's authority to settle are factual issues to be resolved by the trial court; however, we will not set aside a trial court's factual findings regarding settlement disputes unless such findings are clearly erroneous.

After reviewing the record, we conclude that the district court did not clearly err in determining that Luethke did not grant express authority to Wickenkamp to compromise or settle his personal injury claim for the sum of \$16,000. The record, in fact, would support a finding that Luethke did not authorize Wickenkamp to settle his personal injury claim for \$16,000.

Having decided the primary issue in this appeal, we conclude that the appellants' remaining assignments of error are without merit. The appellants had argued that the district court erred in receiving evidence, over a § 7-107(2) objection, pertaining to the settlement agreement at issue. We note briefly that § 7-107(2) does not apply to the present case, because a lawyer's "proper duties and powers" do not include settling a lawsuit without a client's express authority. Moreover, Luethke testified regarding interactions and agreements between himself and Wickenkamp, not about the settlement agreement between Wickenkamp and Plessman. Thus, Luethke's testimony and Schmitt's testimony were properly admitted into evidence, and the court did not err in overruling the appellants' § 7-107(2) objection.

CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in determining that Wickenkamp could not enter into an out-of-court settlement agreement, and bind her client to the

agreement, without the express authority of Luethke, her client. The judgment of the district court is, therefore, affirmed, and this cause is remanded to the district court for a trial on the merits of the personal injury cause of action.

AFFIRMED, AND CAUSE REMANDED
WITH DIRECTIONS.

McCORMACK, J., not participating.

CAPITOL CITY TELEPHONE, INC., A NEBRASKA CORPORATION,
APPELLANT, V. NEBRASKA DEPARTMENT OF REVENUE,
AN AGENCY OF THE STATE, AND MARY JANE EGR,
TAX COMMISSIONER, APPELLEES.

ALIAN T COMMUNICATIONS CO., DOING BUSINESS AS ALLTEL,
A DELAWARE CORPORATION, AND ALIAN T SYSTEMS, INC.,
DOING BUSINESS AS ALLTEL, A NEBRASKA CORPORATION,
APPELLEES AND CROSS-APPELLANTS, V. NEBRASKA
DEPARTMENT OF REVENUE, AN AGENCY OF THE
STATE OF NEBRASKA, AND MARY JANE EGR,
TAX COMMISSIONER, APPELLANTS
AND CROSS-APPELLEES.

650 N.W.2d 467

Filed August 9, 2002. Nos. S-00-879, S-01-558.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
4. **Administrative Law: Statutes: Appeal and Error.** To the extent the interpretation of statutes and regulations is involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent.

5. **Courts: Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
6. **Administrative Law.** Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.
7. **Administrative Law: Statutes: Legislature.** Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction. This is particularly so when the Legislature has failed to take any action to change such an interpretation.
8. **Administrative Law: Statutes.** An administrative agency cannot use its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering.
9. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. 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.
10. **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. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
11. **Appeal and Error.** In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.
12. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
13. **Equity: Estoppel.** Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.

Appeals from the District Court for Lancaster County: STEVEN D. BURNS and EARL J. WITTHOFF, Judges. Judgment in No. S-00-879 affirmed. Judgment in No. S-01-558 affirmed in part and in part reversed, and cause remanded for further proceedings.

Michael L. Schleich, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellant Capitol City Telephone, Inc., in No. S-00-879.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees Nebraska Department of Revenue and Mary Jane Egr in No. S-00-879.

Don Stenberg, Attorney General, and L. Jay Bartel for appellants Nebraska Department of Revenue and Mary Jane Egr in No. S-01-558.

Paul M Schudel and Shannon L. Doering, of Woods & Aitken, L.L.P., for appellees Aliant Communications Co. and Aliant Systems, Inc., in No. S-01-558.

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

MCCORMACK, J.

NATURE OF CASE

These consolidated cases involve appeals from the Nebraska Department of Revenue (the Department). Capitol City Telephone, Inc. (Capitol); Aliant Communications Co. (Aliant); and Aliant Systems, Inc. (Systems), were each audited and issued deficiency assessments by the Department.

ALIAN AND SYSTEMS PROCEDURE

Aliant filed a petition for redetermination and paid the alleged deficiency. Systems paid the alleged deficiency and filed a claim of overpayment of sales and use tax. The cases of Aliant and Systems were consolidated. A hearing on that consolidated case was held before a hearing officer of the State Tax Commissioner (the Commissioner). The issues in the district court, according to Aliant's brief, were as follows: (1) whether gross receipts from charges by Aliant and Systems associated with installations, moves, additions, upgrades, or changes of inside wire, station connection, and terminal connections, performed within the premises of businesses or residences at locations commonly referred to as a "customer side" of the "demarcation point" (D mark), are subject to Nebraska sales tax pursuant to Neb. Rev. Stat. §§ 77-2703(1) and 77-2702.07(2) (Cum. Supp. 2000); (2) whether imposition of sales tax on charges by Aliant and Systems associated with installations, moves, additions, upgrades or

changes of inside wire, station connections, and terminal connections, when sales taxes assertedly not imposed on similar telephone equipment installed by others, constitutes an unreasonable classification in violation of the equal protection clause; and (3) whether the doctrine of equitable estoppel should be applied.

The hearing officer sustained the deficiency determination issued to Aliant and denied Systems' claim for overpayment of sales and use tax. Aliant and Systems then appealed to the district court for Lancaster County which set aside the orders of the Department and the Commissioner. The trial court found that Aliant and Systems are not subject to sales tax, interest, or penalties relating to the gross receipts from the installation and labor charges on the customer side of the D mark, but found that the elements of equitable estoppel had not been proved. The trial court did not address the second issue, the equal protection claim. From that, the Department appeals to this court.

CAPITOL PROCEDURE

Capitol, after being issued a deficiency assessment by the Department, filed a petition for redetermination, and a hearing was held before a hearing officer of the Commissioner. The issue was whether the portion of the Department's assessment of sales tax on Capitol's gross receipts relating to trip and labor charges, installation charges, and programming charges for installing, connecting, and servicing new telephone systems and related equipment, and for moving, changing, and upgrading existing telephone equipment and features, was properly subject to sales tax in Nebraska. It should be noted that all of Capitol's charges were on the customer side of the D mark. The deficiency assessment was upheld. Capitol appealed to the district court for Lancaster County which affirmed the decision. The district court found that under § 77-2702.07(2), gross receipts shall also mean gross income received from the provision, installation, construction, servicing, or removal of property used in connection with the furnishing, installing, or connecting of telephone communication service. Because of the substantially similar questions involved in these cases, they have been consolidated for this court's review and determination.

BACKGROUND

LEGAL BACKGROUND

On March 1, 1983, the Nebraska Public Service Commission issued an order directing that telephone customers would be responsible for the installation, repair, and maintenance of new inside station wiring and for the repair and maintenance of existing station wiring. Telephone customers were also allowed to purchase their own terminal equipment from sources other than the service provider.

The telephone company was to continue to own its facilities up to the D mark. The D mark is the point at which the facilities that are owned and maintained by the telephone company are connected to the inside station wiring owned by and dedicated to an individual customer's use. Commencing June 1, 1983, ownership of inside wire, station connections, and terminal equipment within the premises of businesses and residences on the customer's side of the D mark was transferred to the customers.

Prior to 1986, separately stated charges for labor and services rendered in installing or connecting tangible personal property were excluded from the definition of gross receipts and, therefore, were not subject to taxation. In 1986, the Nebraska Legislature extended the sales and use tax to the gross receipts of any person involved in connecting and installing telephone, telegraph, gas, electricity, sewer, water, and community antenna service. 1986 Neb. Laws, L.B. 1027. The following year, the Legislature removed the sales and use tax on the gross receipts of any person involved in installing and connecting sewer, water, gas, and electrical service. 1987 Neb. Laws, L.B. 523. The sales and use tax on the gross receipts of telephone, telegraph, and community antenna television service was retained.

Section 77-2703(1), which amendments have not substantively changed the applicable law in effect during Capitol's, Aliant's, and Systems' audit periods beginning in 1993, provides in relevant part:

There is hereby imposed a tax at the rate provided in section 77-2701.02 upon the gross receipts from all sales of tangible personal property sold at retail in this state, the gross receipts of every person engaged as a public utility,

as a community antenna television service operator or any person involved in the connecting and installing of the services defined in subdivision (2)(a), (b), or (d) of section 77-2702.07

The current version of § 77-2702.07(2), which amendments also have not substantively changed the applicable law in effect during the audit periods beginning in 1993, defines "gross receipts" to include the following:

Gross receipts of every person engaged as a public utility specified in this subsection or as a community antenna television service operator or any person involved in connecting and installing services defined in subdivision (2)(a), (b), or (d) of this section shall mean:

(a) In the furnishing of telephone communication service, the gross income received from furnishing local exchange telephone service and intrastate message toll telephone service. Gross receipts shall not mean (i) the gross income, including division of revenue, settlements, or carrier access charges received on or after January 1, 1984, from the sale of a telephone communication service to a communication service provider for purposes of furnishing telephone communication service or (ii) the gross income attributable to services rendered using a prepaid telephone calling arrangement. For purposes of this subdivision, a prepaid telephone calling arrangement shall mean the right to exclusively purchase telecommunications services that are paid for in advance that enables the origination of calls using an access number or authorization code, whether manually or electronically dialed;

(b) In the furnishing of telegraph service, the gross income received from the furnishing of intrastate telegraph services;

. . . .
(d)

Gross receipts shall also mean gross income received from the provision, installation, construction, servicing, or removal of property used in conjunction with the furnishing, installing, or connecting of any public utility services specified in subdivision (2)(a) or (b) of this section or com-

munity antenna television service specified in subdivision (2)(d) of this section. Gross receipts shall not mean gross income received from telephone directory advertising.

On September 22, 1986, Roger W. Hirsch, then the deputy Tax Commissioner, wrote a "Dear Telephone Company" letter. The letter stated that telephone companies would be taxed only on installation charges relating to the assembly and placement of components necessary to effect delivery of service from the company's general delivery system up to, but not beyond, the point where the service entered a customer's premises. The Commission has changed its position since this letter was sent, but the record does not reveal any specific documentation regarding this change.

In 1993, the Department's regulation regarding telephone and telegraph communication services, 316 Neb. Admin. Code, ch. 1, § 065.05 (1994), was formally amended in contravention of the Hirsch letter, and was enacted on May 14, 1994. That regulation provides: "Charges made by a telephone company to the customer for installations, service connections, move and change charges, service upgrades, optional features like call waiting or voice mail, and construction costs constitute gross receipts for telephone service and are taxable."

Capitol, Aliant, and Systems maintain that the sales tax is not applicable to the services they provide. They claim that the above-cited laws are limited only to those installations and services performed in the context of delivering a utility service, which is not the context of their installations and services at issue. The particular procedural background of each case is presented below.

CAPITOL

Capitol is a Nebraska corporation with its principal place of business in Nebraska. It purchases and services premanufactured telephone communications systems and equipment and resells the telephone systems to small- and medium-sized businesses. It also installs and maintains computer cabling networks and paging and intercom sound systems. Its systems and services consist of a group of products that are sold as complete communications systems with a variety of features and functions. The systems

vary in size and cost depending on the complexity of the features, functions, and telephones requested by the customer. The basic unit of the systems sold during the relevant time period was a key service unit (KSU) or a private branch exchange unit (PBX).

When Capitol sells a telephone system or equipment to a customer in Nebraska, the customer has several options. The customer can do his or her own installation, engage another party to perform the installation, or have Capitol install the telephone system. The installation process involves unpacking the various components of the system and mounting the KSU or PBX to a floor or wall. Parts of the PBX have to be connected. Wire or cable would then be run from the PBX to various locations throughout the building where the telephone jacks are located. Individual systems are then connected to the system by running a wire from the jacks to a plug in the telephone.

The telephones and the KSU or PBX are programmed to incorporate the features ordered by the customer. The system is physically linked with the local exchange telephone company's wire or cable via the D mark, thereby interconnecting the system with the local telephone facilities. This permits each telephone on the system the ability to access the local telephone exchange service. Capitol does not provide local exchange telephone service or intrastate message toll service in Nebraska. Capitol bills its customers for installing, connecting, and servicing telephone systems, and for moving, changing, and upgrading the related equipment and features at the customer's request.

The Department conducted an audit for sales and consumer's use tax of the books and records of Capitol for the period December 1, 1993, through October 31, 1997. As a result of said audit, the Department issued a notice of deficiency determination to Capitol on April 1, 1998. Capitol timely filed a petition for redetermination of its sales and use tax liability for the portion of the sales tax deficiency relating to trip and labor charges, installation charges, programming charges, and charges associated with moving, changing, and upgrading telephone systems and related equipment. On October 22, 1999, the Commissioner issued an order sustaining the deficiency determination and dismissing Capitol's petition for redetermination.

Capitol then appealed to the district court for Lancaster County. The district court held that Capitol's services are rendered in conjunction with the furnishing, installing, or connecting of local exchange and intrastate message toll service. Capitol has appealed to this court. The amount of tax being protested is \$9,260, excluding interest and penalties.

ALIENT AND SYSTEMS

Aliant is a Delaware corporation domesticated under the laws of Nebraska with its principal offices and place of business in Lincoln, Nebraska. During the relevant time period (February 1, 1995, through March 31, 1998), Aliant operated as a diversified communications company.

Aliant also purchased telephones and resold them to its residential and business customers. It provided and installed voice mail and custom calling features such as call waiting and caller identification remotely from its central office. If requested by a customer, Aliant also installed materials such as inside wiring.

Systems is a Nebraska corporation with its principal offices and place of business also in Lincoln. During the relevant time period (July 1, 1995, through June 30, 1998), Systems provided intrastate message toll service through its division known as Lincoln Telephone Long Distance and later as Aliant Long Distance, provided sales and leases of telephone systems and other equipment, provided installation and training for the operation of telephone systems and other equipment, provided service agreements related to telephone systems and other equipment, and provided telephone answering service.

Systems also purchased premanufactured telephone systems and resold them to customers. Among the systems it sold were KSU, PBX, voice mail, call monitoring, facsimile machines, and intercoms.

The Department conducted an audit of Aliant for compliance with the sales and use tax laws of Nebraska for the period of February 1, 1995, through March 31, 1998. The Department issued a notice of deficiency determination to Aliant on or about February 16, 1999. On March 11, Aliant timely filed a petition for redetermination of such sales and use tax liability with the Department. Aliant requested a redetermination of the audit

findings, including, but not limited to, the application of sales tax to gross receipts that Aliant derived from installations, moves, equipment changes, and additions.

The Department also conducted an audit of Systems for compliance with the sales and use tax laws of Nebraska for the period July 1, 1995, through June 30, 1998. The Department issued a notice of deficiency determination on or about November 30, 1999. Systems made payment of amounts set forth in the notice. On or about January 26, 2000, Systems filed with the Department a claim for overpayment of sales and use tax, requesting a refund of amounts taxed, interest, and penalties paid as a result of the audit of Systems, and the subsequent deficiency assessment. The request for refund included sales tax on gross receipts that Systems derived from labor involved in the installation of telephone systems, equipment, and wiring.

The Department assessed sales tax on installation labor services provided by Aliant and Systems that were performed with regard to customer-owned facilities on the customer side of the D mark. As a result of a regulatory directive, these facilities were not a part of the public utility operations of either Aliant or Systems during the audit period. After consolidation of Aliant's petition for redetermination and Systems' claim for overpayment, on May 16 and 17, 2000, the Department conducted a hearing. On July 20, the Commissioner issued her order sustaining the deficiency determination against Aliant and denying Systems' claim for overpayment of sales and use tax.

Aliant and Systems then appealed to the district court for Lancaster County. The district court held that the weight of the evidence supports Aliant and Systems' argument that gross receipts from the labor services at issue do not relate to public utility functions, nor do such receipts relate to the connecting or installing of services. Thus, the trial court set aside the order of the Department and the Commissioner and stated that Aliant and Systems were not subject to sales tax, interest, or penalties relating to the gross receipts from the installation charges on the customer side of the D mark.

The Department has now appealed to this court. Again, the disputed items relate only to the various installation services performed by Aliant and Systems on the customer side of the

D mark, and the sales tax on those charges are \$136,095 and \$98,307, respectively.

ASSIGNMENTS OF ERROR

Capitol argues, rephrased, that its gross receipts from connecting and installing telephone communications systems are not subject to Nebraska sales tax pursuant to §§ 77-2703(1) and 77-2702.07(2) and that the trial court erred in finding that they were.

The Department argues just the opposite both in response to Capitol's assignment of error and in its own assignment of error against Aliant and Systems. The Department argues, rephrased, that the gross receipts of Aliant and Systems derived from charges for the provision, installation, or construction of property used in conjunction with the furnishing, installing, or connecting of telephone communication services are subject to Nebraska sales tax, pursuant to §§ 77-2703(1) and 77-2702.07(2), and that the trial court erred in finding they were not.

On cross-appeal, Aliant and Systems argue (1) that the trial court erred in failing to conclude that the Department's imposition of sales tax upon Aliant and Systems, while refusing to impose sales tax upon other providers of the same services, constitutes an unconstitutional denial of equal protection and (2) that the trial court erred in finding that Aliant and Systems failed to meet their burden to prove that the Department and the Commissioner are equitably estopped from assessing sales tax on the gross receipts at issue in this case.

STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Young v. Neth*, 263 Neb. 20, 637 N.W.2d 884 (2002); *Gottsch Feeding Corp. v. State*, 261 Neb. 19, 621 N.W.2d 109 (2001).

[2] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious,

nor unreasonable. *Young v. Neth, supra*; *Gottsch Feeding Corp. v. State, supra*.

[3] An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Gottsch Feeding Corp. v. State, supra*.

[4] To the extent the interpretation of statutes and regulations is involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Inner Harbour Hospitals v. State*, 251 Neb. 793, 559 N.W.2d 487 (1997).

[5] An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001).

ANALYSIS

WHETHER GROSS RECEIPTS AT ISSUE ARE TAXABLE

Capitol, Aliant, and Systems argue that the gross receipts from the labor services at issue do not relate to a public utility function, nor were they received from the provision, installation, construction, servicing, or removal of property used in conjunction with the furnishing, installing, or connecting of a public utility service pursuant to §§ 77-2703(1) and 77-2702.07(2).

[6] Capitol specifically points to the 1986 "Dear Telephone Company" letter written by Hirsch to support its position that those charges are not taxable under §§ 77-2703(1) and 77-2702.07(2). The Department's regulation § 065.05 provides: "Charges made by a telephone company to the customer for installations, service connections, move and change charges, service upgrades, optional features like call waiting or voice mail, and construction costs constitute gross receipts for telephone service and are taxable." Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000).

The Aliant and Systems trial court concluded that neither § 77-2703(1) nor § 77-2702.07(2) provides a basis for assessing sales tax on the gross receipts from the labor services provided by Aliant or Systems. The trial court, in the Aliant and Systems' case, also held that the Department could not through adoption of § 065.05 enlarge its power to assess sales tax.

[7] The Department interprets §§ 77-2703(1) and 77-2702.07(2) as allowing for the gross receipts from the relevant labor services of Capitol, Aliant, and Systems to be subject to taxation. Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction. This is particularly so when the Legislature has failed to take any action to change such an interpretation. *Cox Cable of Omaha v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998).

Section 065.05 became effective May 14, 1994. Since Aliant's and Systems' tax deficiencies were from 1995 to 1998, the Hirsch letter had no effect as to Aliant or Systems. As to Capitol, however, its audit period was December 1, 1993, to October 31, 1997. Since § 065.05 became effective on May 14, 1994, the Hirsch letter was in existence with regard to Capitol from December 1, 1993, through May 14, 1994. The Hirsch letter, however, was not controlling and is not a rule or regulation. See *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997) (Department of Correctional Services' memorandum did not constitute rule or regulation), *disapproved on other grounds*, *Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999).

[8] In *Perryman*, we were required to determine whether a memorandum by the director of the Department of Correctional Services was a rule or regulation. This memorandum was written in response to a letter containing a legal opinion from the Attorney General. The memorandum advised that, effective immediately, the application of good time toward mandatory minimum sentences imposed for certain drug offenses was to be discontinued. We held in *Perryman* that the memorandum did not constitute a rule or regulation. See, also, Neb. Rev. Stat. § 84-901(2) (Reissue 1999). We conclude that the Hirsch letter is akin to the Department of Correctional Services' director's memorandum in *Perryman*. The Hirsch letter is not a rule or regulation.

Even if the Hirsch letter was a rule or regulation, an administrative agency cannot use its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997); *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994).

[9] Additionally, statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. 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. *Philpot v. Aguglia*, 259 Neb. 573, 611 N.W.2d 93 (2000); *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999).

[10] 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. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Burlington Northern & Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001).

We previously addressed a similar issue of statutory interpretation in *Cox Cable of Omaha v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998). In that case, Cox hired independent contractors to perform the installation of "house drops." These drops connect the distribution plant to a subscriber's residence, thereby enabling the subscriber to receive cable television. A use tax was assessed to Cox for the charges paid to the independent contractors for the installation of house drops. Cox maintained that the tax applied only to the franchise company when it performed the installation services because the independent contractors were not licensed cable providers.

This court, however, rejected that argument, stating:

The tax imposed by § 77-2703(1) is on the gross receipts of cable television service operators "or any person involved in the connecting and installing" of regulated

television services. Section 77-2703(1) clearly reflects an intent to tax not only the receipts of cable television service operators, but also the receipts of persons who are not franchised entities but perform services involving the connection and installation of regulated television services. Similarly, § 77-2702(4)(b)(iv) defines "gross receipts" to include not only gross income from furnishing regulated cable television service, but also gross income from the installation and construction of tangible personal property "used in conjunction with" the installation or connection of regulated cable television services.

254 Neb. at 604, 578 N.W.2d at 427.

We held in *Cox Cable of Omaha* that if the Legislature had intended to tax only the gross receipts attributable to connection and installation services performed by the holder of a franchise or permit, it could have so stated. However, the Legislature's use of broader language reflects that it intended the scope of the tax to extend beyond the receipts of the franchised entity to other persons or entities who derive revenue from performing services which involve the "installing" or "connecting" of regulated television services. Therefore, we held that the tax imposed by § 77-2703(1) extended to independent contractors' gross receipts derived from services which they performed in installing house drops pursuant to their contractual agreements with Cox. *Cox Cable of Omaha v. Nebraska Dept. of Revenue, supra*.

We conclude that §§ 77-2703(1) and 77-2702.07(2) allow for the charges at issue to be taxable. The definition of "gross receipts" in § 77-2702.07(2) encompasses every person engaged in furnishing telephone communication services or any person involved in connecting and installing telephone communication services. Subsection (2)(a) provides that gross receipts include the gross income from furnishing local exchange service and intrastate message toll telephone service. Additionally, the definition of "gross receipts" is broadened by subsection (2)(d) to include in the gross income revenue received from the provision, installation, construction, servicing, or removal of property used in conjunction with the furnishing, installing, or connecting of any public utility service, including telephone communication service.

The language of § 77-2703(1) ties in closely to the definition of "gross receipts" in § 77-2702.07(2). Section 77-2702.07(2) imposes a sales tax on the gross receipts of every person engaged as a public utility or any person involved in the connecting and installing of public utility service, including telephone communication service.

If the Legislature had intended only labor on the regulated side of the D mark to be taxable, it could have so stated in the statute. It did not, however, and instead stated that not only would the gross receipts of the public utility be taxed, but so would the gross receipts of "any person involved in the connecting and installing of the services defined in subdivision (2)(a), (b), or (d) of section 77-2702.07." § 77-2703(1).

We agree with the trial court in Capitol's case and find that the gross receipts of Capitol, Aliant, and Systems at issue are taxable. Regardless of who owns the inside wiring or terminal equipment, it is used in conjunction with the equipment of the telephone service carrier to provide the level of telecommunication service required by the customer. Capitol, Aliant, and Systems are engaged in installing and connecting telephones, wires, cables, consoles, and other property that form the telephone communication systems. Their telephone systems are connected or united with the local exchange network to carry telephone service into their customers' premises, and it is highly unlikely that their customers would pay for the systems if they would not have access to local telephone service. The services are, therefore, plainly rendered in conjunction with the furnishing, installing, or connecting of any local exchange service or intrastate message toll telephone service, even when performed on the customer side of the D mark.

We conclude that § 065.05 does not alter or enlarge the provisions of §§ 77-2703(1) and 77-2702.07(2) and, therefore, that the gross receipts of Capitol, Aliant, and Systems at issue are subject to Nebraska sales tax pursuant to §§ 77-2703(1) and 77-2702.07(2). We thus affirm the decision of the Capitol trial court and reverse the decision of the Aliant and Systems trial court on this issue.

EQUAL PROTECTION

Equal protection is not raised as an issue in Capitol's case. In Aliant and Systems' cross-appeal, they argue that the Department's

selective imposition of sales tax upon them constitutes an unconstitutional denial of equal protection. They claim discriminatory treatment subjecting them to taxes not imposed upon others in the same class performing exactly the same services.

[11,12] The trial court, because it determined that the installations performed by Aliant and Systems were not subject to the sales tax under the relevant statutes, did not address the equal protection claim that Aliant and Systems presented. In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001). This court has held that a constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. See *In re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002).

Therefore, we remand the equal protection issue raised by Aliant and Systems to the trial court for its consideration.

EQUITABLE ESTOPPEL

Aliant and Systems also argue on cross-appeal that the Department is equitably estopped from retracting, without appropriate notice, the position delineated in the Hirsch letter. They claim that in reliance upon the letter, Aliant's billing system was changed, and it is exactly what the Department intended to happen. Despite the Department's contentions that the letter was intended to be an interim statement, nowhere in the letter is that so stated, and the Department has never explicitly revoked or rescinded the letter.

[13] This court has set forth six elements that must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of

knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel. See *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999).

The facts are that the Hirsch letter was dated September 22, 1986, and § 065.05 was issued in 1993, effective May 14, 1994. The regulation therefore superseded the Hirsch letter and was in full force and effect during the relevant time periods. Aliant and Systems are not being assessed taxes for periods before the issuance of § 065.05.

We agree with the trial court that the issuance of § 065.05 put Aliant and Systems on notice that they should no longer rely on the Hirsch letter. Agency regulations must be subject to a public hearing prior to their adoption, and § 065.05 has been a matter of public record since 1993. Additionally, Systems had notice from their customers that the Department changed its position with regard to installation charges. Had Aliant and Systems consulted the Department, they would have been further advised of the Department's position. Thus, under the facts of the case, it cannot be said that Aliant and Systems lacked the means to ascertain the correct interpretation and application of the law on the subject.

We therefore hold that the doctrine of equitable estoppel cannot be applied under the facts of this case.

CONCLUSION

We conclude that under §§ 77-2703(1) and 77-2702.07(2), the installation and labor charges at issue are subject to sales tax. The language of the statutes is broadly worded, and deference is to be given to the Department's interpretation. Additionally, the language in its common, ordinary sense provides for the taxing of these activities.

We remand to the trial court Aliant and Systems' equal protection claim as set forth in its cross-appeal, as the trial court did not pass on the issue.

Finally, we conclude that the trial court in the Aliant and Systems case was correct in holding that equitable estoppel is not applicable under the facts of this case.

We affirm the ruling of the trial court in the case of Capitol.

We reverse the decision of the trial court in the case of Aliant and Systems as to its holding that the installation and labor charges at issue were not taxable under §§ 77-2703(1) and 77-2702.07(2); affirm that court's holding as to Aliant and Systems' equitable estoppel claim; and remand Aliant and Systems' equal protection claim to the trial court for its consideration.

JUDGMENT IN NO. S-00-879 AFFIRMED.

JUDGMENT IN NO. S-01-558 AFFIRMED IN PART,
AND IN PART REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

GREEN TREE FINANCIAL SERVICING CORPORATION, APPELLEE, v.
RANDY SUTTON AND RITA SUTTON, APPELLANTS, AND
WILL ANDERS AND TONI ANDERS, APPELLEES.

650 N.W.2d 228

Filed August 9, 2002. No. S-00-1256.

1. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
2. **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. **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. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
5. **Security Interests.** The filing of a financing statement is not necessary or effective to perfect a security interest in property subject to Neb. Rev. Stat. § 60-110 (Reissue 1998).
6. **Property: Appurtenances: Vendor and Vendee.** The characterization put upon articles as fixtures or nonfixtures by parties to a purchase contract should be upheld where the rights of third parties are not adversely affected, no statute suggests a contrary result, and the articles are not so completely merged with the realty as to prevent removal of the article without material injury to the realty.

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. **Motor Vehicles: Appurtenances.** Neb. Rev. Stat. §§ 60-102 to 60-117 (Reissue 1993) apply to all motor vehicles, commercial trailers, and semitrailers required to be registered under Neb. Rev. Stat. §§ 60-301 to 60-306 (Reissue 1993) and all cabin trailers defined in Neb. Rev. Stat. § 60-614 (Reissue 1993).
9. **Appurtenances: Words and Phrases.** According to Neb. Rev. Stat. § 71-4603 (Reissue 1996), a "manufactured home" is defined as a structure, transportable in one or more sections, which in the traveling mode, is 8 body feet or more in width or 40 body feet or more in length or, when erected on site, is 320 or more square feet and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities and includes the plumbing, heating, air-conditioning, and electrical systems contained in the structure.
10. **Actions: Pleadings.** Although a pleading should not leave uncertainty as to the theory of recovery on which the pleader wishes to proceed, in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader.

Appeal from the District Court for Morrill County: PAUL D. EMPSON, Judge. Affirmed in part, and in part reversed and remanded.

Gregory J. Beal, of Gregory J. Beal & Associates, P.C., for appellants.

Richard A. Drews, of Taylor, Kluver, Peters & Drews, for appellee Green Tree Financial Servicing Corporation.

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

McCORMACK, J.

NATURE OF CASE

In this replevin action, Randy Sutton and Rita Sutton appeal the decision in favor of appellee Green Tree Financial Servicing Corporation, now known as Conseco Finance Servicing Corporation (Green Tree). Green Tree sought possession of a manufactured home situated on real estate purchased by the Suttons. The Suttons were not debtors, but were in possession of the manufactured home at the time the action was commenced. Prior to trial, Green Tree obtained an order allowing it to take possession of the manufactured home. At the time of trial, the

home was already in Green Tree's possession. The trial court directed a verdict in favor of Green Tree for possession of the manufactured home, but denied Green Tree's request for loss-of-use damages. No cross-appeal was taken by Green Tree. The trial court also directed a verdict against the Suttons on their claim for damages to their real property.

BACKGROUND

On or about March 25, 1997, Steven D. Beck and Lynda J. Beck made, executed, and delivered to Green Tree a manufactured home promissory note, security agreement, and disclosure statement (contract). Pursuant to the contract, the Becks were to make 360 monthly payments to Green Tree for the purchase of a manufactured home. Green Tree was to get a security interest in the home, which is noted on the certificate of title to the home.

The manufactured home was placed by the Becks on real property in Morrill County, which the Becks purchased from John Riggs. That transaction took place in December 1996. The Becks later filed for protection in the U.S. Bankruptcy Court for the District of Nebraska, but Green Tree obtained an order granting it relief from the automatic stay provisions.

On April 28, 1999, Green Tree filed a proof of claim with respect to its secured claim in the amount of \$57,504.19. Under the contract for the sale of the manufactured home, the failure to make payments and the filing of bankruptcy were acts of default. This default entitled Green Tree to accelerate the full amount due under the contract and to repossess the home.

Sometime prior to July 16, 1999, the Becks abandoned the subject property. On June 15, 1999, the trustee executed a deed of reconveyance to "the person or persons entitled thereto." That same day, the trustee sold the real estate subject to the deed of trust to Timothy B. Riggs. On July 16, 1999, a warranty deed from Timothy Riggs and Kellye Riggs was given to Camp Clarke Ranch, L.L.C., conveying certain real estate, including the land on which the manufactured home was located. That same day, a warranty deed and attached plat from Camp Clarke Ranch, L.L.C., was given to the Suttons conveying the real estate at issue to the Suttons for \$52,200.

At no time prior to the trustee's sale or the filing of the deed of reconveyance did Green Tree file or record a lien or claim of interest in the real estate. The Suttons checked for liens in the real estate records of Morrill County, but did not check the Morrill County clerk's records regarding a certificate of title to the manufactured home, or any liens thereon.

Randy Sutton testified that the value of the real property would have been only \$700 per acre without the home. He assumed the home went with the land, and gave \$52,200 for the property, which would have otherwise been farm ground. The Suttons claim that they were unaware of Green Tree's interest in the manufactured home until they learned otherwise on or about July 26, 1999.

The Suttons leased the manufactured home to Will Anders and Toni Anders, who occupied it until Green Tree commenced a replevin action. The Anderses moved out of the manufactured home and have no further interest in the proceeding.

Green Tree filed a replevin action to recover possession of the manufactured home. After a temporary possession hearing, the trial court entered an order granting immediate possession of the home to Green Tree. Green Tree posted an undertaking in replevin and a bond in the amount of \$120,000. Green Tree hired a transfer company to remove the home and take it to a mobile home park in North Platte, Nebraska.

Under a writ of replevin, Morrill County Sheriff John Edens was ordered to deliver the manufactured home, a 1997 Guerdon Premier, 28- by 58-foot "mobile home," serial No. GDGENE0997158531/II. He oversaw the removal of the home, and met with the transfer company at approximately 9 a.m. on January 13, 2000. He observed the skirting around the manufactured home had been removed and jacks had been placed underneath the home to split the home into trailers. The only foundation observed by Edens was a flat cement surface. The home was sitting on cinder blocks, and attached underneath the trailers were axles and tongues.

Edens did not stay the entire day to observe the removal of the manufactured home, but checked in periodically until the home was removed around 4 p.m. He was not present when the home was actually driven off the property, but arrived soon after

the workers had left. He observed no damage to the trees or the real estate other than tire tracks on the grass where the trucks had driven. However, according to Randy Sutton, water lines were cut, left open, and exposed; septic system pipes were destroyed; a pump was removed from a well; and the real property was left in a state of utter destruction. The Suttons claim thousands of dollars in damages to their property by reason of the removal of the manufactured home.

During the testimony of Edens, the Suttons attempted to offer photographs of the property. Green Tree objected. An order was previously entered requiring all exhibits to be provided by September 13, 2000, unless good cause was shown. The photographs, marked as exhibits 39 to 47 were not produced by September 13, or prior to trial. Green Tree objected to the photographs on the basis that the pretrial order directed all exhibits to be provided by September 13, unless good cause was shown. The first time the attorney for Green Tree had seen any of these photographs was at the trial. The Suttons' attorney responded that the photographs were offered only as impeachment of Edens' testimony, since he testified that he did not see any damage to the real estate. The trial court sustained the objection, stating that Edens "didn't say there wasn't any damage. He said he didn't see any."

At the conclusion of the evidence, Green Tree moved for a directed verdict on all of the issues. The trial court sustained the motion as to whether Green Tree rightfully possessed the property, but denied the motion as to whether Green Tree was entitled to damages and as to whether the Suttons' counterclaim should be dismissed.

Before the jury was instructed, the trial court reconsidered its decision on Green Tree's motion to dismiss. Finding that the claim for damages incident to the removal of the manufactured home was insufficiently pled to be submitted to the jury, the trial court dismissed the Suttons' counterclaim with prejudice.

ASSIGNMENTS OF ERROR

According to the Suttons, the trial court erred (1) in directing a verdict in favor of Green Tree on the issue of whether it had the right to immediate possession of the manufactured home; (2)

in finding that it was not necessary for Green Tree to make a fixture filing in order to perfect a security interest in the manufactured home and ruling that Green Tree could treat the subject property as a motor vehicle or personal property rather than as property affixed to real estate; (3) in refusing to submit to the jury the issue of whether their real property had been damaged as a result of the removal of the manufactured home from said real property; and (4) in its rulings on evidence, the cumulative effect of which constitutes prejudicial error toward them.

STANDARD OF REVIEW

[1] A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (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. *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002).

[3,4] 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. *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001). A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000).

ANALYSIS

GREEN TREE'S RIGHT TO POSSESSION

The trial court directed a verdict in favor of Green Tree as to the issue of possession. The trial court necessarily found that

Green Tree had a valid lien on the manufactured home listed on the certificate of title, that it did not need to make a fixture filing in order to perfect its security interest, and that the manufactured home could be treated as a motor vehicle rather than as property affixed to real estate.

Neb. Rev. Stat. § 60-110 (Reissue 1998) provides:

The provisions of article 9, Uniform Commercial Code, shall never be construed to apply to or to permit or require the deposit, filing, or other record whatsoever of a security agreement, conveyance intended to operate as a mortgage, trust receipt, conditional sales contract, or similar instrument or any copy of the same covering a motor vehicle. Any mortgage, conveyance intended to operate as a security agreement as provided by article 9, Uniform Commercial Code, trust receipt, conditional sales contract, or other similar instrument covering a motor vehicle . . . if a notation of the same has been made by the county clerk or the Department of Motor Vehicles on the face thereof, shall be valid as against the creditors of the debtor, whether armed with process or not, and subsequent purchasers, secured parties, and other lienholders or claimants but otherwise shall not be valid against them

[5] At the time that Green Tree filed its petition in replevin, Neb. U.C.C. § 9-302(3)(b) (Cum. Supp. 1996) stated that the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to § 60-110 (now found at Neb. U.C.C. § 9-311(a)(2)(i) (Reissue 2001)). Thus, a lien on a motor vehicle under § 60-110 is valid when noted on the certificate of title, and not through a fixture filing under article 9 of the Uniform Commercial Code.

[6] In *Metropolitan Life Ins. Co. v. Reeves*, 223 Neb. 299, 389 N.W.2d 295 (1986), we stated that the characterization put upon articles as fixtures or nonfixtures by parties to a purchase contract should be upheld where the rights of third parties are not adversely affected, no statute suggests a contrary result, and the articles are not so completely merged with the realty as to prevent removal of the article without material injury to the realty. The original contract between the Becks and Green Tree clearly demonstrate their intent for the manufactured home to remain

personal property and not become a fixture. Paragraph 9 of the contract between the Becks and Green Tree states:

I agree that regardless of how my Manufactured Home is attached to the real property and regardless of how your security interest in my Manufactured Home is perfected and regardless of whether an affidavit of affixture (or other similar instrument identifying the property as a fixture) has been recorded, my Manufactured Home is and shall remain personal property and is not and shall not become a fixture or part of the real property unless you consent in writing and state law permits a contrary classification. I agree to pay any and all personal property taxes assessed against my Manufactured Home and agree that failure to pay such taxes shall constitute a default under paragraph 14 on page 3.

[7] To the extent the Suttons claim to be innocent third parties adversely affected by the intent of the original parties or that removal of the manufactured home would materially injure the real property upon which it is placed, the plain language of the Nebraska Revised Statutes dictates that Green Tree was entitled to immediate possession of the manufactured home and did not need to file a fixture filing. 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. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[8] Neb. Rev. Stat. § 60-102 (Reissue 1993) states, "Sections 60-102 to 60-117 shall apply to motor vehicles, commercial trailers, and semitrailers required to be registered under sections 60-301 to 60-306 and **all cabin trailers defined in section 60-614 . . .**" (Emphasis supplied.) Neb. Rev. Stat. § 60-614 (Reissue 1993) defines a cabin trailer as

a trailer or semitrailer which is designed, constructed, and equipped as a dwelling place, living abode, or sleeping place, whether used for such purposes or instead permanently or temporarily for the advertising, sale, display, or promotion of merchandise or services or for any other commercial purpose Cabin trailer shall not mean a

trailer or semitrailer which is permanently attached to real estate. There shall be three classes of cabin trailers:

....
(2) Mobile home which shall include cabin trailers more than one hundred two inches in width or more than forty feet in length[.]

The issue is, therefore, whether a "manufactured home" is within the scope of § 60-110 as a "cabin trailer" or "mobile home."

According to the Suttons, none of the statutory definitions setting forth what a motor vehicle is suggest that a manufactured home is a motor vehicle. Therefore, the Suttons claim that Green Tree was required to make a fixture filing. They claim that absent a fixture filing, Riggs, as an innocent purchaser for value without notice, passed title to the manufactured home to the Suttons.

Green Tree, on the other hand, argues that it did all acts necessary under Nebraska law to obtain a perfected security interest in the manufactured home. Green Tree's lien was noted on the face of the certificate of title and was valid against the Suttons. Thus, Green Tree was entitled to immediate possession of the manufactured home.

[9] According to Neb. Rev. Stat. § 71-4603(1) (Reissue 1996), a "manufactured home" is defined as

a structure, transportable in one or more sections, which in the traveling mode is eight body feet or more in width or forty body feet or more in length or when erected on site is three hundred twenty or more square feet and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities and includes the plumbing, heating, air conditioning, and electrical systems contained in the structure

The size of the manufactured home is 28 feet by 58 feet. The home was not attached to real estate when originally purchased. It is designed, constructed, and equipped as a dwelling place, living abode, or sleeping place, and was used as a permanent residence. It is designed to be moved, and is issued or delivered in two parcels or sections. Both Will Anders and Edens reported seeing axles attached to the bottom of the home.

Pursuant to Neb. Rev. Stat. §§ 71-4621(1), 76-1463, and 81-5,138 (Reissue 1996), the term "mobile home" includes "manufactured homes." While these statutes do not involve the certificates of title, they do provide insight as to how Nebraska law views manufactured homes. Nebraska law includes the term "manufactured home" within the definition of "mobile home."

Pursuant to Neb. Rev. Stat. § 60-113 (Reissue 1993), once the manufactured home was affixed to real property, the owner, in order to have the lien on a motor vehicle title canceled, would go to the county clerk's office to have the certificate of title surrendered. However, the lien noted on the certificate of title would still be valid if Green Tree did not consent to its being canceled. There appears to be nothing in the record which demonstrates that the Becks or the Suttons had the certificate of title surrendered or canceled. Thus, Green Tree would still have a valid lien on the manufactured home even if it was determined to be affixed to the Suttons' real property.

Other courts have come to similar decisions regarding the effect of noting a lien for a mobile home or manufactured home on a certificate of title. See, *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000) (security interest in mobile home is perfected when such interest is listed on certificate of title to mobile home); *ENT Fed. Cr. Un. v. Chrysler First Fin.*, 826 P.2d 430 (Colo. App. 1992) (noting lien on certificate of title was all that was required to create lien on manufactured home); *Beneficial Finance Co. v. Schroeder*, 12 Kan. App. 2d 150, 737 P.2d 52 (1987), *review denied* 241 Kan. 838, 737 P.2d 52 (bank properly perfected its security interest in mobile home by noting its interest on mobile home's certificate of title, and court noted that, as practical matter, if mobile homes were subject to fixture filing requirements, secured party with interest in mobile home could maintain priority only by making new fixture filing each time mobile home was moved). See, also, *Hiers v. Bank One*, 946 S.W.2d 196 (Ky. App. 1996); *Hughes v. Young*, 115 N.C. App. 325, 444 S.E.2d 248 (1994), *review denied* 337 N.C. 692, 448 S.E.2d 525; *Bank of Commerce v. Waddell*, 731 S.W.2d 61 (Tenn. App. 1986); *T & O Mobile Homes v. United California Bank*, 40 Cal. 3d 441, 709 P.2d 430, 220 Cal. Rptr. 627 (1985) (decided under statutory scheme applicable during relevant transactions).

Based on the above discussion, we conclude that the trial court did not err in granting Green Tree a directed verdict as to whether it had a right to immediate possession of the manufactured home. Green Tree noted its lien on the certificate of title to the manufactured home and did not need to make a fixture filing. It could thus treat the property as personal property rather than a fixture, since the certificate of title has not been surrendered with Green Tree's consent.

SUTTONS' DAMAGES

The Suttons also argue that the trial court erred in refusing to submit to the jury the issue of whether their real property had been damaged as a result of the removal of the manufactured home. The trial court held that the Suttons failed to sufficiently plead damages to their property caused by the manner of removing the home and that judgment on that issue was to be directed in favor of Green Tree.

We disagree with the trial court and find that the Suttons sufficiently pled damages to their real property caused by the manner in which the manufactured home was removed. On February 8, 2000, the Suttons filed an amended answer and counterclaim and claimed, *inter alia*, the following damages:

4. That the Defendants would be damaged in an amount in excess of \$10,000.00, in any event, should the Court order that the Plaintiff in this case should be allowed to remove the residence from the property, and that the Plaintiff in any such case, should be ordered to pay the Defendants damages and restore the property to the same condition as it was prior to the construction of this house on the subject real estate, including replacement of trees and restoration of the landscape.

That if Plaintiff has removed the residence from Defendant's real estate prior to trial, Plaintiff should be adjudged liable for replacement value of the residence plus any and all costs necessary to re-erect, construct or otherwise restore Defendant's property to substantially the same condition it was in before wrongful removal; that Defendant's [sic] should further be awarded damages for lost rental income and/or other revenues which Defendants

otherwise would have received from the property removed, the beneficial use and enjoyment thereof.

5. That Defendants should be awarded any consequences damages sustained by Defendants resulting from Plaintiff's seizure and removal of the residence.

[10] Although a pleading should not leave uncertainty as to the theory of recovery on which the pleader wishes to proceed, we have held that in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader. *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999).

Liberally construed, in light of the damages requested in paragraph 4, and when read in conjunction with paragraph 5, we conclude that the request in paragraph 5 for "consequences damages . . . resulting from Plaintiff's seizure and removal of the residence" did contemplate consequential damages. This paragraph was sufficient to notify Green Tree that the Suttons were requesting damages arising from the manner in which the manufactured home was removed from the real property.

Because we have found that the Suttons adequately pled damages to their real estate caused by the manner in which the manufactured home was removed, we find it unnecessary to address whether the trial court erred in failing to grant the Suttons leave to amend their pleading to conform to the evidence of the case.

We accordingly reverse the trial court's decision directing a verdict in favor of Green Tree on this issue, and we remand the cause to the trial court for a new trial on the issue of damages.

RULINGS ON EVIDENCE

The Suttons argue that the trial court erred in excluding exhibits 39 to 47, which allegedly included photographs of the Suttons' real estate after the manufactured home was removed. The basis for the objection ruling was that the photographs were not produced in compliance with the pretrial order. This assigned error is not likely to occur in the new trial, and we decline to address the assignment of error.

CONCLUSION

For the aforementioned reasons, we find that the trial court did not err in granting a directed verdict in favor of Green Tree as to whether it had the right to immediate possession of the

manufactured home and as to whether a fixture filing was necessary for Green Tree to perfect a security interest in the manufactured home. However, we find that the trial court did err in directing a verdict in favor of Green Tree on the issue of the Suttons' damages.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED.

RONALD D. MEYER, SPECIAL ADMINISTRATOR OF THE ESTATE
OF RAMONA C. MEYER, DECEASED, APPELLANT, V.
STATE OF NEBRASKA, APPELLEE.
650 N.W.2d 459

Filed August 9, 2002. No. S-01-303.

1. **Tort Claims Act: Appeal and Error.** A district court's findings of fact in a proceeding under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996 & Cum. Supp. 2000), will not be set aside unless such findings are clearly erroneous.
2. **Proximate Cause: Evidence.** The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause (1) that produces a result in a natural and continuous sequence and (2) without which the result would not have occurred.
5. **Negligence: Proximate Cause.** A proximate cause need not be the immediate cause of an injury; it may be enough that the acts complained of set in motion a series of events through which damage results.
6. ____: _____. A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster.
7. **Trial: Presumptions: Appeal and Error.** In reviewing the findings of the trial court, an appellate court presumes that the court resolved any controverted facts in favor of the successful party and considers the evidence and permissible inferences therefrom most favorably to that party.

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

Denise E. Frost and Clarence E. Mock, of Johnson & Mock, for appellant.

Douglas L. Kluender and Jay L. Welch, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellee.

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

PER CURIAM.

NATURE OF CASE

Ramona C. Meyer (Meyer) was killed as a result of a three-vehicle accident. At the time, Donald C. Poston (Poston), the driver of the van which struck Meyer's car, was being pursued by a Nebraska State Patrol trooper. Meyer's husband, as special administrator of her estate, filed this action against the State of Nebraska. The district court for Cuming County entered judgment for the State, and the estate appeals.

STANDARD OF REVIEW

[1] A district court's findings of fact in a proceeding under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996 & Cum. Supp. 2000), will not be set aside unless such findings are clearly erroneous. *Goodenow v. State*, 259 Neb. 375, 610 N.W.2d 19 (2000).

[2] The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong. *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993), *disapproved in part on other grounds*, *Henery v. City of Omaha*, 263 Neb. 700, 641 N.W.2d 644 (2002).

FACTS

On August 5, 1995, Poston, his wife Julie, and his sister-in-law drove from Springfield, Nebraska, to Norfolk, Nebraska, to visit the Postons' daughter, who was a patient at the Norfolk Regional Center. As a pretense, Julie suggested that Poston take their daughter to pick up supplies while Julie remained at the center. Julie actually wanted to discuss with staff of the center a recent deterioration in Poston's behavior.

Poston was to return to the center to pick up Julie, and the family planned to see a movie.

Poston left the center with his daughter and sister-in-law as passengers in his van. Rather than driving to pick up supplies, he left Norfolk on U.S. Highway 275, heading toward Springfield. Traveling east at a high rate of speed, he met a west-bound patrol car driven by Sgt. Gerald Sieck of the Nebraska State Patrol. Using radar, Sieck determined that Poston was traveling at 94 miles per hour. Sieck turned his car around and, with his car's siren and overhead lights activated, pursued Poston approximately 27 miles through Wisner and Beemer and into West Point.

Poston slowed as he passed through Wisner, but outside town, he increased his speed to more than 100 miles per hour. On two occasions, Sieck was able to get close enough to the van to read its license plate.

At Sieck's request, Sgt. Lonnie Schultz of the West Point Police Department set up a roadblock on the north side of the town. Poston passed through the roadblock and then accelerated, continuing into West Point at a speed estimated at between 70 and more than 100 miles per hour. At the intersection of Highway 275 and Grant Street, Poston's van collided with two vehicles.

One of the cars was driven by Meyer, who was killed. Her estate filed a wrongful death action and sought damages for pain and suffering and medical and funeral expenses. The other car was driven by Muriel A. Bacus, who was injured along with her sons. It is undisputed that Meyer was killed during a vehicular pursuit involving a law enforcement officer employed by the State.

The district court found that on the day of the accident, Poston was suffering a psychotic episode which continued after the collision and that Poston was undeterred in his obsession to return home to Springfield at a high rate of speed. The court found that although Sieck's actions "were obviously a factor," the evidence did not show that Poston would have driven other than as he did in the absence of a pursuit. The court concluded that the pursuit was not a concurring proximate cause of the accident, and it dismissed the estate's claim against the State. Additional facts will be set forth in the analysis as necessary.

ASSIGNMENTS OF ERROR

The estate asserts that the district court erred in its interpretation and application of the proximate cause element of § 81-8,215.01 (Reissue 1994) (which was in effect at the time of the accident) and in finding that the estate failed to prove that the pursuit proximately caused the accident, thus incorrectly dismissing the estate's claim against the State. The estate also asserts that the court abused its discretion in admitting and adopting the opinion of a physician about the state of mind and actions of Poston, including whether his van would have collided with the Meyer and Bacus vehicles absent the pursuit by Sieck.

ANALYSIS

The district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous. *Goodenow v. State*, 259 Neb. 375, 610 N.W.2d 19 (2000). The question presented is whether Sieck's pursuit of Poston was a proximate cause of Meyer's death. The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong. *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993).

At the time of the accident, § 81-8,215.01 provided:

In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by the state during vehicular pursuit, damages shall be paid to such third party by the state.

For purposes of this section, vehicular pursuit shall mean an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

In *Adams v. State*, 261 Neb. 680, 625 N.W.2d 190 (2001), we stated that the conduct of the officer must be examined to

determine whether such conduct proximately caused the plaintiff's injuries. If an officer's actions during a vehicular pursuit proximately cause damage to an innocent third party, the State is strictly liable for those damages. *Id.*

In *Stewart*, we construed Neb. Rev. Stat. § 13-911 (Reissue 1991), which addressed vehicular pursuits conducted by officers of political subdivisions. We held that § 13-911

created strict liability on the part of a political subdivision when (1) a claimant suffers death, injury, or property damage; (2) such death, injury, or property damage is proximately caused by the actions of a pursuing law enforcement officer employed by the political subdivision; and (3) the claimant is an innocent third party.

Stewart, 242 Neb. at 244, 494 N.W.2d at 133.

The district court found that Poston was suffering from a psychotic episode during his travel from Norfolk to West Point and that this psychotic state continued after the collision. The court concluded that as a result of his psychotic state, Poston was undeterred in his obsession to return home at a high rate of speed. The court found that Poston was aware that Sieck was pursuing him, but it concluded that the evidence did not show that the accident was caused by Sieck's actions. It concluded that Sieck's actions were not a concurring proximate cause because Poston's high-speed driving had taken place for several miles prior to the time Sieck observed Poston. The court found that the estate failed to establish that the pursuit by Sieck was a proximate cause of the accident, and it dismissed the action.

The estate argues that the district court erroneously interpreted the proximate cause element of § 81-8,215.01 to require that the vehicular pursuit be the sole proximate cause of the accident, rather than merely a proximate cause of the accident. It relies upon the court's finding that while Sieck's actions "were obviously a factor," they were not the proximate cause of the accident.

[3] We therefore consider whether the language of § 81-8,215.01 requires that the vehicular pursuit be the sole proximate cause. Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision

made by the court below. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, 263 Neb. 544, 641 N.W.2d 55 (2002).

[4] We conclude that the plain language of § 81-8,215.01 requires that the actions of a law enforcement officer during a vehicular pursuit be merely a proximate cause of the damage, and not the sole proximate cause. A proximate cause is a cause (1) that produces a result in a natural and continuous sequence and (2) without which the result would not have occurred. *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001).

[5,6] In *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994), we approved a jury instruction stating that a proximate cause need not be the immediate cause of an injury; it may be enough that the acts complained of set in motion a series of events through which damage results. See, also, *Rose v. Buffalo Air Service*, 170 Neb. 806, 104 N.W.2d 431 (1960). A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999).

[7] We therefore must address whether the district court was clearly wrong in finding that the pursuit was not a proximate cause of the accident. In reviewing the findings of the trial court, an appellate court presumes that the court resolved any controverted facts in favor of the successful party and considers the evidence and permissible inferences therefrom most favorably to that party. *Vilas v. Steavenson*, 242 Neb. 801, 496 N.W.2d 543 (1993).

The following evidence is significant in our determination. Poston was driving his van at a high rate of speed, which was clocked at 94 miles per hour. Sieck gave chase and turned on his car's siren and overhead lights. The siren and lights remained in operation through Wisner, Beemer, and West Point, a distance of approximately 27 miles. During the pursuit, Poston's van passed any vehicle it approached, and vehicles pulled over for Sieck.

Poston slowed to approximately 70 miles per hour as he passed through Wisner and then sped up. Sieck increased his speed to more than 100 miles per hour to catch up to Poston. On two occasions between Wisner and Beemer, Sieck closed to

within 100 feet of the van. With Sieck close behind, Poston went through Beemer in excess of 100 miles per hour. Sieck then radioed the Cuming County Sheriff and requested a roadblock north of West Point. In the 8 miles between Beemer and West Point, Sieck clocked Poston at 107.3 miles per hour.

According to Sieck's testimony, he believed during the pursuit that Poston was resisting apprehension by attempting to elude him. Sieck noted, however, that Poston did not try to turn off onto a county road to lose him, a common action taken by those who are evading police. Sieck said there was a time during the pursuit when he perceived that no matter what he did, including terminating the pursuit, Poston would continue to flee.

Sieck requested that the roadblock be set up at the junction of Highways 275 and 9, which is about 1 mile from the West Point city limits. The roadblock was set up in one lane by Sergeant Schultz of the West Point Police Department.

Schultz said he was notified by the county sheriff's office dispatch that Sieck was involved in a pursuit from the north into West Point. The one-lane roadblock allowed an escape path and followed department policy. Southbound traffic was directed onto the shoulder of the road. After Schultz parked his patrol car, he turned on the emergency lights and took a shotgun with him in case the speeding vehicle headed toward him.

When Schultz first saw the van, Sieck's vehicle was approximately one-eighth to one-half mile behind it. Schultz stated that Poston was obviously aware of the roadblock because the van went around three vehicles on the shoulder, cut sharply between the patrol car and another car, cut back within a few feet in front of the patrol car, and continued southbound. Schultz could hear the van accelerate as it continued into West Point. As Sieck approached the roadblock, he slowed down. He then accelerated after passing through the roadblock and continued the pursuit.

Sieck followed Poston into West Point at a distance described variously as one-half mile, several blocks, or just a few seconds. Within the city limits of West Point, Highway 275 is known as Lincoln Street, which extends a distance of 1.8 miles. Sieck was at the top of a hill about .63 of a mile from the intersection of Lincoln and Grant Streets when the accident occurred.

The Meyer vehicle was facing east on Grant Street and was apparently preparing to turn north onto Highway 275. Poston passed another vehicle about two blocks before the intersection with Grant Street. The Poston and Meyer vehicles collided head on, and Poston's van then crossed the centerline and collided head on with the Bacus station wagon, which was northbound on Highway 275.

Gaylon Kuchel, who teaches courses in law enforcement pursuit and helped design the pursuit policy for the Omaha Police Department, stated that the Nebraska State Patrol pursuit policy met the criteria established in the curricula of law enforcement academies, the Nebraska State Crime Commission, and state law, which requires law enforcement agencies to adopt vehicular pursuit policies. Police officers are taught that the continuation of a high-speed pursuit over a protracted distance very frequently results in an accident. Kuchel said that roadblocks are not used often because they are dangerous and that after a fleeing suspect has passed a roadblock, there can be an "excitation about that situation" and the vehicle increases its speed as it leaves the roadblock.

On August 7, 1995, Poston was interviewed by Investigator David Spiegel. Poston said he remembered meeting Sieck outside Norfolk. Poston said he knew if he stopped, he would be killed. Poston stated that the "voice" told him to "go, go, go" and that he would be protected. Poston told Spiegel that he saw the red lights and heard the siren behind him. He recognized the roadblock at West Point and went around it.

Dr. Terry Davis, a psychiatrist practicing in Omaha, testified that Poston's behavior was consistent with a psychotic episode. Psychosis impairs one's ability to interpret reality. Davis said that Poston did not appear to understand the consequences of his actions. Davis stated that a person in a psychotic state may perceive voices when no one is present. Davis stated that Poston believed a "voice" directed him to leave Norfolk.

Dr. William Spaulding, a clinical psychologist who treated Poston at the Lincoln Regional Center, said Poston had a chronic psychiatric disorder punctuated by periods of acute psychosis, which were characterized by confusion, emotional arousal, delusional beliefs, and a propensity to act on those

beliefs. On the date of the accident, Poston was suffering from a severe psychiatric disorder-either schizophrenia or schizoaffective disorder, Spaulding said. Poston's behavior was driven by his delusional beliefs and extreme emotional arousal, and he was not able to understand the basic concepts of right and wrong on that day.

Spaulding said he saw no reason why Poston would have changed his behavior if the patrol vehicle had not been following him. Spaulding said it is highly unlikely that any action by Sieck would have disrupted the general nature of Poston's behavior that day. "He was on a psychotic mission, and whatever events may have transpired I very much doubt that it would have diverted him from his psychotic mission."

All the injured were taken to the hospital in West Point, where Douglas Kelley, a Nebraska State Patrol officer, said he heard Poston tell his daughter: "I knew we had to outrun that police officer because he was going to kill us." She responded, "No, Dad, we were stupid," and Poston stated, "No, we weren't. If I hadn't wrecked we'd be dead."

In its written opinion, the district court stated:

Although the Trooper's actions were obviously a factor, the evidence does not show that in the absence of a pursuit Poston would have driven other than as he did. . . .

. . . [T]he evidence shows that Poston left Norfolk and drove at a high rate of speed to the point of the accident [which] was as likely caused by the "voice" in his head directing him to drive fast as by Trooper Sieck's pursuit.

This Court cannot find that Trooper Sieck's actions were a concurring proximate cause for the reason that Poston's high speed driving had been taking place for several miles prior to Sieck's observations. Although the chase may have been a factor, the evidence does not show that his pursuit combined with Poston's psychotic behavior to cause the accident.

The definition of vehicular pursuit is especially relevant to our decision.

[V]ehicular pursuit shall mean an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle when the

driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

§ 81-8,215.01.

The accident occurred when Poston's vehicle arrived at the intersection of Highway 275 and Grant Street in West Point at the same time the Meyer and Bacus vehicles arrived. For the pursuit to have been a proximate cause of the accident, the pursuit must have caused Poston to resist apprehension by maintaining or increasing his speed or must have caused Poston to attempt to elude Sieck while driving at speeds in excess of those reasonable under the conditions. If the actions of law enforcement caused Poston to increase his speed or attempt to elude Sieck by driving at an excessive speed, then those actions can be found to have been a proximate cause of the accident.

The district court found that the pursuit was not a proximate cause because Poston would have taken the same actions regardless of any action by law enforcement personnel who were in pursuit of Poston. We disagree and conclude that the court was clearly wrong.

A cause of injury may be a proximate cause, notwithstanding that it acted through a series of events, if the events were combined in one continuous chain to produce the accident. See *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). The test of causation is not that the particular injury could be anticipated but whether after the occurrence, the injury appears to be the reasonable and probable consequence of the acts or omissions. *Id.*

Whether Poston could have been diverted from his psychotic mission and whether the pursuit had anything to do with how Poston drove the van while on his mission are two separate issues. If the pursuit caused Poston to drive the van in an attempt to elude apprehension, then the pursuit is a proximate cause of the accident.

Poston was aware that he was being pursued by law enforcement. When he was first observed by Sieck, he was traveling at 94 miles per hour. The pursuit lasted for 27 miles, during

which time Poston's speed varied from 70 to 107 miles per hour. At several times, Poston increased his speed during the pursuit.

Because of Poston's psychotic condition, the district court discredited what he said about the pursuit, but it is not disputed that Poston knew he was being pursued and that some of his actions while driving were for the purpose of eluding his pursuer. He swerved around the roadblock and accelerated after passing the roadblock. Immediately following the accident, Poston stated, "'I knew we had to outrun that police officer because he was going to kill us.'" Poston's reasons for evading the pursuer, whether real or imagined, are not relevant to our determination. What is important is the fact that at certain times, Poston's actions were a result of his attempts to evade his pursuer.

It was not disputed that Poston was trying to resist apprehension. Sieck stated that Poston was attempting to elude him. Schultz stated that Poston was obviously aware of the roadblock and that the van accelerated as it passed the roadblock. After passing the roadblock, Poston accelerated and continued into West Point. Sieck continued to pursue Poston through the roadblock and into West Point.

The roadblock was a factor in the pursuit. It was initiated at the specific request of Sieck in an attempt to apprehend Poston. Poston attempted to elude law enforcement when he encountered the roadblock. As Poston approached the roadblock, he altered his speed, swerved to avoid the cars, and then accelerated. Poston's actions were the result of Sieck's attempt to apprehend Poston. The pursuit and the roadblock were factors contributing to Poston's arrival at the intersection of Highway 275 and Grant Street at a time which resulted in the accident.

Section 81-8,215.01 creates strict liability on the part of the State when a claimant suffers death or injury which is proximately caused by the actions of a pursuing law enforcement officer and the claimant is an innocent third party. See *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993). Meyer was an innocent third party who died as a result of the accident. The pursuit of Poston, which included the use of a roadblock, was, at a minimum, a proximate cause of the accident. Sieck's

actions set in motion a series of events through which the accident occurred. These events were combined in one continuous chain which ultimately resulted in the accident.

The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong. *Stewart v. City of Omaha, supra*. We find that the district court was clearly wrong in determining that the pursuit was not a proximate cause of the accident.

The estate also objects to the district court's admission and adoption of Davis' opinion that the pursuit was an extraneous factor that did not affect Poston's actions. Because we find that the court erred in entering judgment for the State, the cause must be remanded for a determination of damages only. Davis' opinion relates to the issue of liability, and it is therefore unnecessary to address this assignment of error.

CONCLUSION

The district court was clearly wrong in finding that the pursuit was not a proximate cause of the accident which resulted in Meyer's death. Therefore, the judgment is reversed, and the cause is remanded for a new trial on the issue of damages.

REVERSED AND REMANDED FOR A NEW TRIAL
ON THE ISSUE OF DAMAGES.

WRIGHT, J., participating on briefs.

MURIEL A. BACUS, APPELLANT, v.
STATE OF NEBRASKA, APPELLEE.
KYLE BACUS, A MINOR, BY MURIEL A. BACUS, HIS NEXT
FRIEND AND CONSERVATOR, APPELLANT, v.
STATE OF NEBRASKA, APPELLEE.
RICHARD J. BACUS, A MINOR, BY MURIEL A. BACUS,
HIS NEXT FRIEND AND CONSERVATOR, APPELLANT, v.
STATE OF NEBRASKA, APPELLEE.
650 N.W.2d 241

Filed August 9, 2002. Nos. S-01-277 through S-01-279.

Appeals from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Reversed and remanded for a new trial on the issue of damages.

Jeff C. Miller and Malcolm D. Young, of Young & White, for appellants.

Douglas L. Kluender and Jay L. Welch, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellee.

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

PER CURIAM.

Muriel A. Bacus (Bacus) and her two sons, Kyle Bacus and Richard J. Bacus, sustained injuries as a result of a three-vehicle accident. The driver of one of the other vehicles, Ramona C. Meyer, was killed. At the time of the accident, Donald C. Poston, the driver of the van which struck the other two vehicles, was being pursued by a Nebraska State Patrol trooper. Bacus, on behalf of herself and her sons, filed these actions against the State of Nebraska. The district court for Cuming County entered judgment for the State, and Bacus appeals.

The issues raised in these appeals are identical to those raised in *Meyer v. State*, ante p. 545, 650 N.W.2d 459 (2002). It is therefore unnecessary to restate the facts and analysis. In *Meyer*, we concluded that the plain language of Neb. Rev. Stat. § 81-8,215.01 (Reissue 1994) (which was in effect at the time of the accident) requires that the actions of a law enforcement officer during a vehicular pursuit be merely a proximate cause of

the damage, and not the sole proximate cause. We held that the district court was clearly wrong in finding that the vehicular pursuit was not a proximate cause of the accident which resulted in the injuries to the Bacuses.

Therefore, the judgment of the district court is reversed, and the cause is remanded for a new trial on the issue of damages.

REVERSED AND REMANDED FOR A NEW TRIAL
ON THE ISSUE OF DAMAGES.

WRIGHT, J., participating on briefs.

ROSIE RODRIGUEZ, APPELLANT, v. JESS C. NIELSEN,
DOING BUSINESS AS NIELSEN & BIRCH, APPELLEE.

650 N.W.2d 237

Filed August 9, 2002. No. S-01-612.

1. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
3. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In civil legal malpractice actions, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client.
4. **Criminal Law: Malpractice: Attorney and Client: Claims: Proof.** In cases involving alleged malpractice in the defense of a criminal matter, a convicted criminal who files a legal malpractice claim against his or her defense counsel must also allege and prove that he or she is innocent of the underlying crime.
5. **Actions: Pleadings.** A petition need not state a cause of action or defense in any particular form as long as the petition states in a logical and legal manner the facts which constitute the cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.
6. ____: _____. It is the facts well pled, not the theory of recovery or legal conclusions, which state a cause of action.
7. **Self-Defense.** Justification of the use of force in self-defense is a statutorily defined affirmative defense in Nebraska.

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

Lori L. Phillips, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Stephen W. Kay and Harold W. Kay, of Kay and Kay, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Rosie Rodriguez brought this malpractice action against her former attorney, Jess C. Nielsen, alleging that his representation of her in a misdemeanor criminal action was negligent. The district court sustained Nielsen's demurrer to Rodriguez' fourth amended petition and gave her 20 days to amend. She did not further amend, and the case was dismissed. Rodriguez appeals.

SCOPE OF REVIEW

[1] Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

FACTS

In November 1996, Rodriguez filed suit against Nielsen. The district court sustained Nielsen's demurrer, and Rodriguez filed an amended petition alleging, among other things, that Nielsen owed her a duty of care to represent her in a competent manner, that Nielsen was negligent in the performance of such duty, and that Nielsen's negligence was the proximate cause of Rodriguez' damages. Part of Nielsen's answer alleged that Rodriguez' amended petition failed to state a cause of action.

Nielsen then filed a motion for summary judgment, alleging there was no genuine issue as to any material fact and that he was entitled to judgment as a matter of law. The district court sustained the summary judgment motion, and Rodriguez appealed. We reversed the judgment and remanded the cause

with directions, concluding that Rodriguez should have been given the opportunity to amend her petition. *Rodriguez v. Nielsen*, 259 Neb. 264, 609 N.W.2d 368 (2000).

On remand, the district court sustained Nielsen's demurrer to Rodriguez' fourth amended petition. When Rodriguez did not further amend, the court dismissed her petition. Rodriguez timely appealed.

ASSIGNMENT OF ERROR

Rodriguez claims the district court erred in finding that she failed to allege sufficient facts to support her allegation of innocence.

ANALYSIS

This matter is before us following the dismissal of Rodriguez' fourth amended petition. The relevant portions of the petition alleged:

14. That the Plaintiff was not guilty of the charges for which she was convicted for the following reasons:

A. That on the date the alleged assault took place Michelle Mora, the alleged victim, was present with her mother at the mall in North Platte, yelling obscenities at the Plaintiff and her daughter and threatening the Plaintiff and her daughter with statements such as "I'm going to kick your ass."

B. That the Plaintiff and her daughter attempted to leave the mall in order to avoid a confrontation with the alleged victim and her mother when Michelle Mora grabbed the Plaintiff by the arms and prevented her from leaving the mall.

C. That the Plaintiff made numerous requests for Michelle Mora to let her go, and that Michelle Mora's response was to squeeze the Plaintiff's arms so hard her fingernails broke the skin on her left arm.

D. That in order to free herself from Michelle Mora's grasp and to protect herself from Michelle Mora the Plaintiff had to use force to repel the alleged victim.

[2] In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as

alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Tilt-Up Concrete v. State City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001). We therefore review Rodriguez' fourth amended petition to determine whether the district court erred in sustaining Nielsen's demurrer. The question is whether Rodriguez has alleged facts that support her allegation of innocence. This is a question of law; therefore, we will reach a conclusion independent of that of the district court. See *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[3,4] Generally, in civil legal malpractice actions, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client. *Rodriguez v. Nielsen*, 259 Neb. 264, 609 N.W.2d 368 (2000); *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991). However, in cases involving alleged malpractice in the defense of a criminal matter, a convicted criminal who files a legal malpractice claim against his or her defense counsel must also allege and prove that he or she is innocent of the underlying crime. See *Rodriguez, supra*. In *Rodriguez*, we set forth the allegations required to state a cause of action for legal malpractice by a convicted criminal against his or her defense lawyer. The convicted criminal must, in addition to the usual requirements of employment, duty, breach, proximate cause, and damage, allege facts supporting an allegation of innocence. See *id.* Therefore, to properly state a cause of action, Rodriguez must allege facts to demonstrate innocence of the underlying crime of which she was convicted.

[5,6] A petition need not state a cause of action or defense in any particular form as long as the petition states in a logical and legal manner the facts which constitute the cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute. *Nuss v. Alexander*, 257 Neb. 36, 595 N.W.2d 263 (1999). It is the facts well pled, not the theory of recovery or legal conclusions, which state a cause of

action. *Id.*, quoting *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993).

In *Rodriguez*, 259 Neb. at 271, 609 N.W.2d at 373-74, we stated:

Unless a plaintiff can establish his or her innocence of the underlying criminal charges, the law views the criminal conduct as the legal cause of damages, and not the attorney's malpractice. . . . Thus, public policy prohibits a convicted criminal from bringing a malpractice action against his or her attorney because allowing such a claim would provide the criminal with an opportunity to profit either directly or indirectly from his or her criminal conduct.

(Citations omitted.)

[7] In considering the demurrer, we are required to give Rodriguez the benefit of all reasonable inferences from the facts alleged in her fourth amended petition. Rodriguez does not allege actual innocence or set forth any facts that would establish her actual innocence. Instead, she alleges that she acted in self-defense. Justification of the use of force in self-defense is a statutorily defined affirmative defense in Nebraska. *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999). Neb. Rev. Stat. § 28-1409(1) (Reissue 1995) provides that "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."

Rodriguez has not denied that she committed the acts but has implied that the acts were the result of a reasonable and good faith belief in the necessity of using force and that the force used was immediately necessary and justified under the circumstances. See *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). Giving Rodriguez the benefit of all reasonable inferences from the facts alleged, she has not alleged and cannot prove actual innocence.

Rodriguez did not allege that she was absent at the time of the incident or that she did not commit the acts which occurred. Instead, Rodriguez alleged she committed the acts but that the acts were in self-defense. In the context of this civil malpractice action, these allegations of fact do not demonstrate actual

innocence. Therefore, Rodriguez' allegations do not establish that she is innocent of the crime of which she was convicted.

CONCLUSION

The district court did not err in sustaining the demurrer and dismissing Rodriguez' petition when she failed to amend. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, v.
DWIGHT L. ROSSBACH, APPELLEE.
650 N.W.2d 242

Filed August 16, 2002. No. S-00-1313.

1. **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.
2. **Constitutional Law: Criminal Law: Preliminary Hearings.** A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of the Nebraska Constitution.
3. **Criminal Law: Preliminary Hearings: Probable Cause.** A preliminary hearing is not a trial of the person charged in regard to his or her guilt or innocence; rather, the purpose of a preliminary hearing is to ascertain whether or not a crime has been committed and whether there is probable cause to believe the accused committed it.
4. **Probable Cause: Evidence: Verdicts.** Evidence that would justify a committing magistrate in finding that probable cause existed for the detention of a defendant need not necessarily be sufficient to sustain a verdict of guilty when he or she is placed on trial.
5. **Preliminary Hearings: Proof.** The rule that an accused is entitled to the benefit of a reasonable doubt does not apply in preliminary examinations.
6. **Criminal Law: Preliminary Hearings: Probable Cause: Evidence.** The test at a preliminary hearing is not whether guilt is established beyond a reasonable doubt, but, rather, whether evidence is adduced that shows a crime was committed and that there is probable cause to believe that the accused committed the crime.
7. **Sexual Assault.** The victim's lack of consent is not an element of the crime of sexual assault when the victim is incapable of resisting or appraising the nature of his or her conduct.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Exception sustained, and cause remanded for further proceedings.

Kay E. Tracy, of the Hall County Attorney's Office, for appellant.

Kirk E. Naylor, Jr., for appellee.

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

GERRARD, J.

The State filed a complaint in the district court charging the appellee, Dwight L. Rossbach, with two counts of first degree sexual assault pursuant to Neb. Rev. Stat. § 28-319(1)(b) (Reissue 1995). A preliminary hearing was held in the district court, and the court refused to bind Rossbach over for trial and dismissed the charges against him. The State initiated error proceedings, arguing that there was sufficient evidence adduced to bind Rossbach over for trial in the district court. We agree, and remand this cause to the district court for further proceedings in accordance with Neb. Rev. Stat. § 29-2316 (Reissue 1995).

FACTUAL BACKGROUND

The State initially filed a complaint in the county court for Hall County, alleging that Rossbach committed first degree sexual assault against A.H. and L.N., pursuant to § 28-319(1)(b). Section 28-319(1) states that "[a]ny person who subjects another person to sexual penetration . . . (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct . . . is guilty of sexual assault in the first degree." The county court conducted a preliminary hearing and dismissed the initial complaint after finding that the evidence indicated that a crime had not been committed by the accused.

The State refiled an identical complaint directly in the district court, and the parties stipulated that a preliminary hearing could be conducted in the district court based upon the record of the proceedings held in the county court. At the district court preliminary hearing, the court received 12 exhibits, including transcribed testimony from six witnesses, including A.H. and L.N., previously offered at the county court hearing. Additionally, the parties stipulated regarding testimony that would be

given by a chemist employed by the Nebraska Department of Motor Vehicles.

The State alleges that on February 10, 2000, Rossbach sexually assaulted A.H. and L.N. at his home. At that time, A.H. and L.N. were 17 and 16 years old, respectively, and attended a small central Nebraska high school. Rossbach, at that time, was a 44-year-old Spanish language teacher at the same high school. Rossbach had L.N. as a student in a class during the 1999-2000 school year; A.H. was not then a student of Rossbach, but had been in the past. The testimony and the evidence from the preliminary hearing reveal the following: In December 1999, A.H. began e-mailing Rossbach after she and L.N. found his e-mail address in another teacher's classroom. A.H. testified that she and her friends composed an e-mail to Rossbach during lunchtime, and A.H. sent it to Rossbach on a dare from her friends. At some point prior to February 10, 2000, A.H. and L.N. showed Rossbach identical tattoos that they each had near the pelvis—a four-leaf clover with the saying “lucky you.” The high school principal testified that prior to February 10, he received a warning from another high school teacher that A.H. had mentioned an attraction to both Rossbach and the principal, and A.H. expressed a desire to have sex with them.

The evidence also showed that A.H. had been hospitalized for alcohol poisoning in October 1999 and that she had spoken with Rossbach about it. Upon hearing this, Rossbach, according to A.H., told her that she “shouldn’t drink so much.” A.H. also testified that she has been taking Zoloft, an antidepressant medication, for approximately 2 years and had been on antidepressants since she was in fifth grade. A.H. mentioned her antidepressant medication to L.N. while at Rossbach’s home on February 10, 2000, and A.H. thought that Rossbach probably heard the exchange.

In an e-mail to Rossbach dated February 9, 2000, A.H. wrote, “I know that you could lose your job But I know I want to do this. . . . I can hardly get my mind off of you, I undress you with my eyes just walking pass [sic] you in the hallway.” A.H. testified that she wrote this e-mail in response to prior conversations with Rossbach in which he expressed a desire to have sex with A.H., but said he could lose his job if anyone found out. A.H. testified that although her flirtation with Rossbach might

have made it seem like she reciprocated his desire, she never actually told him that she wanted to have sex with him. Rossbach invited A.H. to his home during the week of February 10, e-mailed her directions to his home, and mentioned specifically that his wife would be out of town.

The evidence revealed that on the evening of February 10, 2000, A.H. and L.N. attended a party in Grand Island, Nebraska, where they each consumed alcoholic beverages. A.H. testified that she drank four bottles of "Two Dogs," an alcoholic beverage, and a "Reserves" wine cooler at the party and that before 9 p.m., was "buzzing" and "had a light head." L.N. testified that before they left the party at 8:30 p.m., she drank a "Reserves" wine cooler and two bottles of "Two Dogs" alcoholic beverage and felt "too drunk to drive." L.N. testified that she and A.H. had not previously agreed to go to Rossbach's home, but decided to go once they were in the car after the party. A.H. had brought the written directions to Rossbach's home and had left them in L.N.'s car. A.H. drove L.N.'s car to Rossbach's home, approximately 20 miles away from the party in Grand Island.

Upon arriving at Rossbach's home, A.H. and L.N. entered without knocking. A.H. and L.N. found Rossbach in his kitchen, where he gave them tequila and beer. L.N. stated that Rossbach was not drinking alcohol, but "some kind of pop." Rossbach knew that A.H. and L.N. had been drinking, as A.H. brought a bottle of "Reserves" with her into Rossbach's home and he tasted it. A.H., when asked how she physically felt while at Rossbach's home, testified that she felt dizzy, had trouble walking, talked fast, slurred her speech, and laughed a lot. L.N. testified that she felt sick but was laughing and did not feel like she was going to pass out.

Rossbach told the high school principal that after talking with A.H. and L.N., he went into the bathroom adjacent to his bedroom. Upon exiting the bathroom, Rossbach found A.H. and L.N. in his bed. L.N. stated that Rossbach had removed some of her clothing before he entered the bathroom; while he was in the bathroom, A.H. suggested that L.N. should remove the rest of her clothes. L.N. testified that she removed her shirt at A.H.'s suggestion, although she did not want to. A.H. and L.N. both testified that though they did not intend to have sex with Rossbach when

going to his home, Rossbach sexually penetrated both of them. A.H. and L.N. remembered having sex with Rossbach. L.N. testified that she does not remember driving herself back from Rossbach's home, because she was feeling "spaced out."

A.H. testified that she had sex with Rossbach willingly and e-mailed him again after February 10, 2000. On February 14, A.H. e-mailed Rossbach:

I dont know Senor, I havent been able to stop thinking about you and everything else. Every time I turn around there you are . . . I have a feeling that I'm gonna fall and that I'm gonna fall hard. I have all these wierd [sic] feelings and thoughts and I just dont know what to do. I get jealous when I see other women in school talking to you. Its stupid, I know, but I do. I want it all, but its all so hard. I just dont know. What do you think?? So when am I gonna get to play again??

Your little "TOY"
me

In an e-mail to Rossbach dated February 16, 2000, A.H. wrote: [W]hen ever [sic] you want to have a little fun, you know how to get ahold of me. And like we discussed, it will only be the two of us. . . . But like I said, dont worry about [L.N.] She just wishes that she never would of done it and shes starting to forget about it. I'm the one whos waiting for more of it.

Again, A.H. signed the e-mail "Your little Toy."

At the preliminary hearing, the State also offered the testimony of Dr. Susan Howard, an expert qualified in adolescent medicine and psychiatry. Howard opined that A.H. and L.N. were mentally or physically incapable of resisting or appraising the nature of their conduct when they had sex with Rossbach. She based this opinion on a reading of the police records, her knowledge of child development, psychiatric issues, and her medical knowledge of the effects of alcohol on judgment and decisionmaking ability. It was Howard's opinion that A.H. and L.N. were incapable of resisting or appraising the nature of their conduct because of (1) A.H.'s and L.N.'s relative ages and stages of development, (2) their level of alcohol consumption, and (3) the imbalance of authority inherent in the student-teacher relationship.

The parties also stipulated at the preliminary hearing that were the State's chemist called to testify, he would opine that A.H.'s blood alcohol content ranged from .310 to .370 at 9 p.m. on February 10, 2000, and that her blood alcohol content increased to a range of .317 to .430, and possibly as high as .500 (depending on the alcohol consumed) at the time of the alleged assault around midnight. Though the stipulation is not specific on the basis of the measurement, it appears from the record that the court and the parties understood the measurement of the alcohol content to be grams of alcohol per 100 milliliters of blood, or its equivalent. The chemist, if called, would have also testified that L.N.'s blood alcohol content ranged from .126 to .186 at 9 p.m. on February 10 and that the range increased up to .202, "with an average" of .149 or .170 (depending on the alcohol consumed) at the time of the alleged assault around midnight. The chemist formed these opinions from a hypothetical based on A.H.'s and L.N.'s self-reporting with respect to the amount of alcohol consumed and the time of consumption, and their respective body weights. Rossbach did not stipulate that the amounts of consumption utilized by the chemist in answering the hypothetical question were, in fact, the amounts consumed by A.H. and L.N. The court accepted the parties' stipulation regarding the offer of testimony by the State's chemist.

The district court determined in its order of dismissal that the State did not show that a crime, as defined by § 28-319(1)(b), had been committed. The court stated in its order that "[t]hese alleged victims . . . were capable of resisting arranging [sic] this sexual encounter and were capable of appraising the nature of their conduct" Further, the district court, without assessing the culpability of Rossbach, reasoned that

the alleged victims consumed the vast majority of the alcohol voluntarily and had the capacity to make a decision to travel in a car in excess of 20 miles, engage in the sexual relationship, discuss the ramifications of the relationship, and . . . the capacity to continue to try to foster the relationship.

Thus, the court, at the preliminary hearing stage, dismissed the two counts of first degree sexual assault against Rossbach. The State takes exception to the judgment of the district court

pursuant to the error proceedings set forth in Neb. Rev. Stat. § 29-2315.01 (Reissue 1995).

ASSIGNMENT OF ERROR

The State assigns that the district court erred in dismissing the charges at the preliminary hearing rather than binding Rossbach over to stand trial on two counts of first degree sexual assault, pursuant to § 28-319(1)(b).

STANDARD OF REVIEW

[1] 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. *State v. Haltom*, 263 Neb. 767, 642 N.W.2d 807 (2002).

ANALYSIS

[2] We have long recognized that a preliminary hearing did not exist at common law. A preliminary hearing is a creature of statute, and its functional purpose is stated in Neb. Rev. Stat. § 29-506 (Reissue 1995). A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of the Nebraska Constitution. *Delay v. Brainard*, 182 Neb. 509, 156 N.W.2d 14 (1968). See *State v. O'Kelly*, 175 Neb. 798, 124 N.W.2d 211 (1963).

[3] A preliminary hearing is not a trial of the person charged in regard to his or her guilt or innocence. See, *Delay, supra*; *State v. Sheldon*, 179 Neb. 377, 138 N.W.2d 428 (1965). Instead, the purpose of a preliminary hearing is to ascertain whether or not a crime has been committed and whether there is probable cause to believe the accused committed it. See, *State v. Wilkinson*, 219 Neb. 685, 365 N.W.2d 478 (1985); *State v. Ruzicka*, 218 Neb. 594, 357 N.W.2d 457 (1984); *State v. Howard*, 184 Neb. 274, 167 N.W.2d 80 (1969); *Delay, supra*; *Fugate v. Ronin*, 167 Neb. 70, 91 N.W.2d 240 (1958). The effect of the foregoing, if found to exist, is to hold the accused for trial in district court, which has jurisdiction to try the accused. *Delay, supra*. See *Fugate, supra*.

[4] Thus, the question before us is not whether the State proved the accused guilty beyond a reasonable doubt, but, rather, whether the State had adduced enough evidence, if believed by a trier of fact, that would show that a first degree sexual assault had been

perpetrated and that there is probable cause to believe the accused committed the act(s). Evidence that would justify a committing magistrate in finding that probable cause existed for the detention of a defendant need not necessarily be sufficient to sustain a verdict of guilty when he or she is placed on trial. See, *Delay, supra*; *Neudeck v. Buettow*, 166 Neb. 649, 90 N.W.2d 254 (1958).

[5,6] The rule that the accused is entitled to the benefit of a reasonable doubt does not apply in *preliminary* examinations. *Delay, supra*. The test is not whether guilt is established beyond a reasonable doubt, but, rather, whether evidence is adduced that shows a crime was committed and that there is probable cause to believe that the accused committed the crime. See, *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000); *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982). Any alteration to this rule, when we require prompt preliminary hearings, would tend to make the preliminary hearing a trial and could seriously impede the flow of criminal prosecutions. See *Delay, supra*.

The issue on appeal, therefore, is whether the State had adduced sufficient evidence at the preliminary hearing to bind Rossbach over for trial on two counts of first degree sexual assault. In other words, assuming the evidence to be true, see *Delay, supra*, is there evidence worthy of consideration that would tend to show that the crime of first degree sexual assault was committed in the present case? There was no dispute at the preliminary hearing stage that Rossbach was the individual who engaged in the charged conduct.

The real issue that troubled the district court, and that we now confront, is whether alleged victims of sexual assault can voluntarily intoxicate themselves so as to render themselves "physically incapable of resisting or appraising the nature of [their] conduct" under § 28-319(1)(b). Nebraska's sexual assault statutory scheme provides the answer.

There are three distinct ways in which a perpetrator can commit the offense of first degree sexual assault under § 28-319(1). In addition to compelled or coerced sexual penetration pursuant to § 28-319(1)(a), a perpetrator 19 years or older may commit first degree sexual assault by subjecting a victim that is less than 16 years of age to sexual penetration. See § 28-319(1)(c). Furthermore, Nebraska's first degree sexual assault law prohibits,

without qualification, a perpetrator from sexually penetrating a victim that the attacker knows or should have known is “mentally or physically incapable of resisting or appraising the nature of his or her conduct.” § 28-319(1)(b). Nothing in the plain language or legislative history of § 28-319(1)(b) limits or qualifies the “incapable of resisting or appraising the nature of his or her conduct” phrase—a fact significant to our analysis.

Common-law authorities treated intercourse with an unconscious woman as rape and occasionally expanded this rule to cases where the female was not technically unconscious but was so incapacitated by alcohol or drugs as to be in a condition of utter insensibility or stupefaction. See, e.g., *Hirdes v. Ottawa Circuit Judge*, 180 Mich. 321, 146 N.W. 646 (1914); *Commonwealth v. Burke*, 105 Mass. 376 (1870); *State v. Stoyell*, 54 Me. 24 (1866); A.L.I., Model Penal Code and Commentaries § 213.1, comment 1 (1980). Most current statutes, however, differentiate unconsciousness from lesser impairment and require in the latter case that the drug or intoxicant be administered by or with the privity of the defendant in order to constitute the highest degree of forcible rape. See, e.g., Cal. Penal Code § 261(a)(3) (West 1999); Idaho Code § 18-6101(4) (Michie Cum. Supp. 2002); La. Rev. Stat. Ann. § 14:43A(1) (West 1997); N.H. Rev. Stat. Ann. § 632-A:2I(f) (Cum. Supp. 2001); N.D. Cent. Code § 12.1-20-03(1)b (1997); Ohio Rev. Code Ann. § 2907.02(A)(1)(a) (Anderson 1999); A.L.I., Model Penal Code and Commentaries, *supra*, comment 5.

The principal modern deviation from this view is the New York statute, under which the incapacitating substance must be administered without the consent of the victim, and the defendant has an affirmative defense if he did not know of the facts or conditions giving rise to the victim’s incapacity to consent. N.Y. Penal Law § 130.10 (McKinney 1998). If the defendant did have such knowledge, however, New York declares him guilty of a lesser offense of rape without requiring that the defendant act with the purpose of preventing resistance or even that he administer the substance in question. *Id.*; N.Y. Penal Law §§ 130.00(6) and 130.25(1) (McKinney 1998). Many states require that the intoxicant be given without the victim’s consent. See, e.g., Ala. Code § 13A-6-60(6) (1994); Colo. Rev. Stat. Ann. § 18-3-402(1)(d) (West 1999); Ky. Rev. Stat. Ann. § 510.010(5) (Michie 1999).

Nebraska, however, is among a handful of states that substantially codifies the common-law view. In these states, the statute requires that the victim be under the influence of an intoxicant or be mentally or physically incapacitated, but does not require that the defendant administer the intoxicant or that the victim be given the intoxicant without consent. See § 28-319(1)(b). See, also, Ariz. Rev. Stat. Ann. § 13-1401(5)(b) (West 2001); Iowa Code Ann. § 709.1(1) (West Cum. Supp. 2002); Kan. Stat. Ann. § 21-3502(a)(1)(C) (Cum. Supp. 2001); Mont. Code Ann. § 45-2-101(40) (1999). Nebraska and these other states grade the offense at the same level as forcible rape.

[7] No qualification or lesser offense exists with regard to voluntary intoxication in Nebraska. Plain and simple, any person who subjects another person to sexual penetration, who knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct, is guilty of first degree sexual assault. § 28-319(1)(b). The victim's lack of consent is not an element of the crime of sexual assault when the victim is incapable of resisting or appraising the nature of his or her conduct. See, *State v. Collins*, 7 Neb. App. 187, 583 N.W.2d 341 (1998); *In re Interest of J.M.*, 223 Neb. 609, 391 N.W.2d 146 (1986). Under § 28-319(1)(b), the two-part analysis requires a significant abnormality, such as severe intoxication or other substantial mental or physical impairment, on the part of the alleged victim, and knowledge of the abnormality on the part of the alleged attacker. See *Collins*, *supra*.

With that in mind, we apply the plain language of § 28-319(1)(b) to the present facts to determine whether there was sufficient evidence (assuming the evidence to be true) that would tend to show that a crime had been committed such as to bind Rossbach over for trial in the district court. As noted earlier, § 28-319(1) provides that "[a]ny person who subjects another person to sexual penetration . . . (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct . . . is guilty of sexual assault in the first degree."

As we view the record for purposes of a preliminary hearing, the State has adduced sufficient evidence, if proved beyond a reasonable doubt at trial and believed by a trier of fact, of acts

that would constitute the crime of first degree sexual assault as defined by § 28-319(1)(b). Without repeating in detail the facts set forth earlier in the opinion, we note that the evidence revealed, at a minimum, significant mental or physical abnormality on the part of both A.H. and L.N. in the hour(s) prior to the alleged sexual assault. A.H. had a blood alcohol content that potentially ranged from .370 at 9 p.m. on February 10, 2000, to .430, or higher, at or around the time of the alleged sexual assault. L.N. had a blood alcohol content that potentially ranged from .186 at 9 p.m. on February 10 up to .202, at or around the time of the alleged sexual assault. Howard testified, *inter alia*, that because of both women's ages and stages of development, along with the high level of alcohol consumption, A.H. and L.N. were incapable of resisting Rossbach or appraising the nature of their conduct.

Further, evidence was adduced indicating that Rossbach knew or should have known of the significant mental or physical abnormalities of both women on the evening of February 10, 2000. In addition to the high blood alcohol contents of both women, the evidence showed that the women felt dizzy, had trouble walking, and slurred their speech. Rossbach gave A.H. and L.N. more alcohol after they arrived at his home, prior to the alleged assaults. The fact that A.H. and L.N. had voluntarily consumed substantial amounts of alcohol earlier in the evening does not lessen the culpability of Rossbach. There was no dispute at the preliminary hearing that Rossbach subjected both A.H. and L.N. to sexual penetration during the evening of February 10.

Given the facts presented at the preliminary hearing, including the expert testimony of Howard and the State's chemist (which may be contested at trial but was undisputed at the preliminary hearing), we conclude that the State has adduced enough evidence at this stage of the proceedings to show that the crime(s) were committed and probable cause to believe that Rossbach committed the crime(s). We determine as a matter of law that the State has adduced enough evidence at the preliminary hearing to bind Rossbach over to stand trial on two counts of first degree sexual assault in the district court. Ultimately, of course, under our statutory and constitutional system, it will be a trier of fact

that will determine whether the State has proved beyond a reasonable doubt that Roszbach subjected A.H. and L.N. to sexual penetration at a time when they were mentally or physically incapable of resisting or appraising the nature of their conduct.

CONCLUSION

For the foregoing reasons, we sustain the exception taken by the State, pursuant to § 29-2315.01. Because jeopardy did not attach at the preliminary hearing, we remand the cause to the district court for further proceedings consistent with this opinion and in accordance with § 29-2316.

EXCEPTION SUSTAINED, AND CAUSE REMANDED
FOR FURTHER PROCEEDINGS.

MCCORMACK, J., participating on briefs.

HENDRY, C.J., not participating.

AMERICAN BUSINESS INFORMATION, INC., ET AL., APPELLEES, V.
MARY JANE EGR, STATE TAX COMMISSIONER, AND NEBRASKA
DEPARTMENT OF REVENUE, APPELLANTS.

650 N.W.2d 251

Filed August 16, 2002. No. S-01-470.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____: _____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
4. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
5. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

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

Richard P. Jeffries, of Kutak Rock, L.L.P., for appellees.

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

McCORMACK, J.

NATURE OF CASE

The Nebraska Department of Revenue and State Tax Commissioner Mary Jane Egr appeal from an order of the district court for Lancaster County. At issue is whether sales of certain products by American Business Information, Inc., now known as infoUSA Inc. (ABI), are "sales of tangible personal property" under Neb. Rev. Stat. § 77-2734.14 (Reissue 1990).

BACKGROUND

ABI provides comprehensive business data and products to other businesses to help those businesses find new customers. The data and products are derived from ABI's database, which contains entries from over 10 million businesses in the United States and Canada. The database is compiled using yellow page directories and other sources of public information. ABI also conducts telephone verification of its database to ensure that the database is accurate and up to date.

Using this database, ABI markets a number of customized and noncustomized products. Customized products include only businesses meeting criteria specified by the customer and are produced in the type of medium requested by the customer. Generally, customized products are priced on a per-name basis. Pricing varies according to the number of names supplied, the type of data delivered, and the medium on which the data is delivered. ABI distributes its products under agreements that grant customers a license to use ABI's products in the ordinary course of their businesses and prohibit the unauthorized reproduction of

ABI's products. The types of products marketed by ABI, and which are the subjects of this appeal, are described below.

The most basic product marketed by ABI is the prospect list. Prospect lists, which are customized products, are printed on 8½- by 11-inch paper and contain entries on individual businesses. The data reported include a business' name, address, telephone number, fax number, type of business, number of employees, sales volume, and other information. Prospect lists are typically three-hole-punched for use in a notebook binder. Prospect lists have a variety of marketing applications, including direct sales.

ABI also markets 3- by 5-inch index cards to its customers. Index cards are also customized products and contain the same data as prospect lists. On the back of each card, space is provided where comments may be written. Index cards are often used for telemarketing purposes because of the convenience of distributing them to numerous sales associates. Index cards were developed by ABI in response to customers' comments about the limitations of prospect lists.

ABI also provides business data via computer diskettes and magnetic tapes. Each of these media is a customized product. Each allows the customer to obtain the data the customer desires from ABI and then to format that data in the manner the customer chooses to produce its own reports, labels, cards, et cetera. The only difference between computer diskettes and magnetic tapes is that magnetic tapes are suitable for use on large mainframe computers.

CD-ROM's are noncustomized products. Each CD-ROM contains the entire ABI database, enabling customers to access and format the data they need. CD-ROM's are "metered" so that customers have access to only the number of records paid for by the customer.

ABI also delivers online data from its database by computer communications over telephone lines. Customers purchasing online data use computer equipment capable of receiving, interpreting, and storing an electronic signal transmitted by ABI. Customers are able to conduct their own search query and download data directly from ABI's database.

Two other products not at issue in this appeal, mailing labels and business directories, are also marketed by ABI. Business directories are bound volumes and are noncustomized products. Mailing labels are customized products and can be directly attached to brochures for direct mail use. ABI and the department have stipulated that sales of business directories and mailing labels are “[s]ales of tangible personal property” under § 77-2734.14(2).

During 1990 and 1991, ABI and its shareholders filed income tax returns which reflected their opinion that the sales of the aforementioned products were “[s]ales of tangible personal property” under § 77-2734.14(2). The department audited ABI for the 1990 and 1991 tax years and determined that ABI’s sales were “other than sales of tangible personal property” under § 77-2734.14(3). Based on that determination, the department assessed deficiency notices to ABI for corporate income tax. During 1990 and 1991, ABI was organized as a subchapter S corporation, meaning that ABI’s income was passed on to its shareholders on a proportional basis for taxation purposes. Thus, the department also assessed deficiency notices to ABI’s shareholders for individual income taxes. ABI and its shareholders (hereinafter collectively referred to as “ABI”) protested the department’s deficiency assessments, which assessments the commissioner later sustained. ABI appealed the commissioner’s decision to the district court for Lancaster County.

The district court reversed the commissioner’s decision for two reasons. First, the district court concluded that it was not logical to conclude that the business directories and mailing labels were tangible personal property, as stipulated by the parties, while finding that ABI’s remaining products were not. Second, the district court felt compelled to reverse the decision based on the language of *May Broadcasting Co. v. Boehm*, 241 Neb. 660, 490 N.W.2d 203 (1992). In *May Broadcasting Co.*, we stated, “The mere fact that [electronic] signals may be received and stored shows that a tangible thing is in issue. The concept of physically storing an intangible thing is beyond comprehension.” 241 Neb. at 666, 490 N.W.2d at 207. The department and commissioner now appeal, and we moved the case to our docket

pursuant to our authority to regulate the docket of this court and the Nebraska Court of Appeals.

ASSIGNMENT OF ERROR

The department and commissioner assign, rephrased, that the district court erred in finding that ABI's sales of business data products were "[s]ales of tangible personal property" under § 77-2734.14(2) rather than "[s]ales, other than sales of tangible personal property" under § 77-2734.14(3).

STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

[4] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

[5] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

ANALYSIS

The income derived from the sales of ABI's products is apportioned to Nebraska pursuant to § 77-2734.14. That section provides in relevant part:

(1) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales everywhere during the tax period.

(2) Sales of tangible personal property are in this state if:

....

(3) Sales, other than sales of tangible personal property, are in this state if

Thus, the statute distinguishes between sales of tangible personal property and sales of other than tangible personal property when apportioning income to Nebraska. Because of other stipulated facts unimportant to our decision, the apportionment of ABI's income hinges on whether the sales of the prospect lists, 3- by 5-inch index cards, computer diskettes, magnetic tapes, CD-ROM's, and online information are sales of tangible personal property under § 77-2734.14(2), or whether they are sales of other than tangible personal property under § 77-2734.14(3).

In support of their argument that the sales of ABI's products are sales of other than tangible personal property, the department and commissioner cite a number of cases from other states. See, e.g., *Fingerhut Products Co. v. Commissioner of Revenue*, 258 N.W.2d 606 (Minn. 1977); *Spencer Gifts, Inc. v. Taxation Div. Director*, 182 N.J. Super. 179, 440 A.2d 104 (1981); *Dun & Bradstreet, Inc. v. City of New York*, 276 N.Y. 198, 11 N.E.2d 728 (1937); *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn. 1976); *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166 (Tex. 1977); *Janesville Data Center v. Dept. of Revenue*, 84 Wis. 2d 341, 267 N.W.2d 656 (1978). The courts in each of these cases concluded that under the law of the respective state, sales of products similar to the products sold by ABI were not sales of "tangible personal property." Instead, the courts concluded that the object or essence of the sale was the sale of intangible information and that the physical medium which conveyed that information was merely incidental or inconsequential to the transaction.

Upon review of these cases, we conclude that the department and commissioner's emphasis on them is misplaced. In each of these cases, the respective state courts inquired into the meaning of the term "tangible personal property" and interpreted that term under state law. However, in the present case, we are required to interpret that term consistent with the meaning given to it under federal law. In addition, we conclude that *May Broadcasting Co. v. Boehm*, 241 Neb. 660, 490 N.W.2d 203

(1992), which the district court relied on in this case, is not directly applicable because in *May Broadcasting Co.*, we were not required to interpret the relevant provisions of Nebraska use tax under federal law, unlike the present case. However, as discussed below, we find the reasoning of *May Broadcasting Co.* to be applicable to our analysis.

The Legislature has directed that the term "tangible personal property," as used in § 77-2734.14,

shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required.

Any reference to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1986

Neb. Rev. Stat. § 77-2714 (Reissue 1996). Thus, we consider the meaning of the term "tangible personal property" under the Internal Revenue Code of 1986.

In *Norwest Corp. & Subs. v. Commissioner*, 108 T.C. 358 (1997), the U.S. Tax Court considered whether computer software was tangible personal property or intangible personal property for purposes of federal investment tax credits. In that case, the taxpayer purchased computer software written on magnetic disks and tapes. The taxpayer's purchase entitled it to use the software on a nonexclusive, nontransferable basis for an indefinite or perpetual term. The taxpayer did not purchase any intellectual property rights in the software, nor did the taxpayer purchase the right to reproduce the software outside of its affiliated corporations.

The Tax Court held that the software was tangible personal property. Relying primarily on legislative history to reach this conclusion, the Tax Court stated that the "explicit legislative intent to define broadly the term 'tangible personal property' suggests that the term may encompass all personal property that is not intangible property in the narrow, traditional sense; i.e., rights and obligations created by law." *Id.* at 374-75.

Intangible intellectual property rights and the tangible or physical manifestations or embodiments of those rights are distinct property interests. . . . A purchaser of a particular tangible manifestation or embodiment of intellectual property acquires only property rights in that manifestation

or embodiment and does not acquire any rights to the underlying intellectual property.
(Citation omitted.) *Id.* at 375.

This distinction between the acquisition of intellectual property rights and the acquisition of a license to use the physical embodiment of intellectual property leads us to conclude that the products sold by ABI constitute tangible personal property. ABI distributes its products under agreements that grant customers a license to use ABI's products in the ordinary course of their businesses. Those agreements also contain terms and conditions prohibiting the unauthorized reproduction of ABI's products. ABI's customers acquired no intangible intellectual property rights when purchasing ABI's products.

In *Norwest Corp. & Subs.*, it was important to the Tax Court's reasoning that the magnetic disks and tapes at issue in that case had a tangible, physical manifestation or embodiment. However, an online data product similar to that in the present case was not at issue in *Norwest Corp. & Subs.* In the present case, it is clear that the prospect lists, the 3- by 5-inch index cards, the computer diskettes, the magnetic tapes, and the CD-ROM's sold by ABI have a tangible, physical manifestation or embodiment. Less clear is whether the online data sold by ABI has a tangible, physical manifestation or embodiment. However, in *May Broadcasting Co. v. Boehm*, 241 Neb. 660, 490 N.W.2d 203 (1992), this court considered whether syndicated programming purchased by a broadcaster and transmitted to the broadcaster via electronic signals was tangible personal property subject to use tax. This court concluded that it was and, in the process, stated: "A transmission by satellite is the transmission of a tangible thing—an electronic signal. The mere fact that the signals may be received and stored shows that a tangible thing is in issue. The concept of physically storing an intangible thing is beyond comprehension." *Id.* at 666, 490 N.W.2d at 207. By the same reasoning employed in *May Broadcasting Co.*, we conclude that ABI's delivery of online data electronically over telephone lines "is the transmission of a tangible thing." We therefore conclude that the sale of each of the business products at issue in the present case is a sale of "tangible personal property" under § 77-2734.14(2).

CONCLUSION

The sales of business data products by ABI are “[s]ales of tangible personal property” under § 77-2734.14(2). Thus, the decision of the district court is affirmed.

AFFIRMED.

HAROLD D. EYL, AN INDIVIDUAL, AND CITY OF WISNER,
A POLITICAL SUBDIVISION, APPELLEES, V. CIBA-GEIGY
CORPORATION, A NEW YORK CORPORATION, AND
NORTHEAST COOPERATIVE, A COOPERATIVE
ASSOCIATION, APPELLANTS.
650 N.W.2d 744

Filed September 6, 2002. No. S-00-219.

1. **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, where an issue should be decided as a matter of law.
2. **Judgments: Verdicts.** In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Constitutional Law: Statutes.** Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state laws that conflict with federal law are invalid.
6. **Constitutional Law: States: Words and Phrases.** There are three varieties of preemption: express, implied, and conflict preemption.
7. ____: ____: _____. Express preemption arises when Congress has explicitly declared federal legislation to have a preemptive effect. It can also arise when a federal agency, acting within the scope of authority conferred upon it by Congress, has expressly declared an intent to preempt state law.
8. **Federal Acts: Products Liability: Claims.** The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (1994), preempts state common-law failure-to-warn claims.
9. **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.
10. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.

Cite as 264 Neb. 582

11. **Federal Acts: Products Liability: Claims.** Claims brought against a manufacturer and distributor alleging liability for failure to place flags or other notices warning others that an herbicide had been applied are labeling claims that are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (1994).
12. ____: ____: _____. A failure-to-warn claim is preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (1994), against both the manufacturer and the distributor of the product.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Reversed and remanded with directions to dismiss.

William J. Brennan and Gerald L. Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellants.

Susan E. Fieber, of Nolan, Olson, Hansen, Fieber,
Lautenbaugh & Geren, for appellee City of Wisner.

David E. Copple and Jim K. McGough, of Copple, Rockey & McGough, P.C., for appellee Harold D. Eyl.

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

CONNOLLY, J.

A jury awarded appellee Harold D. Eyl a \$2,146,000 verdict for injuries he sustained after he was exposed to the herbicide "Pramitol 5PS" while working for appellee City of Wisner. Pramitol is manufactured by appellant Ciba-Geigy Corporation, and the City of Wisner purchased the product from appellant Northeast Cooperative, a distributor. We granted the appellants' motion to bypass.

On appeal, the appellants argue that Eyl's claims are labeling based and preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq. (1994). Eyl contends that FIFRA does not preempt his claims and asks us to overrule our decision in *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255. In the alternative, Eyl argues that because he was a bystander who should have been warned that a substance had been applied, his claims are not labeling based and that FIFRA does not apply. We determine that FIFRA applies to preempt

Eyl's failure-to-warn claims and decline to overrule *Ackles*. Accordingly, we reverse, and remand with directions to dismiss.

I. BACKGROUND

On April 9, 1993, Eyl was assigned to work at River Park in Wisner, Nebraska, where employees were setting posts and laying pea rock around playground equipment. On that morning, Donald H. Bode, an employee of the City of Wisner, applied Pramitol to prevent weeds in the playground area, which would then be covered by the pea rock. Pramitol requires water to activate it, and Bode testified that he usually wore rubber boots if it was wet.

Neither Ciba-Geigy nor Northeast Cooperative provided flags or signs that could be displayed to warn others that Pramitol had been applied in the area. A representative for Ciba-Geigy admitted that in addition to product labels, the company does send out additional pamphlets, brochures, leaflets, and news articles to suppliers or communities, but that the information must be consistent with the label.

Richard Brahmer, the general manager of Northeast Cooperative, testified that on some occasions, he would give customers information about a product that was not on the label. Brahmer stated that he was probably aware that people from the community would come in contact with Pramitol, but did not warn customers purchasing it to protect the application area. He testified that Northeast Cooperative sometimes prepared warning flags for customers of other products, because in 1996, a law was passed that required applicators to post warnings.

The label for Pramitol states, "DANGER":

Corrosive — causes eye and skin damage. Do not get in eyes, on skin or clothing. Wash clothing after handling. Wear goggles or face shield and rubber gloves when handling. Harmful if swallowed, inhaled or absorbed through the skin. . . .

If on skin: Remove contaminated clothing and immediately wash affected areas thoroughly with soap and water. The material safety data sheet for Pramitol in effect on April 9, 1993, states that if skin contact occurs, the person should wash with soap and water and should remove contaminated clothing

and wash before reuse. The data sheet advises users to wear rubber gloves, waterproof boots, a long-sleeved shirt, long pants, and a hat. The data sheet also states that Pramitol can cause chemical burns to the skin and lists it as being "extremely irritating" to the skin. A later data sheet, issued in 1994, lists the same precautions, but omits the reference to chemical burns and states that Pramitol is "non-irritating" to the skin.

Eyl was present when the Pramitol was applied. Eyl did not read the label or the data sheet for the product because he did not use the product. The data sheet was available at a city warehouse where the employees worked, and boots were available for them to wear if needed. Eyl spent the day hauling pea rock to the playground area in a wheelbarrow, which required that he walk through grass and over the playground area. He testified that there was heavy fog and that the grass was wet. Puddles of water were also in the playground area.

Eyl was wearing steel-toe leather boots with oil-resistant soles. He testified that the boots became wet and stayed wet all morning. When he got home that evening, his boots, socks, and pant legs were wet. He wore the boots again for about 5 hours the next day. After April 10, 1993, the boots turned whitish in color and became stiff and brittle.

On April 11, 1993, Eyl's feet were red and sore. Eyl first saw his physician on April 13, and at that time, Eyl's feet and ankles were swollen, red, and hot. Eyl's feet later developed ulcers and remained painful. His condition did not improve, and Eyl was later seen by a dermatologist and was referred to the Mayo Clinic in Rochester, Minnesota. Because of the condition of his feet, Eyl is permanently disabled.

After Eyl presented his case, the appellants moved for a directed verdict, arguing that labeling-based state common-law failure-to-warn claims were preempted by FIFRA. The court stated that it did not view the case as a labeling-based claim that was preempted by FIFRA and denied the motion. The appellants then adduced evidence and renewed their motion for a directed verdict. The motion was overruled.

During the jury instruction conference, the court refused an instruction on design defects and stated that the case was a failure-to-warn case. The court submitted Eyl's claims to the

jury on negligent failure to warn against both appellants. The court submitted to the jury Eyl's strict liability claim for a warning defect against only Ciba-Geigy. The only claims submitted to the jury were claims based on a theory of failure to warn. The jury found for Eyl on all claims and awarded damages. The appellants moved for judgment notwithstanding the verdict. Among the issues raised, the appellants argued that Eyl's claims were preempted by FIFRA. The motions were overruled, and judgment was entered against the appellants.

II. ASSIGNMENTS OF ERROR

The appellants assign, rephrased, that the district court erred in (1) failing to find that Eyl's failure-to-warn claims are preempted by FIFRA, (2) failing to grant their motion for a directed verdict because Eyl failed to present a prima facie case, (3) failing to find that Eyl was negligent as a matter of law in a manner that entitled them to a directed verdict, (4) allowing medical experts to testify regarding causation when the experts did not know the level and extent of Eyl's exposure to Pramitol, (5) failing to grant their motions for a mistrial, (6) allowing prejudicial evidence, (7) failing to instruct the jury on the allocation of damages, (8) instructing the jury on future medical expenses, (9) instructing the jury regarding the label approved by the Environmental Protection Agency (EPA), (10) instructing the jury about Eyl's factual claims, and (11) overruling their motions for judgment notwithstanding the verdict because the verdict was excessive.

III. STANDARD OF REVIEW

[1] 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, where an issue should be decided as a matter of law. *Bowley v. W.S.A., Inc.*, ante p. 6, 645 N.W.2d 512 (2002).

[2] In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

[3,4] Statutory interpretation presents a question of law. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). When

reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *In re Grand Jury of Douglas Cty.*, 263 Neb. 981, 644 N.W.2d 858 (2002).

IV. ANALYSIS

1. PREEMPTION

The appellants contend that FIFRA preempts Eyl's failure-to-warn claims because this court, and a large majority of other courts, have held that FIFRA preempts labeling-based common-law causes of action. See *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255 (holding that FIFRA preempts labeling-based common-law claims and citing cases from other jurisdictions).

Eyl, however, asserts that the claims are not preempted because after our decision in *Ackles*, the EPA, in an amicus brief filed in *Etcheverry v. Tri-Ag*, 22 Cal. 4th 316, 993 P.2d 366, 93 Cal. Rptr. 2d 36 (2000), expressed the opinion that FIFRA does not preempt common-law claims. The Montana Supreme Court then adopted the EPA's position that FIFRA does not preempt common-law claims. *Sleath v. West Mont Home Health Services*, 304 Mont. 1, 16 P.3d 1042 (2000), *cert. denied sub nom. Dow AgroSciences LLC et al. v. Sleath et al.*, 534 U.S. 814, 122 S. Ct. 40, 151 L. Ed. 2d 13 (2001). Eyl further argues that even if FIFRA preempts failure-to-warn claims, it does so only for labeling-based claims in which there is a failure to warn the user of the product. Eyl argues that because he was a bystander, not a user, his claims are not labeling based.

(a) Federal Preemption: General Background

[5,6] Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state laws that conflict with federal law are invalid. U.S. Const. art. VI, cl. 2. See Scott A. Smith and Duana Grage, *Federal Preemption of State Products Liability Actions*, 27 Wm. Mitchell L. Rev. 391 (2000) (citing sources). There are three varieties of preemption: express, implied, and conflict preemption. See *id.*

[7] Express preemption arises when Congress has explicitly declared federal legislation to have a preemptive effect. It can

also arise when a federal agency, acting within the scope of authority conferred upon it by Congress, has expressly declared an intent to preempt state law. *Id.* This case involves issues of express preemption.

(b) FIFRA

Originally enacted in 1947, FIFRA establishes a comprehensive regulatory scheme for the packaging of chemicals such as pesticides and herbicides. See *Ackles, supra*. The EPA is the administrative agency in charge of setting appropriate regulations. Before an herbicide may be sold, it must be registered and its labeling approved by the EPA. *Id.*; § 136a(a). The review procedure requires that an applicant submit a proposed label to the EPA for approval. The label must address various concerns, including ingredients, directions for use, and adverse effects of the product. *Ackles, supra*; § 136a(c). “The objectives and purposes of FIFRA include the strengthening of federal standards, increasing EPA authority for their enforcement, and providing a comprehensive and uniform regulation of the labeling, sale, and use of pesticides.” *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 71 (8th Cir. 1995).

FIFRA, at 7 U.S.C. § 136(p), defines label and labeling as follows:

(1) Label

The term “label” means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling

The term “labeling” means all labels and all other written, printed, or graphic matter—

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device

FIFRA contains specific preemption language for labeling-based claims, yet it also allows the states to regulate the use of a product. Section 136v provides in part:

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to

the extent the regulation does not permit any sale or use prohibited by [FIFRA].

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].

(c) *Cipollone, Medtronic, Inc., and Ackles*

The U.S. Supreme Court has never addressed the issue whether FIFRA preempts common-law causes of action. The Court, however, decided two cases involving other statutes that courts rely on when deciding issues regarding preemption under FIFRA.

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), the Court addressed the issue whether the Federal Cigarette Labeling and Advertising Act (1965 Act), as amended by the Public Health Cigarette Smoking Act of 1969 (1969 Act), preempted common-law claims—including design defect and failure-to-warn claims. The 1965 Act provided that “[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provision of this chapter.” 15 U.S.C. § 1334(b) (Supp. V 1965-69). The 1969 Act’s preemption clause provides: “No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.” 15 U.S.C. § 1334(b) (2000).

Concerning the 1965 Act, the Court stated that Congress spoke precisely and narrowly by using the term “statement.” Thus, the Court determined that on its face, the preemption section of the 1965 Act prohibited only rulemaking bodies from mandating particular cautionary statements on cigarette labels. In determining the preemptive effect of the 1969 Act—a plurality of the Court held that unlike the 1965 Act—the 1969 Act preempted state common-law failure-to-warn claims that were based on advertising. The plurality’s focus was on the terms “requirement or prohibition” in the 1969 Act. The plurality stated:

Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is

much broader. First, the later Act bars not simply “statement[s]” but rather “requirement[s] or prohibition[s] . . . imposed under State law.” Second, the later Act reaches beyond statements “in the advertising” to obligations “with respect to the advertising or promotion” of cigarettes.

Cipollone, 505 U.S. at 520.

The plurality rejected an argument that common-law damages actions do not impose “requirement[s] or prohibition[s],” stating that this argument was at odds with the plain language of the 1969 Act and the general understanding of common-law damages actions. The Court reasoned:

The phrase “[n]o requirement or prohibition” sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we noted in another context, “[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”

505 U.S. at 521, citing *San Diego Unions v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959).

The plurality also rejected an argument that the phrase “imposed under State law” excluded common-law actions, stating that it previously recognized that “State law” included common-law rules of liability. The Court noted that the preemption clause did not preempt all common law, but only those actions predicated on a theory that necessarily interferes with the 1969 Act. The Court determined that the plaintiff’s failure-to-warn claim was preempted because it was specifically at odds with the labeling requirement of the 1969 Act.

After the decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), every federal court of appeals to address the issue has held that common-law labeling-based failure-to-warn claims brought against manufacturers of pesticides or herbicides are preempted by FIFRA. See, *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255 (citing *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995);

Taylor AG Industries v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995); *Lowe v. Sporidicin Intern.*, 47 F.3d 124 (4th Cir. 1995); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King v. E.I. Dupont De Nemours and Co.*, 996 F.2d 1346 (1st Cir. 1993), *cert. dismissed* 510 U.S. 985, 114 S. Ct. 490, 126 L. Ed. 2d 440; *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied* 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248; *Arkansas-Platte & Gulf v. Van Waters & Rogers*, 981 F.2d 1177 (10th Cir. 1993), *cert. denied* 510 U.S. 813, 114 S. Ct. 60, 126 L. Ed. 2d 30).

In addition, numerous state appellate courts hold that FIFRA preempts labeling-based common-law causes of action. See, e.g., *Ackles, supra*; *Schuver v. E.I. Du Pont de Nemours & Co.*, 546 N.W.2d 610 (Iowa 1996), *cert. denied* 519 U.S. 910, 117 S. Ct. 274, 136 L. Ed. 2d 197; *Hochberg v. Zoecon Corp.*, 421 Mass. 456, 657 N.E.2d 1263 (1995); *Quest Chemical Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995); *All-Pure Chemical Co. v. White*, 127 Wash. 2d 1, 896 P.2d 697 (1995); *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 886 P.2d 869 (1994), *cert. denied* 516 U.S. 820, 116 S. Ct. 80, 133 L. Ed. 2d 38 (1995).

After the decisions of these courts, the U.S. Supreme Court, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996), revisited its decision in *Cipollone*. In *Medtronic, Inc.*, the plaintiff, who was injured when her pacemaker failed, sought to recover damages under Florida common law. The manufacturer contended that the claims were preempted under the Medical Device Amendments of 1976 (MDA).

Under the MDA, the Food and Drug Administration (FDA) prohibits marketing certain classes of medical devices, including pacemakers, without assurances that the devices are safe and effective. This requirement subjects a company to a rigorous pre-market approval process. *Medtronic, Inc., supra*. See 21 U.S.C. § 360e (1994). But the MDA provided a grandfather clause that allowed existing devices to remain on the market during the approval process. The MDA also allowed devices that were substantially equivalent to preexisting devices to avoid the rigorous approval process by filing a notice and completing a relatively

simple approval process referred to as a “‘§ 510(k) process.’” *Medtronic, Inc.*, 518 U.S. at 478. See 21 U.S.C. § 360(b). The pacemaker at issue in *Medtronic, Inc.* was approved under this “§ 510(k) process.”

The MDA provides in part:

[N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—

(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and

(2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a) (2000). The Court’s plurality held that the MDA generally does not preempt common-law damages claims.

The Court focused on the term “requirement” in the MDA. The plurality reasoned that

if Congress intended to preclude all common-law causes of action, it chose a singularly odd word with which to do it. The statute would have achieved an identical result, for instance, if it had precluded any “remedy” under state law relating to medical devices. “Requirement” appears to presume that the State is imposing a specific duty upon the manufacturer, and although we have on prior occasions concluded that a statute pre-empting certain state “requirements” could also pre-empt common-law damages claims, see *Cipollone*, 505 U.S., at 521-522 (opinion of STEVENS, J.), that statute did not sweep nearly as broadly as *Medtronic* would have us believe that this statute does.

Medtronic, Inc., 518 U.S. at 487-88.

The plurality noted that the act at issue in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), prohibited state requirements that were “based on smoking and health” and that common-law claims not based on smoking and health were not preempted. Concerning the MDA in *Medtronic, Inc.*, however, the plurality determined that an examination of the entire MDA makes it apparent that the term “‘requirements,’” as used throughout, “is linked with language suggesting that its focus is device-specific enactments of positive

law by legislative or administrative bodies, not the application of general rules of common law by judges and juries." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 489, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). See, also, *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255 (discussing *Medtronic, Inc.*).

In *Ackles*, this court held that FIFRA preempted common-law failure-to-warn claims. The plaintiff, a mail carrier, was delivering mail when he became exposed to an insecticide that was being sprayed on an adjacent cornfield. He then sought damages under theories of negligence and strict liability based on a failure of the manufacturer to warn him of the danger.

We addressed both *Cipollone* and *Medtronic, Inc.* and stated: "[W]hile at first blush *Medtronic, Inc.* appears to retreat from the preemption analysis put forth in *Cipollone*, it was the separate and distinct statutes that were involved in each case that were the determining factor." *Ackles*, 252 Neb. at 281, 561 N.W.2d at 578. We then noted other courts which held that the preemption language employed in FIFRA was more similar to the statutory language in *Cipollone* than the statutory language in *Medtronic, Inc.* *Ackles, supra* (citing *Lewis v. American Cyanamid Co.*, 294 N.J. Super. 53, 682 A.2d 724 (1996), *aff'd as modified* 155 N.J. 544, 715 A.2d 967 (1998), and *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996)). See, also, S. Douglas Fish, Note, *In Defense of FIFRA Preemption of Failure to Warn Claims*, 12 J. Nat. Resources & Env. Law 123 (1996-97) (discussing *Medtronic, Inc.*). In particular, we relied on the following reasoning from a New Jersey case:

"[L]ike the preemption clause at issue in *Cipollone* and unlike that in *Medtronic*, the preemption provision of FIFRA is precise and explicit; i.e., a State 'shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.' Furthermore, FIFRA, like the *Cipollone* statutes, leaves unconstrained all state common law causes of action for defective products except those based on inadequate labels. Finally, FIFRA has no escape clauses like the 'grandfathering' and 'substantially equivalent' provisions of MDA. The statute and regulations provide that

substantially all pesticides are subject to extensive review by the EPA, and the EPA prescribes precise content for pesticide labels”

Ackles, 252 Neb. at 281-82, 561 N.W.2d at 578, quoting *Lewis v. American Cyanamid Co.*, *supra*.

(d) Decisions Since *Ackles*

Since our decision in *Ackles*, a majority of courts continue to hold that FIFRA preempts labeling-based failure-to-warn claims. See, e.g., *Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir. 2002) (rehearing and rehearing en banc denied); *Grenier*, *supra*; *Arnold v. Dow Chemical Co.*, 91 Cal. App. 4th 698, 110 Cal. Rptr. 2d 722 (2001); *Etcheverry v. Tri-Ag*, 22 Cal. 4th 316, 993 P.2d 366, 93 Cal. Rptr. 2d 36 (2000); *Ackerman v. American Cyanamid Co.*, 586 N.W.2d 208 (Iowa 1998); *Didier v. Drexel Chem. Co.*, 86 Wash. App. 795, 938 P.2d 364 (1997); *Lewis*, *supra*.

Since *Ackles*, two courts have held that failure-to-warn claims are not preempted by FIFRA. *Sleath v. West Mont Home Health Services*, 304 Mont. 1, 16 P.3d 1042 (2000), *cert. denied sub nom. Dow AgroSciences LLC et al. v. Sleath et al.*, 534 U.S. 814, 122 S. Ct. 40, 151 L. Ed. 2d 13 (2001); *Brown v. Chas. H. Lilly Co.*, 161 Or. App. 402, 985 P.2d 846 (1999), *review denied* 330 Or. 138, 6 P.3d 1098 (2000).

2. EYL’S ARGUMENTS

(a) Preemption

Eyl asks this court to reverse our decision in *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255, and determine that FIFRA does not preempt common-law failure-to-warn claims because of the reasoning of *Sleath*, *supra*. He argues that under *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996), FIFRA does not preempt failure-to-warn claims and asks this court to adopt the position of the EPA that was set forth in an amicus brief filed in *Etcheverry*, *supra*.

In *Sleath*, *supra*, the Montana Supreme Court overruled a previous case in which it held that common-law failure-to-warn claims were preempted by FIFRA. *Sleath*, *supra* (overruling *McAlpine v. Rhône-Poulenc Ag. Co.*, 285 Mont. 224, 947 P.2d

474 (1997)). In reaching this determination, the court considered the amicus brief filed by the EPA in *Etcheverry*, *supra*, in which the EPA argued that FIFRA did not preempt state law claims. The court determined that it should consider the government's position on the issue and gave it deference. The court also discussed *Medtronic, Inc.*, which it had not previously considered, and concluded that in the light of that case, FIFRA did not preempt state law claims for damages.

We decline to adopt the position taken by the Montana Supreme Court. First, we have already considered the effect of *Medtronic, Inc.* on the issue of FIFRA preemption in *Ackles* and determined that FIFRA preempts failure-to-warn claims.

Second, we give no deference to the EPA's position in the amicus brief filed in *Etcheverry*. The *Etcheverry* brief was written for that specific case. The EPA did not file an amicus brief with this court in this case. Nor have we found—outside of *Etcheverry*—a similar brief filed by the EPA in any of the numerous other cases which have discussed FIFRA preemption. In addition, the record is silent whether the view expressed in the *Etcheverry* brief was an EPA official policy statement for all cases and if the EPA still adheres to that view. Further, we note that in *Etcheverry*, the California Supreme Court did not adopt the EPA's arguments. See *Etcheverry*, *supra*. Under these circumstances, we give no deference to the position taken in the *Etcheverry* brief.

Finally, the Eighth Circuit Court of Appeals recently considered and rejected the same arguments asserted by Eyl. *Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir. 2002) (rehearing and rehearing en banc denied). In *Netland*, the appellant requested the Eighth Circuit to overrule precedent holding that FIFRA preempts state common-law failure-to-warn claims based on *Medtronic, Inc.*, *supra*, *Sleath*, *supra*, and *Brown*, *supra*, and on the EPA's brief in *Etcheverry*, *supra*. The Eighth Circuit panel stated that it would not overrule a prior decision unless it did so en banc. The plaintiff in *Netland* then sought rehearing en banc, which was denied. The continuing position of the Eighth Circuit is that state common-law failure-to-warn claims are preempted by FIFRA.

[8] The overwhelming majority of jurisdictions hold that FIFRA preempts state common-law failure-to-warn claims. We agreed with this position in *Ackles*, *supra*. We decline to now

overrule *Ackles*. We hold that Eyl's failure-to-warn claims are preempted by FIFRA.

(b) Argument That Eyl's Claims Are Not Labeling Based

Eyl contends that Ciba-Geigy should have provided notice of the dangers of Pramitol to the general public through "signs, flags, newspaper notices, etc." Reply brief for appellee Eyl at 14. He argues that FIFRA applies to preempt only claims that are labeling based and directed to the actual user of a product. He argues that his claim was not labeling based because he was a bystander and was seeking damages for failure to warn that a chemical had been applied instead of basing his claim on the existing Pramitol label. For purposes of this opinion, we assume, without deciding, that Eyl, as an employee of the applicator, was a bystander.

[9,10] Whether a particular form of warning comes within the definitions of "label" and "labeling" set forth in 7 U.S.C. § 136(p) is a matter of statutory interpretation. 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. *In re Application No. C-1889*, ante p. 167, 647 N.W.2d 45 (2002). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Gracey v. Zwonechek*, 263 Neb. 796, 643 N.W.2d 381 (2002). The question is whether warning flags, posters, or signs supplied by the manufacturer and aimed at warning that a pesticide has been applied or of its dangers are part of the label or labeling under FIFRA. We conclude that they are.

In cases where the plaintiff claims that the lack of point-of-sale signs or consumer notices are not related to labeling and packaging, the overwhelming majority of courts hold that FIFRA preempts the claims. *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), cert. denied 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248; *Dow Chemical Co. v. Ebling*, 723 N.E.2d 881 (Ind. App. 2000) (*Ebling I*), vacated in part on other grounds 753 N.E.2d 633 (Ind. 2001); *Jenkins v. Amchem Products, Inc.*, 256 Kan.

602, 886 P.2d 869 (1994), *cert. denied* 516 U.S. 820, 116 S. Ct. 80, 133 L. Ed. 2d 38 (1995); *Hopkins v. American Cyanamid Co.*, 666 So. 2d 615 (La. 1996); *Wadlington v. Miles, Inc.*, 922 S.W.2d 520 (Tenn. App. 1995); *Goodwin v. Bacon*, 127 Wash. 2d 50, 896 P.2d 673 (1995). See, *Kuiper v. American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S. Ct. 1839, 140 L. Ed. 2d 1090 (1998) (alleged misrepresentation in advertising separate from label is labeling based when it reiterates information on label); *Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999) (agreeing with *Kuiper*, *supra*).

In *Papas*, *supra*, a worker at a humane society suffered injuries after applying a pesticide to dogs at his workplace. See *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *vacated and remanded on other grounds* 505 U.S. 1215, 112 S. Ct. 3020, 120 L. Ed. 2d 892 (1992). After remand from the U.S. Supreme Court to consider the case in the light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), the Eleventh Circuit held that point-of-sale signs, consumer notices, or other informational materials were labeling based. In addressing the issue, the court stated:

Appellants urge us to hold that their warning claims “unrelated to labeling and packaging” are not pre-empted by section 136v. They contend that because the language of 136v refers only to “labeling or packaging,” the section does not pre-empt failure to warn claims based on point-of-sale signs, consumer notices, or other informational materials that are “unrelated” to labeling and packaging. But any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff[s] necessarily challenge the adequacy of the warnings provided on the product’s labeling or packaging. If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends. Plaintiffs may not interfere with the FIFRA scheme by bringing a common law action alleging the inadequacy of, for example, point-of-sale signs. Because claims challenging the adequacy of warnings on materials other than the label or package of a product necessarily imply that the labeling

and packaging failed to warn the user, we conclude that these claims are also pre-empted by FIFRA.

Papas, 985 F.2d at 519. See, also, *Taylor AG Industries, supra*; *Ebling I*; *Hopkins, supra*; *Wadlington, supra*; *Goodwin, supra*.

Shortly after *Papas* was decided by the 11th Circuit, the 4th Circuit agreed, stating:

To allow the [plaintiffs] to argue that the warning language which appears on point-of-sale or other promotional material is inadequate when that language is identical to that approved by the EPA would in effect allow the establishment of an additional or different state law requirement concerning adequate warning language.

Worm, 5 F.3d at 748. See, also, *Jenkins, supra* (agreeing with *Papas, supra*, and *Worm, supra*).

Agreeing with the view taken in *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied* 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248, and similar cases about point-of-sale signs and similar devices, the Court of Appeals of Indiana further addressed the plain language of § 136(p). *Ebling I*. In *Ebling I*, an applicator sprayed an apartment with a pesticide before, and possibly for a short time after, the plaintiffs, a family, moved in. The plaintiffs were not provided with labeling information regarding the pesticide before they were exposed. The children later developed seizure disorders, and the plaintiffs filed suit against the applicator and the manufacturer.

On appeal, the plaintiffs argued that the defendants owed a common-law duty to distribute additional materials warning of the product to people whose homes were being sprayed. The Indiana Court of Appeals rejected this argument because of the definitions of "label" and "labeling" contained in § 136(p). The court noted that FIFRA has a broad definition of labeling that does not require the labeling materials to be affixed to the pesticide. Applying the language of § 136(p), the court stated:

Thus, any written information that a pesticide registrant disseminates with a pesticide is considered "labeling" under FIFRA, and any obligation placed upon a registrant in this regard is necessarily a labeling requirement. From this language, it is clear that Congress intended to preempt state common law actions that would impose requirements

on a registrant to disseminate additional written matter with its product, regardless of whether this matter was identical to the EPA-approved labeling information.

Ebling I, 723 N.E.2d at 897. The court then stated its agreement with *Papas, supra*, and similar cases. The court held that FIFRA preempted claims against both the manufacturer and the applicator. On further review, the Supreme Court of Indiana reversed the decision regarding the applicator, but summarily affirmed the decision regarding the manufacturer. *Dow Chemical Co. v. Ebling*, 753 N.E.2d 633 (Ind. 2001) (*Ebling II*).

Eyl's argument that Ciba-Geigy should have provided notice of the dangers of Pramitol to the general public through "signs, flags, newspaper notices, etc." is off the mark. As previously noted, the overwhelming majority of jurisdictions hold that these types of warnings are labeling based. Under § 136(p), labeling means all labels and all other written, printed, or graphic matter accompanying the pesticide or device at any time. A warning flag or sign in this case consists of some form of written or graphic material provided by the manufacturer that will accompany the product at some time. This alone meets the plain language of "labeling" under § 136(p). The definition of "label" is also met, because additional warning materials or devices that a manufacturer provides would need to be "attached to, the pesticide or device or any of its containers or wrappers." § 136(p)(1). In addition, Eyl argues that the public should have been warned of Pramitol's dangers. This, however, would require some type of printed information. In that case, the warning would then have to incorporate language from the direct product label and information about the warning system would need to be incorporated into the directions for use on the label—information that also falls under the statutory definition of "label" and "labeling."

Further, considerations such as (1) whether warning devices such as flags are needed, (2) what they should look like, (3) what printed material they should contain, and (4) how they should be used and for how long are all factors that would affect the types of warnings provided from the manufacturer and are properly part of the EPA review process. The purpose of FIFRA preemption is to create a uniform system of labeling across the

country. Requiring manufacturers to provide additional warning devices to some states and not to others frustrates the goal of FIFRA preemption.

But Eyl argues that flags and other such warning devices are not labeling based and thus not preempted. He relies on cases dealing with ordinances affecting applicators. He argues that if an applicator can be required to provide warning flags, then a manufacturer should also be required to provide that type of warning.

Eyl's reasoning ignores the reason why a warning provided by an applicator—as opposed to a manufacturer—is not labeling based. Although FIFRA prevents states from implementing additional or different labeling requirements on manufacturers under § 136v(b), it specifically allows states to regulate the “use” of pesticides by applicators under § 136v(a). In applicator cases, it is the applicator, not the manufacturer, who is responsible for providing the warning. The manufacturer is not required to take any action whatsoever in providing the warning devices. Nor is the manufacturer required to alter the labeling. As a result, when an applicator is required to provide label information, the labeling approved by the EPA and provided by the manufacturer is unaffected and the regulation is simply a regulation on the use of the product under § 136v(a). But if a *manufacturer* is required to provide items such as warning flags, then the labeling of the product is involved, which labeling requirement is preempted by FIFRA. The applicator cases make this point clear.

In *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991), an applicator case, the U.S. Supreme Court determined that an ordinance that required applicators to obtain a permit before application of certain pesticides and to place placards containing notice of the pesticide and label information was not preempted by FIFRA. In reaching this conclusion, the Court relied specifically on the language in § 136v(a). Section 136v(a) provides that states may regulate the sale or use of pesticides so long as the state regulation does not permit a sale or use prohibited by FIFRA. The Court specifically noted that FIFRA does not expressly supersede local regulation of pesticide use. The Court did not base its reasoning on a definition of “labeling.” Instead, the Court recognized that the ability to regulate use

does not give states any greater power over their ability to regulate labeling. The Court stated:

The specific grant of authority in § 136v(a) consequently does not serve to hand back to the States powers that the statute had impliedly usurped. Rather, it acts to ensure that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur.

Mortier, 501 U.S. at 614. Another court describes the difference by stating, "Labeling regulation represents a subset of use regulation. *Mortier*'s permissible overlap allows states to ban EPA-registered pesticides The explicit language of section 136v(b), however, completely preempts any state regulation of the labeling itself." *Goodwin v. Bacon*, 127 Wash. 2d 50, 65, 896 P.2d 673, 681 (1995) (holding that claims based on point-of-sale signs are preempted).

The difference between regulating the use of a product by requiring applicators to provide warnings and a preempted labeling-based claim when a manufacturer is required to provide warnings is illustrated in *Ebling I* and *Ebling II*. In *Ebling I*, the Indiana Court of Appeals held that failure-to-warn claims based on a lack of notice to nonusers were preempted against both the manufacturer and the applicator. The Indiana Supreme Court granted review and reversed the conclusion of preemption for the applicator but affirmed for the manufacturer. In reaching the conclusion that the imposition of a duty to warn on an applicator is not preempted, the court made note of § 136v(a), which allows State regulation of pesticide use. The court noted:

While FIFRA requires pesticide manufacturers to affix an approved label to their product in order to sell it, applicators, either commercial or private, are not required to label anything but, as with members of the general public, applicators are prohibited from detaching, altering, defacing, or destroying the label affixed to the pesticide by the manufacturer. 7 U.S.C. § 136j(2). The law is fairly settled that when a pesticide *manufacturer* "places EPA-approved warnings on the label and packaging of its products, its duty to warn is satisfied, and the adequate warning issue ends." *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir.1993). Because of the

absence of an affirmative FIFRA labeling requirement for *applicators*, however, we find that the alleged state tort law duty imposed upon applicators to convey the information in the EPA-approved warnings to persons placed at risk does not constitute a requirement additional to or different from those imposed by FIFRA.

(Emphasis in original.) *Ebling II*, 753 N.E.2d at 639.

The court then stated: "From *Mortier*, we discern that, like a state or local regulatory scheme that requires permits and notice to the non-user consumer/bystander and imposes penalties, the imposition of a duty to warn on applicators is not preempted by FIFRA." *Ebling II*, 753 N.E.2d at 640. The court, however, summarily affirmed that the claims against the manufacturer were preempted. See, also, *Mann v. H.W. Andersen Products, Inc.*, 246 A.D.2d 68, 676 N.Y.S.2d 658 (1998) (claims by deformed child brought against mother's employer, where employer's use of pesticide exposed mother to pesticide, were not preempted, but claims against manufacturer were preempted).

The other applicator cases that Eyl relies on do not hold that a failure-to-warn claim brought against a *manufacturer* for failure to place devices such as warning flags is not a labeling-based claim. Instead, these cases address the narrow issue about whether such claims when brought against *applicators* are a requirement affecting the use of a product instead of being a labeling-based action. See, e.g., *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989).

In most of the cases cited by Eyl, applicators of pesticides or herbicides were being regulated. If an ordinance requires an applicator to provide warnings that a product has been applied, the product's use under § 136v(a) is regulated without imposing additional labeling requirements on the manufacturer that are preempted under § 136v(b). Instead of imposing an additional burden on the manufacturer, and thus requiring the manufacturer to violate FIFRA, the applicators are simply being required in their use of the product to relay information to additional people. But if a manufacturer is required to provide additional warning materials, such as flags, signs, advertisements, or other notices, the manufacturer is being required to change the label of the product: This must be approved by the

EPA, and such a requirement on the manufacturer is preempted by FIFRA.

Eyl also relies on a federal trial court opinion holding that the Cigarette Labeling and Advertising Act, the 1965 Act discussed earlier, does not preempt failure-to-warn claims that are made by a bystander who was injured from inhaling secondhand smoke. *Wolpin v. Phillip Morris, Inc.*, 974 F. Supp. 1465 (S.D. Fla. 1997). In addition, he cites *Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941 (9th Cir. 1992), and *Macrie v. SDS Biotech Corp.*, 267 N.J. Super. 34, 630 A.2d 805 (1993). We find these cases unpersuasive and contrary to the majority of FIFRA preemption cases that address the issue whether FIFRA preempts failure to warn claims that are not directly based on the language of the label. See *Ebling I* (disagreeing with *Macrie, supra*).

In sum, under FIFRA, the inclusion of warning flags or other such materials encompasses the concept of providing information to others that there are adverse effects associated with the product. Requiring a manufacturer to provide warning signs, flags, or other devices constitutes "labeling" under the plain language of § 136(p). Claims challenging the adequacy of warnings on materials other than the direct label or package of a product necessarily infer that the labeling and packaging failed to warn. Because the manufacturer and distributor would be in no position to actually place warnings on the sites where products were being applied, the only manner in which the manufacturer could prevent liability would be to add the warning devices as part of the labeling and packaging. See *All-Pure Chemical Co. v. White*, 127 Wash. 2d 1, 896 P.2d 697 (1995).

[11] *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied* 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248, and the overwhelming majority of jurisdictions that have considered this issue agree that claims based on the lack of point-of-sale signs and other such devices are labeling based and are preempted by FIFRA. Even assuming that Eyl, as an employee of the City of Wisner, was a bystander, the status of a plaintiff as a bystander does not have an effect on this determination. The effect of the plain language of § 136(p) remains the same: Labeling-based failure-to-warn claims against manufacturers are preempted. The plaintiff's status makes no difference in the determination. See

Ebling I and *Ebling II*. We hold that Eyl's claims are labeling-based failure-to-warn claims that are preempted by FIFRA.

(c) Application of Preemption to Distributors

After this case was submitted to this court following argument, we ordered the parties to provide supplemental briefs regarding whether a failure-to-warn claim is preempted when brought against a distributor. The U.S. Court of Appeals for the Ninth Circuit determined that when a "distributor's liability is essentially predicated upon the language in the manufacturer's label, we apply FIFRA's preemption provision equally to manufacturers and distributors." *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555, 562 (9th Cir. 1995). Other jurisdictions generally assume that FIFRA preempts state law failure-to-warn claims against both manufacturers and distributors. See, e.g., *Arnold v. Dow Chemical Co.*, 91 Cal. App. 4th 698, 110 Cal. Rptr. 2d 722 (2001); *Hughes v. Tennessee Seeds of Brownsville, Inc.*, 970 S.W.2d 471 (Tenn. App. 1997). We agree.

[12] Eyl's failure-to-warn claims are labeling based. Under FIFRA, a manufacturer or distributor cannot change a label. Because Eyl predicates his failure-to-warn claims on the quality of the warning, his claims are preempted against both the manufacturer and the distributor.

V. CONCLUSION

We determine that Eyl's common-law failure-to-warn claims are labeling based and preempted by FIFRA. The only claims submitted to the jury in this case were Eyl's negligence and strict liability failure-to-warn claims. The court did not submit any nonpreempted claims to the jury, and Eyl does not cross-appeal the trial court's decision to not submit a design defect claim to the jury. We hold that Eyl's claims are preempted and that the district court erred in failing to sustain the appellants' motions for a directed verdict and judgment notwithstanding the verdict. We reverse, and remand with directions to dismiss. Because we reverse, and remand with directions to dismiss, we do not address Eyl's remaining assignments of error.

REVERSED AND REMANDED WITH
DIRECTIONS TO DISMISS.

Cite as 264 Neb. 605

STEVEN J. HAUSER, APPELLEE AND CROSS-APPELLANT, v.
NEBRASKA POLICE STANDARDS ADVISORY COUNCIL AND
NEBRASKA COMMISSION ON LAW ENFORCEMENT AND
CRIMINAL JUSTICE, APPELLANTS AND CROSS-APPELLEES.

650 N.W.2d 760

Filed September 6, 2002. No. S-01-467.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** In instances where an appellate court is required to review cases for errors appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Administrative Law: Statutes.** Administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act.
6. **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.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded for further proceedings.

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

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., and R. Bradley Dawson, of Clough, Dawson, Piccolo & Jones, for appellee.

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

McCORMACK, J.

NATURE OF CASE

This case involves an Administrative Procedure Act (APA) appeal by the State from a decision of the Hall County District Court. An administrative hearing was originally held before the Nebraska Police Standards Advisory Council (Council) in regard to State Trooper Steven J. Hauser's certification as a Nebraska law enforcement officer. The Council ordered the revocation of Hauser's certification, subject to the review and approval of the Nebraska Commission on Law Enforcement and Criminal Justice (Commission). The Commission ordered that Hauser's certification be revoked. Hauser appealed to the district court, which reversed the order of the Commission.

BACKGROUND

Hauser received his certification as a law enforcement officer from the Nebraska Law Enforcement Training Center (Training Center) on November 3, 1978. He was appointed a Nebraska state trooper and deputy state sheriff on that same date.

In 1999, Allen L. Curtis, executive director of the Commission, received a petition signed by numerous residents of North Platte and vicinity requesting the revocation of Hauser's law enforcement certification. Curtis notified Hauser of the complaint by letter dated September 8, 1999, and requested that Hauser respond to the allegations of the petition. In his response letter, Hauser stated that the allegations against him were outside the scope of the rules and regulations regarding the revocation of certificates and that the allegations did not fit into the statutory definition of revocable actions.

Curtis requested that an investigation be conducted pursuant to title 79, chapter 9, of the Training Center's rules and regulations. The investigation was to review the allegations brought against Hauser and to determine if the allegations were within the purview of Neb. Rev. Stat. § 81-1403(5) (Reissue 1999) (now found at § 81-1403(6) (Cum. Supp. 2000)). Curtis notified Hauser that the investigation was being requested pursuant to 79 Neb. Admin. Code, ch. 9, § 006.02 (1998). After reviewing the results of the investigation, David A. Stolz, staff attorney for the

Training Center, was appointed to commence formal revocation proceedings against Hauser.

The Training Center, acting as a relator on behalf of the State, filed an administrative complaint against Hauser. The second amended complaint alleged that Hauser had abused his wife throughout 1998; provided false information to a law enforcement officer; and violated his duties and responsibilities as set forth in his oath of office and various policies, codes, and canons of ethics of the Nebraska State Patrol. According to the complaint, Hauser's alleged actions represented incompetence; neglect of duty; and/or physical, mental, or emotional incapacity, and warranted revocation. Hauser was sent a letter from Curtis providing him with a copy of the complaint and a copy of title 79, chapter 9.

In Hauser's amended answer, he challenged the substance of the complaint and the procedure employed by the State. He alleged that requests to have him decertified by certain citizens of North Platte did not conform to Commission rules. He also argued that the Commission and Council lacked the requisite jurisdiction to consider the matters alleged in the complaint and, further, that the allegations did not state sufficient facts to bring or maintain a revocation proceeding.

The matter was heard by the Council in August 2000. At Hauser's request, the hearing was bifurcated. The first stage addressed claims relating to the Council's authority to hear the matter, and the second addressed the merits. The evidence at the first stage demonstrated that there were no rules or regulations filed by the Council under the APA. In fact, it was the Commission who filed title 79, chapter 9, with the Secretary of State's office. There was also evidence that the Council originally reviewed the regulations in title 79, chapter 9, passed on the rules, and relayed them to the Commission. The Commission then approved and formally promulgated the rules pursuant to the APA. There was no evidence adduced at the hearing that the Nebraska State Patrol's code of ethics or the Nebraska State Patrol's disciplinary procedures and code of conduct had been promulgated under the APA or filed with the Secretary of State. In spite of these findings, the Council determined that it had

jurisdiction over the matter and proceeded to the fact allegations against Hauser.

In the second phase of the bifurcated hearing, the Council heard evidence regarding the alleged misconduct of Hauser. After deliberation, the Council ordered the revocation of Hauser's certification. The Council concluded that Hauser physically abused his wife several times in 1998 and lied to an investigating officer regarding one of those occasions. The Council also concluded that the State had proved the existence of one or more statutory grounds for revocation, which have been incorporated by reference into title 79, chapter 9. Based on the State Patrol's code of ethics, the Council determined that Hauser's actions amounted to a neglect of his duties and emotional incapacity.

The matter was then forwarded to the Commission. The Commission began hearing deliberations in closed session. It later returned to open session, and by unanimous vote of the present and participating members, it decided to revoke Hauser's certification. The Commission held that the Council had jurisdiction to hear the matter and that the hearing was properly conducted. In concluding that Hauser exhibited neglect of duty and emotional incapacity, the Commission held that Hauser's violent behaviors were violations of various State Patrol codes of ethics, canons of police ethics, and general rules of conduct.

Hauser appealed to the district court under the APA. The trial court reversed the Commission's decision, concluding that it was made in excess of the Commission's statutory authority or jurisdiction. The trial court also concluded that the Commission's decision was made upon unlawful procedure in that it had no power to revoke Hauser's certification and, further, that there were no rules and regulations governing the revocation of certificates passed by the Council. However, the trial court did not award attorney fees to Hauser.

ASSIGNMENTS OF ERROR

The Council and Commission argue that the trial court erred in (1) concluding that the regulations promulgated concerning the revocation of certificates were invalid; (2) concluding that the process used in reaching final revocation was unlawful; (3) concluding that violating the rules set by the State Patrol could

not constitute grounds for certification revocation if, in fact, the trial court was indicating that those standards must be promulgated under the APA; and (4) reversing the Commission's approval of the Council's decision to revoke Hauser's law enforcement certification.

On cross-appeal, Hauser argues that the trial court erred in not awarding attorney fees to him because the Council and Commission's position was not substantially justified.

STANDARD OF REVIEW

[1] A judgment or final order rendered by the district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Honda Cars of Bellevue v. American Honda Motor Co.*, 261 Neb. 923, 628 N.W.2d 661 (2001).

[2] When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] In instances where an appellate court is required to review cases for errors appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Lancaster Cty. Sch. Dist. No. 0001 v. State*, 260 Neb. 108, 615 N.W.2d 441 (2000).

[4] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Heathman v. Kenney*, 263 Neb. 966, 644 N.W.2d 558 (2002).

[5] Administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act. *Honda Cars of Bellevue v. American Honda Motor Co.*, *supra*.

ANALYSIS

The district court found that it was the Council which had the sole power as delegated by the Legislature to adopt rules and regulations concerning the revocation of law enforcement certificates.

In this case, the Council conducted a hearing of the complaints against Hauser. The Council then ordered the revocation

of Hauser's law enforcement certificate. The matter was then forwarded to the Commission which, after a hearing and vote of the Commission, revoked Hauser's certificate.

The first question we address is which entity, the Commission or the Council, is empowered to revoke law enforcement certificates. According to § 81-1403 (Cum. Supp. 2000):

Subject to review and approval by the commission, the council shall:

....
(6) Revoke or suspend such certificates or diplomas according to rules and regulations established by the council for reasons which shall include, but not be limited to, (a) incompetence, (b) neglect of duty, and (c) physical, mental, or emotional incapacity. Such rules and regulations shall include a procedure for hearing appeals of any person who feels that the revocation or suspension of his or her certificate or diploma was in error.

Neb. Rev. Stat. § 81-1406 (Cum. Supp. 2000) states:

There is hereby created the Nebraska Police Standards Advisory Council. *The council shall be a special standing committee of the commission* with the express purpose of overseeing all training schools and training academies and the operation of the training center and ensuring that all rules, regulations, and policies with respect to pre-certification, certification, continuing education, and training requirements are implemented. The council shall act for the commission in all matters relating to law enforcement training and the training center but shall not have any other powers and duties with respect to the commission or any of its duties. The council shall conduct regular meetings in order to carry out its statutory duties.

(Emphasis supplied.)

[6] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Heathman v. Kenney*, *supra*. However, 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. See *Spradlin v. Dairyland Ins. Co.*, 263 Neb. 688, 641 N.W.2d 634 (2002).

The trial court found that there were no rules or regulations adopted, promulgated, and filed with the Secretary of State by the Council. The trial court held that the Commission is a separate agency from the Council. We disagree. Both the Council and the Commission's duties are set out under Neb. Rev. Stat. § 81-1401 et seq. (Reissue 1999 & Cum. Supp. 2000). As previously stated, § 81-1406 states very specifically that "[t]he council shall be a special standing committee of the commission." According to the plain and unambiguous language of § 81-1406, the Council is a committee of the Commission. As such, it is the Commission, not the Council, which is charged with the promulgation, adoption, and filing with the Secretary of State of the rules and regulations. The Commission performed these functions in this case.

Because statutory interpretation is a question of law, our review is de novo. We conclude, therefore, that the Council and Commission's first assignment of error is correct in that the trial court erred in concluding that the regulations promulgated concerning the revocation of certificates was invalid. Since our conclusion requires that we reverse, and remand this matter to the trial court for further proceedings consistent with this opinion, it is not necessary that we address the Council and Commission's remaining assignments of error in this case, nor is it necessary that we address the cross-appeal by Hauser.

The trial court did not make a finding with regard to the code of ethics, the canons of police ethics, and the general rules of conduct. In this case, we conclude that the better course would be to remand this entire cause to the trial court rather than try to decide, piecemeal, parts of it.

CONCLUSION

For the reasons set out above, we hereby reverse the decision of the trial court and remand the cause to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
THOMAS EDWARD NESBITT, APPELLANT.
650 N.W.2d 766

Filed September 13, 2002. No. S-00-751.

1. **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.
2. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. Where such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.
3. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.
4. **Criminal Law: Preliminary Hearings: Probable Cause.** The purpose of a preliminary hearing is to ascertain whether a crime was committed and whether there is probable cause to believe the accused committed it.
5. **Effectiveness of Counsel: Proof.** To state a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and demonstrate that a conviction must be overturned, a defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
6. **Attorney and Client.** Except for such basic decisions as whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant is bound by the tactical or strategic decisions made by his or her counsel.
7. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
8. **Criminal Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
9. **Homicide: Intent: Proof.** Motive is not an element of first degree murder and does not have to be proved beyond a reasonable doubt.
10. **Criminal Law: Self-Incrimination.** The State may not impeach a defendant's exculpatory testimony, given for the first time at trial, by cross-examining the defendant about his or her failure to have told the story after receiving *Miranda* warnings at the time of the defendant's arrest.

11. **Constitutional Law: Jury Instructions.** A defendant has no constitutional right to be present at a conference in which jury instructions are formulated by counsel and the trial judge.
12. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
13. **Jury Instructions.** The trial court is required to give an instruction where there is any evidence, which could be believed by the trier of fact, in support of a legally cognizable theory of defense.
14. **Jury Instructions: Appeal and Error.** A jury instruction which directs the attention of the jury to, and unduly emphasizes, a part of the evidence is erroneous and should be refused.
15. **Constitutional Law: Appeal and Error.** A constitutional question not properly raised in the trial court will not be considered on appeal.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Clarence E. Mock, of Johnson & Mock, for appellant, and, on brief, Thomas Edward Nesbitt, pro se.

Don Stenberg, Attorney General, and Susan J. Gustafson for appellee.

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

STEPHAN, J.

Thomas Edward Nesbitt appeals from an order of the district court for Douglas County denying his motion for postconviction relief without an evidentiary hearing.

I. BACKGROUND

Following a 1986 jury trial resulting in a guilty verdict, Nesbitt was convicted of first degree murder in connection with the 1975 death of Mary Kay Harmer and sentenced to life imprisonment. His conviction and sentence were affirmed by this court on direct appeal in *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987). The underlying facts of Nesbitt's criminal trial are summarized in that opinion and will not be repeated here except as necessary to

our disposition of Nesbitt's postconviction claims. However, a more thorough recitation of the complex procedural history of this case is needed to properly analyze the issues in this appeal and will thus be provided here in some detail.

In an information filed in the district court for Douglas County on February 26, 1985, the State alleged that Nesbitt did "purposely and of deliberate and premeditated malice or in the perpetration of, or in an attempt to perpetrate a sexual assault in the first degree, kill Mary Kay Harmer." The State's evidence at trial included testimony from Michele McKeever regarding a prior uncharged act. Over a defense objection, McKeever testified that approximately 1 year prior to the date of Harmer's death, she was abducted, taken to Nesbitt's home, threatened, and raped by Nesbitt. At the close of the State's case, Nesbitt's attorney moved for a directed verdict or, alternatively, an order of dismissal. The district court ruled on the motion as follows:

I don't feel the State has sufficiently — at least for this particular motion — proven either the killing in the perpetration or in the attempt to perpetrate a sexual assault in the first degree and I think the evidence is insufficient for me to allow it to go any further in those two areas and I am going to sustain the defendant's motion in that regard and dismiss at this time that part of the [motion] dealing with the killing in the perpetration or in the attempt to perpetrate a sexual assault in the first degree of Mary Harmer, however, I am overruling the motion at this time with regard to purposely or deliberately and premeditatedly with malice the killing of Mary Harmer, and I am going to overrule their motion there. I feel there is sufficient evidence at this time to proceed.

In his direct appeal to this court, Nesbitt assigned as error the admission of McKeever's testimony regarding the prior uncharged sexual assault, the sufficiency of the evidence to support his conviction, and the failure of the trial court to grant a mistrial due to attempted solicitation of inadmissible testimony by the prosecutor. This court found no merit in any of those assignments. *State v. Nesbitt, supra*.

In 1987 and 1988, Nesbitt filed several pro se motions with the district court in which he requested access to all of the records and court files of his case "in order to properly present and litigate the

facts and claims . . . in the Defendant/Appellants [sic] Post Conviction Motion to Vacate Sentence, that will be filed in this Court.” On January 28, 1988, the district court appointed counsel “to represent the defendant in his post-conviction action.” Nesbitt responded with a March 3 motion to vacate the appointment of counsel and informed the court that he had no intention of filing a postconviction motion and had not requested the appointment of counsel. In a March 4 journal entry, the district court vacated the appointment of counsel and denied Nesbitt’s requests for access to the court files and records, finding that there was no action pending and no intent on the part of the defendant to file an action. Nesbitt filed an appeal from a denial of his April 7, 1988, renewed motion for access to court records and files. We summarily dismissed this appeal and issued a mandate on September 30, 1988. *State v. Nesbitt*, 230 Neb. xix (No. S-88-283, Sept. 22, 1988).

On September 7, 1990, Nesbitt filed a 501-page pro se document captioned “Defendants Verified Post-Conviction Motion to Vacate Sentence and Supporting Case Law.” On January 4, 1991, he filed a pro se motion to amend this motion. At an April 23 hearing, the district court denied Nesbitt’s motion to be released on bail during the pendency of his postconviction action and granted the oral motion of an attorney who appeared as Nesbitt’s counsel requesting 90 days in which to file an amended postconviction motion. The court’s order specifically granted counsel until July 23, 1991, to file the amended motion and further ordered that the motion be no more than 30 pages in length. Nesbitt never filed an amended motion as directed by the district court, but did appeal from the portion of the district court’s April 23 order denying his request to be released on bail during the pendency of his post-conviction action. We summarily affirmed, issuing our mandate on December 11, 1991. *State v. Nesbitt*, 239 Neb. xxvi (No. S-91-536, Nov. 12, 1991).

On July 16, 1998, a pleading captioned “Verified Petition and Motions to Vacate Judgment & Orders and for a New Trial/Hearing” was filed by Nesbitt. In this filing, Nesbitt asserted that the computer records of the district court contained a March 19, 1997, entry noting, “Case Disposed of by Final Order.”

Nesbitt alleged that he was never given notice of this order and that he was unable to confirm the physical existence of the referenced order. No such order appears in any of the voluminous files and records presently before this court. Attached to Nesbitt's July 16 motion was a three-page outline of Nesbitt's various postconviction claims and issues. The outline, which was labeled "exhibit 1018," was neither signed nor file stamped. This document is captioned "Amended Post-Conviction Motion to Vacate Sentence" and is alleged by Nesbitt to have been the sole work product of the attorney appointed in February 1992 to represent him.

On April 2, 1999, Nesbitt filed an application for leave to commence an original action and a petition for mandamus. In his petition, Nesbitt alleged that the district court had not ruled upon his September 7, 1990, postconviction motion or his other subsequent but related filings. Nesbitt alleged that on April 4, 1991, the district court "appointed two very new and inexperienced attorneys" to amend his pro se motion. He alleged that these attorneys withdrew shortly thereafter because the judge issued an unreasonable page and time limitation on how to amend his motion. He alleged that another attorney was appointed on May 14, but such attorney had a direct conflict of interest and withdrew a short time later. On February 11, 1992, another attorney was appointed to represent Nesbitt and to amend his postconviction pleading. Nesbitt alleged that from November 1992 until March 18, 1997, this attorney accomplished virtually nothing. On March 4, 1998, Nesbitt filed a pro se motion to compel the latest counsel to provide assistance. Nesbitt alleged that the attorney was then improperly allowed to withdraw by the district court. Nesbitt alleged that he subsequently filed several motions, all of which the district court had yet to rule upon. We denied the petition for writ of mandamus but reassigned the case to a different district judge in September 1999.

After reassignment of the case, the district court held a general status conference in which Nesbitt participated by telephone. At this conference, Nesbitt alleged and the court generally agreed that the only action pending was the September 7, 1990, postconviction motion. In an order filed December 28, 1999, the district court, referring to Nesbitt's "Amended Postconviction Motion to Vacate Sentence," denied Nesbitt's motion for postconviction

relief without granting him an evidentiary hearing. Nesbitt subsequently filed a motion for new trial.

The district court ruled on Nesbitt's motion for new trial in an order filed June 15, 2000. In this order, the court noted that it had reviewed the nearly 10-year-old motion for postconviction relief and all relevant materials and affirmed its order denying postconviction relief without an evidentiary hearing. The court determined that Nesbitt could not amend his petition to state any new claims.

II. ASSIGNMENTS OF ERROR

Nesbitt assigns, restated and summarized, that the district court erred in denying him postconviction relief without an evidentiary hearing. He also assigns that the district court erred in failing to appoint him postconviction counsel and erred in failing to allow him to amend his pleading.

III. STANDARD OF REVIEW

[1] 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. Gamez-Lira*, ante p. 96, 645 N.W.2d 562 (2002); *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002); *State v. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002).

[2] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. Where such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief. *State v. Dean*, ante p. 42, 645 N.W.2d 528 (2002); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

IV. ANALYSIS

The State initially raises the issue of whether the district court referred to the proper documents when entering its order denying postconviction relief. The December 28, 1999, order of the district court expressly refers to and generally follows the issues

raised in an alleged "Amended Postconviction Motion to Vacate Sentence." The document captioned "Amended Post-conviction Motion to Vacate Sentence" was never filed with the district court and appears to be in the record only as an exhibit to one of Nesbitt's various motions. However, the December 28 order clearly considers more than the bare outline contained in the "Amended" motion. Moreover, after Nesbitt filed a motion for new trial from the December 28 order, the district court clarified in its June 15, 2000, order that it had in fact reviewed the motion Nesbitt filed "almost 10 years ago" and all other relevant materials. It is thus clear that the district court directly addressed the allegations in Nesbitt's September 7, 1990, postconviction motion, and the appeal before us is a review of that disposition.

The assignments of error set forth in Nesbitt's pro se brief to this court with respect to such disposition by the district court are vague. In general, however, each assignment asserts that the district court erred in denying Nesbitt's motion for postconviction relief without an evidentiary hearing. His brief acknowledges that the "[e]rrors presented to Court below by way of appellant's 9-7-90 Verified postconv. motion, are the same ones assigned as error on this appeal." Brief for appellant at 2. For this reason, we consider each allegation in Nesbitt's September 1990 motion in light of the proposition that an evidentiary hearing on a motion for postconviction relief should be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Constitutions of Nebraska and the United States, unless the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief. See, *State v. Dean, supra*; *State v. Caddy, supra*. We also consider Nesbitt's claims that the district court erred in denying him an opportunity to amend his motion and denying his motion for the appointment of postconviction counsel.

1. COMPLAINT AND INFORMATION

Although the first section of Nesbitt's motion for postconviction relief is entitled "The Complaint and Information," he does not identify any specific deficiency in either of those documents. Instead, Nesbitt's argument seems to be directed

toward the sufficiency of the circumstantial evidence used by the prosecution to establish the elements of his first degree murder conviction. To the extent this assignment involves a perceived defect in the information or complaint, it is procedurally barred because it could have been raised on direct appeal. See, *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

[3] Insofar as Nesbitt alleges insufficiency of the evidence to support his conviction, this claim was argued and decided against Nesbitt in his direct appeal and is now barred in this postconviction action. *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987). A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Soukharith*, *supra*; *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000).

2. PRELIMINARY HEARING

Nesbitt alleges in this section of his motion that he appeared before the county court for the purpose of a preliminary hearing but that he ultimately waived his right to such a hearing after his motion to close the proceedings to the public was denied. Nesbitt appears to argue that the county court's decision to overrule his motion for closure unconstitutionally coerced him into waiving his rights at the preliminary hearing for fear that the evidence adduced at the hearing might taint the jury panel.

[4] At the outset, we note that the county court's decision to overrule Nesbitt's motion for closure had nothing to do with the issues to be determined at his preliminary hearing. The purpose of a preliminary hearing is to ascertain whether a crime was committed and whether there is probable cause to believe the accused committed it. Neb. Rev. Stat. § 29-506 (Reissue 1995); *State v. Rossbach*, *ante* p. 563, 650 N.W.2d 242 (2002); *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998). Therefore, an examination of whether the media attention generated by this case made it difficult or impossible to later impanel an impartial jury is irrelevant in this context. If, for whatever reason, Nesbitt wished to challenge the validity of his waiver of the preliminary hearing, he could have done so by filing a plea in abatement or a motion to

quash. See, *State v. Hill, supra*; *State v. Moss*, 182 Neb. 502, 155 N.W.2d 435 (1968). Nesbitt's failure to do so bars him from now litigating an issue that could have been raised and litigated at an earlier time. See *State v. Soukharith, supra*. Moreover, any defect in Nesbitt's waiver of his preliminary hearing was ultimately cured by the jury's subsequent finding that he was guilty beyond a reasonable doubt. See *State v. Hill, supra*.

3. ARRAIGNMENT

Nesbitt makes three seemingly unrelated arguments under this section of his motion. We address each one separately.

(a) Plea in Abatement

[5] Nesbitt first argues that his counsel was ineffective for failing to file a plea in abatement at or before his arraignment. To state a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and demonstrate that a conviction must be overturned, a defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Long, ante* p. 85, 645 N.W.2d 553 (2002); *State v. Dean, ante* p. 42, 645 N.W.2d 528 (2002). The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *State v. Long, supra*; *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

In this case, the jury's subsequent finding of guilt beyond a reasonable doubt resolved any questions about whether probable cause existed to bind Nesbitt over for trial. See *State v. Hill, supra*. Thus, Nesbitt has not shown and cannot show that his counsel's decision not to file a plea in abatement prejudiced him in any way. See, *State v. Cook*, 257 Neb. 693, 601 N.W.2d 501 (1999); *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). This argument is without merit.

(b) Statute of Limitations

Nesbitt also argues that his trial counsel was ineffective because he failed to argue that the statute of limitations had run

on the felony murder charge. Neb. Rev. Stat. § 29-110 (Reissue 1985) provides a statute of limitations on prosecution of all felonies except treason, murder, arson, and forgery. Nesbitt argues that because the statute of limitations had run on the predicate felony of first degree sexual assault underlying the felony murder charge, the statute of limitations had also run on the felony murder charge.

We addressed and rejected a similar argument in *State v. White*, 239 Neb. 554, 477 N.W.2d 24 (1991). Moreover, the trial court dismissed the felony murder portion of the information at the conclusion of the State's case in chief, and Nesbitt was subsequently convicted of premeditated first degree murder. Trial counsel could not have been ineffective in failing to raise a defense to a charge that was dismissed, and this argument is without merit.

(c) Entry of Plea of Not Guilty

Finally, Nesbitt claims that his arraignment was unconstitutional because he did not personally enter his plea of not guilty. The record reflects that defense counsel entered a plea of not guilty on Nesbitt's behalf and in Nesbitt's presence. Although the *decision* as to what plea to enter belonged solely to Nesbitt, see, *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); *State v. Sayers*, 211 Neb. 555, 319 N.W.2d 438 (1982); ABA Standards for Criminal Justice Prosecution and Defense Function 4-5.2 (3d ed. 1993), there is no requirement, constitutional or otherwise, that the accused actually speak the words of the plea himself. If Nesbitt wished to enter a different plea or take a different course, he could have interjected and corrected his counsel and the judge as he in fact did on numerous occasions throughout the pretrial and trial process. There is nothing in the record to suggest that counsel entered a plea different from that which Nesbitt would have entered had he spoken the words himself. This argument is without merit.

4. DEPOSITIONS

In this section of his motion, Nesbitt alleges that his state and federal constitutional rights were violated during the discovery phase of his case. He alleges three separate violations, which we individually address.

(a) Date Change

Nesbitt first alleges that the prosecutor engaged in misconduct by intentionally changing the date of five scheduled depositions to deprive Nesbitt of the opportunity to personally attend those depositions. Nesbitt alleges that the depositions were originally scheduled for a Friday and that the prosecutor rescheduled them for the next day, Saturday, because he knew that detainees at the Douglas County jail were required to make advance arrangements for transportation if they wished to attend case-related functions on weekends. The record affirmatively establishes that this allegation is incorrect.

A hearing to order and schedule the depositions at issue was held on Monday, December 30, 1985. At this hearing, the prosecutor indicated that he would be traveling out of the state in the near future but could accommodate defense counsel by conducting the depositions on New Year's Day or the upcoming Saturday or Sunday. After some discussion, the district court approved the scheduling of the depositions on Saturday, which was January 4, 1986, but misstated the date as January 3. By Nesbitt's own admission, the depositions were conducted on Saturday, January 4, as originally scheduled. Therefore, the record affirmatively establishes that the date of the depositions was never changed from the date the court originally approved.

Moreover, given that the hearing on this matter was held 6 days prior to the taking of the depositions, Nesbitt had ample time to secure transportation arrangements to attend the depositions. The fact that such arrangements were not made may be due to Nesbitt's own negligence or perhaps a miscommunication between Nesbitt and defense counsel, but it certainly is not attributable to any form of prosecutorial misconduct. This argument is without merit.

(b) Deposition Questions

Nesbitt next alleges that his counsel was ineffective for failing to ask Kenneth G. Miller, the State's lead investigator, a list of 22 detailed deposition questions that Nesbitt had personally prepared. Nesbitt alleges that these questions, if asked, would have favorably affected the outcome of his subsequent motion in

limine that sought to exclude the testimony of McKeever and/or any reference to the McKeever incident.

[6] At the outset, we note that “except for such basic decisions as . . . whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant is bound by the tactical or strategic decisions made by his or her counsel.” *State v. Sayers*, 211 Neb. 555, 562, 319 N.W.2d 438, 442 (1982). See, also, *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); *People v. Towey*, 92 Cal. App. 4th 880, 112 Cal. Rptr. 2d 326 (2001); ABA Standards for Criminal Justice Prosecution and Defense Function 4-5.2 (3d ed. 1993). Consequently, defense counsel was under no obligation to ask Miller the questions Nesbitt had provided. Except for those basic decisions listed above, and others of similarly fundamental import, the control and direction of the case rests in the sound discretion of defense counsel and not the accused. *Id.*

The fact that defense counsel has authority over strategic decisions such as whom to call and what questions to ask does not, however, mean that defense counsel’s decisions cannot be considered ineffective if those decisions ultimately prejudice the accused. Nesbitt claims that his counsel was constitutionally ineffective for failing to propound certain questions to the deponent. Fourteen of the twenty-two proposed questions involve single or multiple levels of hearsay. See Neb. Rev. Stat. § 27-802 (Reissue 1995). Given the strong presumption that trial counsel acted reasonably, see, e.g., *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000), we cannot conclude that defense counsel was deficient in not asking questions that called for inadmissible answers.

Nesbitt alleges that his attorney failed to question Miller concerning the cause of Harmer’s death. However, select portions of Miller’s deposition were read into the record by Nesbitt’s counsel during the trial. Those portions indicate that Miller was asked by Nesbitt’s counsel if he had knowledge to indicate that Harmer had met “a violent death,” to which Miller answered no. Therefore, the records and files affirmatively prove that Nesbitt’s counsel did not fail to question Miller in this regard. See, e.g., *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000).

Nesbitt also alleges that his attorney failed to question Miller about whether a private investigator or the county attorney's office had provided information to the media in order to influence the outcome of his trial. However, Nesbitt has failed to allege any specific facts demonstrating how he was prejudiced by this alleged omission. Accordingly, Nesbitt is not entitled to an evidentiary hearing on this issue.

Finally, Nesbitt alleges that his attorney failed to question Miller about the substance of police reports regarding the McKeever incident, which reports were subsequently lost or destroyed. Nesbitt alleged generally that such reports were "relevant, favorable and material to the defense" and "would have made a difference on [sic] the outcome of this case." However, he made no allegations regarding the specific factual content of such reports or the extent of Miller's knowledge concerning them. We conclude that Nesbitt's conclusory allegations are insufficient to state a claim for postconviction relief and that the district court did not err in denying relief as to these allegations without an evidentiary hearing.

(c) Stipulation Concerning Deposition Testimony

During Miller's deposition, the State and defense counsel stipulated that if Miller were unavailable to testify at trial, admissible portions of Miller's deposition could be read to the jury as a substitute for his live testimony. This stipulation was made because Miller was undergoing chemotherapy treatments and there was a real possibility that he could be very ill at the time of trial. A few days before Miller was scheduled to testify for the defense, he informed Nesbitt's counsel that he was undergoing chemotherapy and was very ill. Miller's doctor recommended that he remain in the hospital, and Miller did not subsequently testify in person. Pursuant to the stipulation, select portions of Miller's deposition were read to the jury by Nesbitt's counsel as a part of his case in chief.

[7] Nesbitt now claims that his trial counsel had no authority to enter into a stipulation that usurped his constitutional right to confront Miller and that counsel was ineffective for entering into the stipulation, because, if required to testify in person, Miller would have provided exculpatory and impeachment evidence "which

would have made a difference on [sic] the outcome of this case.” Nesbitt, however, does not identify in his motion the substance of such evidence. In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial 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. Dean*, ante p. 42, 645 N.W.2d 528 (2002). Because Nesbitt makes no factual allegations regarding the nature of the evidence favorable to his case which he contends that Miller could have supplied if testifying in person, he has not alleged a basis for postconviction relief in this regard.

5. SEQUESTRATION OF WITNESSES

At a pretrial hearing, both parties agreed that all trial witnesses would be sequestered. See Neb. Rev. Stat. § 27-615 (Reissue 1995). The prosecution, however, asked the district court to except Miller from the sequestration order to allow him to assist the State in obtaining witnesses and presenting its case. See § 27-615(3). Defense counsel did not object to Miller’s presence in the courtroom on the conditions that Miller remained in the back row of the courtroom and that he was personally admonished by the court not to discuss the substance of any witness’ testimony with any other witness. The court obliged defense counsel’s conditions, and Miller was allowed to remain in the courtroom during the trial. Nesbitt now argues that the district court erred in excepting Miller from the sequestration order and that his counsel was ineffective for not objecting to Miller’s presence in the courtroom. To the extent Nesbitt’s argument assigns error to the district court, it is procedurally barred because this issue could have been raised on direct appeal. See, *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

To the extent this allegation involves a claim of ineffective assistance of counsel, Nesbitt has failed to and cannot plead that he was prejudiced by defense counsel’s performance. See *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). Before the trial began, the State indicated that it did not intend to call Miller as a witness, and it did not do so. Nesbitt’s counsel offered select portions of Miller’s deposition testimony during

Nesbitt's case in chief, but Miller's deposition was taken *prior* to trial and thus could not have been influenced by his presence in the courtroom. This assignment of error is thus without merit.

6. CONSTITUTIONALITY OF NEBRASKA'S FELONY MURDER DOCTRINE

In this section of his motion, Nesbitt argues that Neb. Rev. Stat. § 28-303(2) (Reissue 1995), Nebraska's felony murder statute, is unconstitutional. (We note that at the time the crime was committed, Neb. Rev. Stat. § 28-401 (Reissue 1975) was in effect, but although amended and renumbered since that time, there are no substantive changes.) The constitutionality of this statute was recently reaffirmed by this court. See, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999). Moreover, this issue is not material to this case because the trial court dismissed the felony murder portion of the information at the conclusion of the State's case in chief, and Nesbitt was subsequently convicted of premeditated first degree murder under Neb. Rev. Stat. § 28-302(1) (Reissue 1995).

7. JURY

In this section of his postconviction motion, Nesbitt asserts that the district court erred (1) in failing to grant additional peremptory challenges to the defense, (2) in failing to sequester the jury during the trial, (3) in failing to individually question each prospective and potential juror about any knowledge of the case he or she may have gained from the media, and (4) in allowing the prosecutor to inquire as to whether any potential juror had any opinions or feelings that would prevent him or her from finding Nesbitt guilty of an offense punishable by death. Nesbitt also argues that his counsel was ineffective for failing to raise the four aforementioned arguments on direct appeal.

To the extent these arguments assign error to the district court, they are procedurally barred. Both Nesbitt and defense counsel were aware of the facts underlying these allegations at the time of the direct appeal and thus could have asserted them at that time. As previously noted, a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those

issues may be phrased or rephrased. *State v. Soukharith, supra*; *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000).

However, Nesbitt's allegation that defense counsel was ineffective for failing to make these same arguments on direct appeal is not procedurally barred. We address each argument in turn.

(a) Peremptory Challenges

Nesbitt alleges that his counsel was ineffective for not arguing on direct appeal that the district court erred in failing to "grant additional peremptory challenges to the defense." Neb. Rev. Stat. § 29-2005 (Reissue 1995) provides in pertinent part:

Every person arraigned for any crime punishable with death, or imprisonment for life, shall be admitted on his or her trial to a peremptory challenge of twelve jurors, and no more The attorney prosecuting on behalf of the state shall be admitted to a peremptory challenge of twelve jurors in all cases when the offense is punishable with death or imprisonment for life . . . [p]rovided, that in all cases where alternate jurors are called, as provided in section 29-2004, then in that case both the defendant and the attorney prosecuting for the state shall each be allowed one added peremptory challenge to each alternate juror.

Because Nesbitt was charged with first degree murder, which carries a maximum penalty of death or life imprisonment, see, currently, Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000), Nesbitt was entitled to 12 peremptory challenges for use during the selection of the original 12 jurors. In addition, because the district court exercised its discretionary authority under Neb. Rev. Stat. § 29-2004 (Reissue 1995) to select alternate jurors, Nesbitt was also entitled to one additional peremptory challenge to be used during the alternate juror selection process.

Nesbitt asserts that he is unable to state the specifics of this claim because he has repeatedly been denied access to the court records he needs to properly research this issue. The record indicates that Nesbitt has in fact made numerous but unsuccessful attempts to obtain the complete voir dire testimony. However, the portions of the voir dire that are contained in the record establish that Nesbitt was present with counsel during the voir dire examination, and thus he has personal knowledge of any alleged

deficient performance of his counsel. Despite this personal knowledge, Nesbitt does not allege that he was denied the peremptory challenges to which he was entitled under § 29-2005, nor does he allege that his attorney requested additional peremptory challenges. Moreover, to state a claim for postconviction relief, Nesbitt must plead both that his trial counsel was deficient and that such deficient performance resulted in prejudice. The missing voir dire transcripts relate solely to the factor of whether counsel was deficient, but Nesbitt has nevertheless completely failed to plead facts demonstrating how any deficient performance of his counsel prejudiced him. Nesbitt therefore has failed to properly plead facts which, if proved, would entitle him to postconviction relief on this claim, and the district court properly denied an evidentiary hearing.

(b) Sequestration During Trial

Nesbitt also alleges that defense counsel was ineffective for failing to argue on direct appeal that the district court erred in failing to sequester the jury during trial. Again, Nesbitt claims that he is unable to state his claim with greater specificity because of the absence of pertinent court records. We disagree. The "records" that Nesbitt presumably needs to state this claim are not court records under the district court's control, but, rather, are newspaper clippings and other media releases that would show how the media's influence was so pervasive and biased that the district court abused its discretion in not sequestering the jury to protect them from these allegedly improper materials. See, Neb. Rev. Stat. § 29-2022 (Reissue 1995); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989) (holding decision to sequester jury subject to abuse of discretion standard). Consequently, Nesbitt has no viable claim that he was prevented by the district court from gaining access to the materials he needed to properly state his claim on this issue. Nesbitt has failed to plead facts demonstrating his counsel was ineffective, and this argument is without merit.

(c) Individual Voir Dire

Nesbitt argues that his defense counsel was ineffective for not arguing on direct appeal that the district court erred by not allowing each potential juror to be individually questioned to determine whether he or she had become biased by the extensive

media coverage surrounding the trial. Nesbitt further argues that this failure prejudiced him by allowing biased jurors to be impaneled during his trial.

The record reflects that an oath was administered to all prospective jurors. During the initial stages of jury selection, the trial judge announced that he would permit counsel to question each prospective juror individually, outside the presence of the others, regarding exposure to pretrial publicity. The record index indicates that 52 prospective jurors and 6 prospective alternate jurors were individually examined. However, the record is incomplete with respect to the substance of these examinations, as it includes a verbatim transcript of the individual examinations of only 12 of the prospective jurors and all 6 of the prospective alternates. Of these, Nesbitt's counsel exercised one challenge for cause, which was sustained. The record further reflects that Nesbitt was present with counsel during the individual examinations.

While the record of voir dire examination is incomplete, we view it as sufficient to establish the fact that each prospective juror and alternate was questioned individually, out of the presence of the others, on the issue of pretrial publicity. That being so, and absent any allegation that Nesbitt was not permitted to be present during any portion of this examination, it was incumbent upon him to allege specific facts regarding any claimed bias on the part of one or more jurors who participated in the verdict in order to support his claim that counsel was ineffective in not raising the issue on direct appeal. He did not do so, and the district court therefore did not err in denying an evidentiary hearing on this issue.

(d) "Death Qualification"

Finally, Nesbitt alleges that his defense counsel was ineffective for failing to argue on direct appeal that Neb. Rev. Stat. § 29-2006(3) (Reissue 1995) is unconstitutional because it allows a juror to be removed for cause if "his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death." We disagree.

This court and the U.S. Supreme Court have held on numerous occasions that it is constitutionally permissible to remove a

prospective juror for cause if his or her opposition to the death penalty is such that it would prevent or substantially impair his or her ability to be an impartial juror. See, *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986); *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986). Defense counsel was not ineffective for failing to raise an argument that has no merit.

8. EVIDENCE OF PRIOR UNCHARGED CRIME

In this lengthy section of his postconviction motion, Nesbitt primarily argues that the evidence relating to the prior uncharged sexual assault on McKeever was improperly admitted into evidence. As noted, McKeever was allowed to testify over objection that in November 1974, she was abducted by Nesbitt, taken to his home, threatened, and raped.

Much of Nesbitt's argument in this regard is framed as trial court error in admitting the testimony. All allegations of trial court error are now barred, as the admission of the prior bad acts evidence could have been and in fact was raised on direct appeal. See *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987). Thus, we do not address Nesbitt's arguments alleging district court error with respect to McKeever's testimony, including his allegations concerning lost reports, unavailable witnesses, lack of judicial corroboration, or improper cross-examination. To the extent Nesbitt characterizes the error as ineffective assistance of counsel, it is not barred and is discussed below.

(a) § 29-110 Statute of Limitations

Nesbitt argues that his trial counsel was ineffective for failing to raise a statute of limitations defense to the use of McKeever's testimony and related evidence. He argues that because the McKeever prior bad act evidence related to an incident that occurred on November 11, 1974, it was precluded by the statute of limitations provisions of Neb. Rev. Stat. § 29-110 (Reissue 1985). He contends that he specifically told his counsel to make the statute of limitations argument and that counsel failed to raise the argument as directed, to his prejudice because it would have resulted in the inadmissibility of the evidence. We disagree.

Section 29-110 only proscribes *prosecution* for a felony that is time barred by its provisions. Nesbitt was not prosecuted for the assault on McKeever, and thus § 29-110 is inapplicable. See *In re Interest of Hollenbeck*, 212 Neb. 253, 322 N.W.2d 635 (1982) (holding § 29-110 inapplicable to allegations of incest relied upon in juvenile proceedings seeking termination of parental rights). Because § 29-110 is inapplicable to prior bad acts evidence, defense counsel was not ineffective for failing to raise the argument. This argument is without merit.

(b) Miller Deposition

Nesbitt further alleges that his counsel was ineffective for failing to develop testimony that would help to impeach McKeever during Miller's deposition. Nesbitt's arguments regarding Miller's deposition have been previously addressed in this opinion and need not be repeated here.

(c) Constitutionality of § 27-403

Finally, Nesbitt alleges that Neb. Rev. Stat. § 27-403 (Reissue 1995) unconstitutionally shifts the burden of proof to the defendant in a criminal case. This argument could have been raised on direct appeal. Nesbitt does not allege ineffective assistance of counsel in failing to raise this argument, and it is now procedurally barred in this postconviction action.

9. RIGHT TO CONFRONT MILLER

In this section of his motion, Nesbitt simply restates the same argument he made under his "Sequestration of Witnesses" section, i.e., that his defense counsel was ineffective for stipulating away his right to confront Miller and that the district court also violated his confrontation rights by accepting the stipulation. To the extent this argument assigns error to the district court, it is procedurally barred. *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000); *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000). To the extent this argument restates an ineffective assistance claim against defense counsel, Nesbitt once again fails to properly plead how counsel's performance prejudiced him. Nesbitt, not the State, offered portions of Miller's deposition at trial, and Nesbitt has not identified any of the deposition testimony which was prejudicial to him. Nesbitt states that

if Miller had testified in person, he would have provided "extremely important exculpatory testimony," and that Miller was an "extremely vital exculpatory witness," but he again fails to state what that testimony might have been. Without alleging the substance of Miller's anticipated testimony, Nesbitt has again failed to plead a constitutional violation. Consequently, this assignment is without merit.

10. ISSUES RELATING TO DISMISSAL OF FELONY MURDER CHARGE

In this section of his motion, characterized by Nesbitt as the "most seriously important" issue of this postconviction proceeding, Nesbitt alleges that his counsel, the district court, and this court on direct appeal failed to realize that the "Specific Directed Verdict of Acquittal" entered at the end of the State's case in chief completely acquitted him of all charges. We disagree.

After the State rested, defense counsel moved for an order of dismissal on the ground that the State had failed to prove its prima facie case. The court found that there was insufficient evidence of a sexual assault or an attempted sexual assault on Harmer and thus dismissed the felony murder theory. However, the court specifically held that it was not dismissing the premeditated murder theory. Defense counsel then moved for a mistrial, arguing that in dismissing the felony murder theory, the court was in effect ruling that "a substantial majority of the testimony offered by the State is not relevant." Defense counsel also argued that the court was in effect ruling that Harmer was never sexually assaulted, while still allowing the State to allege that the sexual assault of Harmer was a motive for the premeditated killing. The motion for mistrial was overruled.

Nesbitt argues that premeditated murder and felony murder are simply alternate means of committing the crime of first degree murder, so that when he was acquitted of felony murder by the district court's dismissal of that charge, he was therefore acquitted of first degree murder altogether. He contends that this "acquittal" barred the State under double jeopardy principles from proceeding on the premeditation theory. To the extent Nesbitt alleges this argument as ineffective assistance of counsel, it is not procedurally barred.

Part of Nesbitt's premise is correct, but his conclusion is ultimately incorrect. We held in *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998), that premeditated murder and felony murder are simply alternate methods of committing first degree murder. To that extent, we agree with Nesbitt. Nevertheless, it is clear that double jeopardy principles did not apply to the premeditation theory in this case.

[8] The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. White, supra*. We have construed Nebraska's double jeopardy clause as providing the same protections. *Id.* Nesbitt's argument relates to the first of these three protections. This protection, however, does not apply to Nesbitt in the instant case because there has never been a second prosecution. Nesbitt was tried once on alternative theories of first degree murder, and our case law clearly permits the assertion of alternative theories in one murder prosecution. See *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991) (holding when defendant is charged in alternative with premeditated murder and felony murder, jury need not be unanimous under which theory it convicts). The Double Jeopardy Clause only bars the State from reprosecuting a defendant at a *subsequent* proceeding under a different theory of criminal liability for the offense of first degree murder. *State v. White, supra*. Because Nesbitt was charged at one trial under alternative theories, he was put in jeopardy for first degree murder only once. Nesbitt's double jeopardy argument lacks legal merit, and thus his counsel could not have been ineffective for failing to raise it.

Nesbitt also relies upon the principle of collateral estoppel embodied in the Double Jeopardy Clause. This principle provides "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Nesbitt argues that pursuant to the principle of collateral estoppel, the dismissal of the felony murder theory resulted in a

resolution in his favor of all of the ultimate facts relating to the sexual assault of Harmer and that the State was therefore precluded from inferring that a sexual assault on Harmer was the motive for premeditated murder.

[9] Again, however, Nesbitt's argument lacks legal merit. As the Eighth Circuit Court of Appeals found in its review of Nesbitt's habeas corpus action alleging this very issue, the collateral estoppel principle, like the concept of double jeopardy itself, applies only in successive prosecution cases and does not apply to a single trial in which conviction was sought on alternative theories of proving the same offense. *Nesbitt v. Hopkins*, 86 F.3d 118 (8th Cir. 1996). Moreover, even if the principle of collateral estoppel applied to a single trial of multiple counts, the principle would still not apply to the instant case. In a criminal case, a fact previously determined is not an "ultimate fact" precluded by the collateral estoppel principle unless it was necessarily determined by the fact finder against the government and, in the second prosecution, that "'same fact is required to be proved beyond a reasonable doubt in order to convict.'" *Id.* at 120, quoting *Prince v. Lockhart*, 971 F.2d 118 (8th Cir. 1992). The district court dismissed the felony murder charge in this case after finding that there was insufficient evidence of a sexual assault upon Harmer for the jury to determine that such assault occurred beyond a reasonable doubt. The State, however, was not required to prove the sexual assault of Harmer beyond a reasonable doubt in order to establish premeditated murder. Although Nesbitt generally argues that the State impermissibly used evidence of a sexual assault on Harmer to infer a motive for her premeditated killing, motive is not an element of first degree murder and does not have to be proved beyond a reasonable doubt. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). The resolution of the felony murder theory therefore did not resolve an ultimate fact in Nesbitt's favor, and the principle of collateral estoppel would not apply to this case.

Nesbitt's argument that he was acquitted of premeditated first degree murder is entirely without legal merit, and the district court did not err in denying an evidentiary hearing on this ground. To the extent Nesbitt's other allegations of error in his motion rest

on his acquittal/double jeopardy argument, they are similarly without merit.

11. ALLEGATIONS OF GOVERNMENT MISCONDUCT

In this section of his motion, Nesbitt generally alleges that there was a conspiracy involving law enforcement officials, prosecutors, and the news media to convict him at all costs and that perjury and governmental misconduct so tainted his trial that he was denied his right to a fair and impartial trial. Although he makes numerous claims including destruction of evidence, withholding of exculpatory evidence, use of perjured testimony, government interference with both witnesses and his attorney-client privilege, improper use of the media by the prosecution to influence the trial, and improper closing argument, he does not characterize any of these errors as ineffective assistance of counsel, nor does he allege that he was unaware of any of these errors at the time of his direct appeal. Because these alleged errors could have been brought on direct appeal, they are now procedurally barred. See *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

With respect to certain of the alleged errors in this section, however, Nesbitt alleges that relevant proceedings were not transcribed on appeal and/or that he has been denied access to relevant records and thus cannot make complete factual allegations in his motion. Specifically, in his argument relating to the improper use by the State of perjured testimony, Nesbitt asserts that the prosecutor knowingly solicited a false statement from a witness. Nesbitt further asserts that defense counsel timely objected to the statement as hearsay. The portions of the record that Nesbitt claims were not transcribed with respect to this issue are the arguments of counsel in chambers on the hearsay objection. Although these arguments were not recorded, the record clearly reveals that the objection of defense counsel was sustained and that therefore no allegedly "perjured" testimony was admitted in this regard. We fail to see how the untranscribed arguments of counsel would help Nesbitt state a claim for the improper use of perjured testimony when the testimony in question was not received in evidence.

Nesbitt also alleges that there are numerous documents and records related to his destruction-of-evidence claim that were not transcribed on direct appeal, even though requested. Because any

transcription error could have been raised at the time of the direct appeal, the issue is now procedurally barred. See *State v. Caddy*, *supra*. Similarly, although Nesbitt alleges he was denied access to records relating to the improper use of the media by the prosecutor, any denial of access to such records in this postconviction motion is irrelevant because the issue of improper use of the media could have been raised on direct appeal and is now procedurally barred. Finally, although Nesbitt also alleges that the closing arguments were not transcribed, any transcription error relating to closing arguments could have been raised on direct appeal and is now procedurally barred. Moreover, we note that the bill of exceptions before us contains a transcription of both parties' closing arguments.

12. DOYLE v. OHIO ISSUES

In this section of his motion, Nesbitt alleges that the prosecution was erroneously allowed to impeach his trial testimony both on cross-examination and during closing argument by referring to his post-*Miranda* silence, in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). With respect to this alleged error, Nesbitt asserts both that the district court erred in allowing the impeachment and that his trial counsel was ineffective for failing to object. Nesbitt's claim that the district court erred in allowing the impeachment could have been made on direct appeal and is therefore procedurally barred. See, e.g., *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001); *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). Nesbitt's assertion that his trial counsel was ineffective, however, is not barred, as he had the same counsel at trial as he did on direct appeal. See *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

Some additional background is necessary to our analysis of this issue. Nesbitt testified at trial that he and Harmer, along with one or two other persons at various times, were in his home on the night of November 30, 1975. He testified that all persons in the home were using controlled substances. According to Nesbitt's testimony, Harmer excused herself to go to the bathroom, and when she did not return a short time later, he went to the bathroom and found her lying on the floor in a pool of vomit. He testified that after determining that she was dead, he cleaned

her body and disposed of it, first wrapping it in carpet and placing it in a garage, and then, on the following day, placing the body in a manhole at a housing development near Carter Lake, Iowa. He assumed that Harmer died of a drug overdose and denied killing her.

Nesbitt testified on direct examination that law enforcement officers came to his home in 1975 shortly after Harmer's death. He admitted that on this occasion, he told police that Harmer had been at his home on the night of November 30, but had left the next morning. He testified that he did not report Harmer's death to authorities because he did not trust them. Nesbitt further testified that he had had a similar conversation a few days later with other officers who had contacted a female acquaintance of Nesbitt's concerning Harmer's disappearance. Several days after these conversations, Nesbitt left Omaha and moved to Chicago, Illinois, where he assumed a new identity. He testified that in 1978, law enforcement officials located him in Illinois, ascertained his true identity, and questioned him about Harmer's disappearance. Nesbitt alleges that he was given *Miranda* warnings at the time of this questioning and on five subsequent occasions between 1978 and 1985 when he was questioned by police.

On cross-examination, Nesbitt again admitted that he originally told law enforcement authorities in 1975 that Harmer left his home while he was asleep. Later in the cross-examination, he was asked:

Q Did you ever tell the story that you told this jury today to anyone who was investigating this case or anyone involved in law enforcement?

A This is not a story; this is what happened.

Q I ask you have you ever told this to anyone who was investigating the case or anybody who involved [sic] in law enforcement before today?

A No.

Nesbitt's counsel did not object to these questions. In his closing argument, the prosecutor made the following statements:

The first time anybody heard Mr. Nesbitt say that, [referring to his testimony that Harmer died of a drug overdose] that's involved in law enforcement or had anything to do

with the case, other than he says his attorneys, was yesterday morning.

....
... To talk real briefly about his testimony, of course, he is the last person to testify. He has had access to every report, every deposition — he sat in on some — and he is going to get on the stand and he's going to be real straightforward with you and tell you what happened

....
... When the defendant testified, and [defense counsel] apparently thought I was trying to be a comic or it was a ridiculous cross examination, was the first time I ever talked to him in my life

....
... There wasn't one time — and I think this offends me more than about anything else about this case — there wasn't one time from November 30th on, until today, that Mr. Nesbitt couldn't have told the Harmers where their daughter's body was anytime. And he didn't have to do it himself, but he sure could have let them know.

[10] In *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the Court held that a state may not impeach a defendant's exculpatory testimony, given for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest. The Court held that because *Miranda* implicitly assures that silence will carry no penalty, it is "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." 426 U.S. at 618. This court adopted the prohibition in *Doyle* against the use of a defendant's silence during the postarrest, post-*Miranda* time period in *State v. Lofquest*, 227 Neb. 567, 418 N.W.2d 595 (1988). In that case, however, we noted that the Supreme Court limited the *Doyle* rule in *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), by holding that a prosecutor's references to postarrest, pre-*Miranda* silence do not necessarily violate a defendant's due process rights. See, also, *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981) (finding no merit to claim that prosecutor's

reference to defendant's failure to make exculpatory statement to police before arrest fell within holding of *Doyle*). Recently, in *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002), we held that it is not a violation of fundamental fairness for the State to use a defendant's pre-*Miranda* silence as impeachment or as substantive evidence of sanity.

We initially address the prosecutor's remarks during closing argument that Nesbitt was the last to testify and that he had access to all the reports and depositions. In *State v. Jacob*, 253 Neb. 950, 974, 574 N.W.2d 117, 137 (1998), the prosecutor made a similar reference to the defendant's testimony during closing argument, stating:

"Credibility, ladies and gentlemen. Does it make sense? As you judge credibility, ladies and gentlemen, recall. Recall. Who has had five years to think of his answers, five years to run through all of this. Five years to prepare. Who sat through this trial and heard every witness and every question. Who sat on the stand and didn't want to answer the question that was posed, he wanted to give his own answer. Credibility, ladies and gentlemen. That's your job to decide."

We held that such statements did not comment upon the defendant's post-*Miranda* silence and did not violate *Doyle*. We reach the same conclusion here. The fact that defense counsel did not make a *Doyle* objection to this statement by the prosecutor does not amount to ineffective assistance of counsel.

However, the remaining *Doyle* issues in this case are more problematic. The prosecutor's remarks about Nesbitt's first disclosing his account of Harmer's death and his disposition of her body during his trial testimony resemble the facts we considered in *State v. Lofquest*, *supra*. In that case, a defendant who had testified on his own behalf was asked on cross-examination, "'As a matter of fact, the first time you've told this story to anyone in law enforcement is today?'" *Id.* at 569, 418 N.W.2d at 596. In closing arguments, the prosecutor also said:

"'It wasn't me.' But, who does he tell that story to? Did he tell it to the police? No. He admitted to you this morning that he knew that if he told the police where he was, the police would go out and they would look for tire tracks

and they'd look for cigarette butts; they'd be trying to verify his story. He said he knew that. And he didn't tell them anything."

State v. Lofquest, 227 Neb. 567, 569, 418 N.W.2d 595, 596-97 (1988). In both instances, defense objections were overruled. We noted that the generalized questions and comments made it "nearly impossible to discern, for purposes of a *Doyle* inquiry, what period of silence the prosecution was referring to, pre-*Miranda* or post-*Miranda*." 227 Neb. at 570, 418 N.W.2d at 597. We therefore held:

In a case such as this where a pre-*Miranda* and post-*Miranda* timeframe may exist, difficulties arise when general references are made to a defendant's silence, which a reasonable juror could construe as including the post-*Miranda* silence period. We cannot allow prosecutors to sidestep the *Doyle* protections by skirting the edge of the law with vague and imprecise references to a defendant's silence. For these reasons we conclude that appellant's constitutional right to due process of law was violated.

State v. Lofquest, 227 Neb. at 570, 418 N.W.2d at 597. After determining that the error was not harmless, we reversed the conviction.

In *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), *overruled on other grounds*, *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), the defendant admitted the killing with which he was charged but testified that it was committed in self-defense. During the trial, a deputy sheriff testified that after his arrest, the defendant told the deputy a trace metal test on the defendant's hands was not necessary because he had killed the victim. The deputy was asked, "'When [the defendant] made that statement . . . did he offer any explanation or excuse for the action he had taken?'" The deputy responded, "None." *Id.* at 914, 510 N.W.2d at 66. On cross-examination, the defendant was asked if he had shown the deputy any marks on his neck from the alleged grabbing by the victim, and the defendant responded, "'No, I didn't talk to anybody when I came in.'" *Id.* at 915, 510 N.W.2d at 66. Finally, during closing arguments, the prosecutor remarked:

"[I]f a guy was claiming—if he were claiming that he shot a guy because he was defending himself from him, wouldn't

he have said, 'Look at the marks on my neck,' or, 'He was trying to get me,' or, 'Look at this, what he did,' or, 'He was trying to knock me down.' He didn't say that. He just said, 'Why brother [sic] [with the trace metal test], I shot him.' Now, you know, he's explained later what he says happened, but why didn't he explain that to the officer on the scene when he was first in custody in the sheriff's office?"

Id. We noted that the testimony and comments were clearly in reference to a postarrest, post-*Miranda* timeframe and thus in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). Finding, however, that defense counsel did not object to the questions at least in part because of a consciously chosen trial strategy, we held that any error was waived.

On the two occasions when Nesbitt spoke with Omaha police in 1975, he had neither been accused of killing Harmer nor given *Miranda* warnings. Thus, if the prosecutor's cross-examination and argument were clearly limited to Nesbitt's silence on those occasions, there would not be a *Doyle* issue. However, the questions asked and argument made can reasonably be interpreted as extending beyond these two occasions into the post-*Miranda* period. Thus, under our reasoning in *State v. Lofquest*, 227 Neb. 567, 418 N.W.2d 595 (1988), the prosecutor's questions under consideration here were susceptible to a *Doyle* objection insofar as they were not limited to Nesbitt's two 1975 contacts with Omaha police in the days following Harmer's death.

The State argues that the decision to object or not object is part of trial strategy to which we must give deference. That is generally true, but unlike the circumstances in *State v. Myers*, *supra*, the record in this case does not affirmatively establish that Nesbitt's trial counsel made a conscious, strategic decision not to assert a *Doyle* objection to the prosecutor's questions and argument about Nesbitt's pretrial, post-*Miranda* silence with respect to his exculpatory account of Harmer's death. Thus, Nesbitt has pled facts entitling him to an evidentiary hearing on this issue.

13. JURY INSTRUCTIONS

In this section of his motion, Nesbitt generally alleges that the district court erred by omitting necessary jury instructions and/or

refusing to give instructions proposed by the defense. Any error by the district court could have been raised on direct appeal and is now procedurally barred.

[11] Nesbitt also makes a general allegation that he was not allowed to personally participate in the jury instruction conference. This does not raise a constitutional issue that would entitle Nesbitt to postconviction relief, as we have previously held that a defendant has no constitutional right to be present at a conference in which jury instructions are formulated by counsel and the trial judge. See *State v. Bear Runner*, 198 Neb. 368, 252 N.W.2d 638 (1977).

Finally, Nesbitt generally asserts that his counsel was ineffective with regard to jury instructions both at trial and on direct appeal. This argument is not procedurally barred. Nesbitt's argument addresses omitted instructions by topic, and we adopt the same format in analyzing his claims.

(a) Corpus Delicti

Nesbitt argues that the district court failed to give an instruction on this issue which was requested by his trial counsel. Because this claim asserts error on the part of the district court only, it could have been raised on direct appeal and is procedurally barred in this postconviction action.

(b) Motive

Nesbitt argues that the district court erred in its duty to properly instruct the jury regarding the permissible use of the prior bad act evidence, i.e., the McKeever testimony. This argument also alleges error by the district court that is procedurally barred in this postconviction action.

Although Nesbitt contends that his counsel adamantly objected to the district court's errors, he also alleges counsel was ineffective because Nesbitt had prepared a jury instruction on the "failed motive" issue and given it to codefense counsel with instructions that it be proposed at the jury instruction conference and such was not done. He alleges that an evidentiary hearing is necessary to determine whether counsel was ineffective in failing to propose the instruction.

[12] We agree with the district court that no evidentiary hearing was required in this regard. To establish reversible error

from a court's refusal to give a requested instruction, an appellant has the burden to show (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001). Nesbitt's proposed instruction provided:

The jury are [sic] instructed that the State claims in support of it's [sic] prosecution that the motive of intent or purpose to kill pursuant to the alleged offense now charged, was that Mary K. Harmer, as the victim of an attempted or perpetrated sexual assault was killed so that she would not be able to identify the accused as the perpetrator of such an assault.

With reference to this claim, you are instructed that the State has failed to support such a position of motive for intent or purpose to kill, and all evidence presented to you on that topic is hereby withdrawn from your consideration and you are instructed to disregard the same.

Further, the absence of all evidence of motive for intent or purpose to kill, is a material circumstance that should be considered by yourselves in connection with all other facts in determining the guilt or innocence of the accused.

This instruction implies that motive is an element that the State must prove in order to establish the elements of first degree murder and, thus, is an incorrect statement of the law. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). Moreover, the proposed instruction directs the jury to disregard portions of the evidence, which directly infringes upon the province of the jury as a fact finder in a criminal case. The instruction appears to be based largely on Nesbitt's acquittal/double jeopardy theory, which we have held to be without merit. Because the proposed instruction is an incorrect statement of the law, Nesbitt cannot show that any failure of counsel to propose the instruction was ineffective, and the district court did not err in denying an evidentiary hearing on this issue.

(c) Theory of Defense

Nesbitt argues next that the district court erred in not instructing the jury regarding his theory of defense. It is not clear what

instruction he contends should have been given, but in any event, any such error by the trial court could have been asserted on direct appeal and is now procedurally barred.

Nesbitt also alleges that he drafted a proposed instruction which he asked his attorneys to request during the instruction conference. He alleges that his counsel was ineffective for failing to propose his drafted instruction.

Nesbitt's proposed instruction provided:

The jury are [sic] instructed that the accused is not required to prove his innocence or to produce any evidence to that effect.

Further you are instructed that the defense has offered evidence in support of it's [sic] position that the death of Mary K. Harmer was the result of a drug related overdose and not from some criminal act of the accused where such evidence shall be considered by yourselves in connection with all other facts and circumstances in determining your verdict. If you should thereupon find that the prosecution's evidence does not refute the defense position and beyond a reasonable doubt, then you must acquit the defendant.

[13,14] The trial court is required to give an instruction where there is any evidence, which could be believed by the trier of fact, in support of a legally cognizable theory of defense. *State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998). This proposed instruction does not relate to a theory of defense, but merely directs the jury to consider the defense's contention that Harmer died of a drug overdose. A jury instruction which directs the attention of the jury to, and unduly emphasizes, a part of the evidence is erroneous and should be refused. *State v. Harrison*, 221 Neb. 521, 378 N.W.2d 199 (1985). Furthermore, the jury instructions, taken as a whole, correctly stated the law as it relates to this issue. The jury was instructed on the burden of proof and the presumption of innocence. The jury was also properly instructed on the elements of first degree murder, requiring proof beyond a reasonable doubt that Nesbitt killed Harmer purposely and with deliberate and premeditated malice. A separate instruction unduly emphasizing a portion of the evidence was therefore not warranted. Nesbitt has not pled facts which, if

proved, would demonstrate that defense counsel was ineffective. This argument is without merit.

(d) Prior Bad Act

Nesbitt generally alleges that the district court erred in giving all of the instructions relating to the limited admissibility of the prior bad act testimony of McKeever. Any such error by the district court could have been raised on direct appeal and is now procedurally barred.

Nesbitt also alleges that he prepared a proposed instruction on this issue that was not offered by his counsel at the instruction conference and contends that an evidentiary hearing on this issue is thus required. Nesbitt's proposed instruction provided:

The jury are [sic] instructed that evidence was received in this case relative to an alleged similar act allegedly committed by the accused in connection with an event which the witness, Michele McKeever, was involved. Such evidence was not admitted for your consideration in order to prove a character trait of the accused to show that he acted in conformity therewith, but rather, this evidence was received solely for the limited purpose of show [sic] a plan and or preparation of the accused for tending to establish the material elements of deliberation and premeditation.

Further you are instructed that the accused is not on trial for any conduct not charged in Instruction No. 5 nor is this evidence in and of itself material to prove the commission of the present offenses charged.

This requested instruction is incorrect. The McKeever evidence was admitted for the purpose of showing plan, motive, preparation, and identity, as correctly stated in instruction No. 14 which was given to the jury. Instruction No. 14 also informed the jury that they were not to consider the evidence for any other purpose. Because Nesbitt's proposed instruction is incorrect and the jury instructions that were given adequately instructed the jury on the matter, Nesbitt cannot show that his counsel was ineffective for failing to propose the instruction. The district court did not err in denying an evidentiary hearing on this ground.

(e) Reasonable Doubt

Nesbitt also argues that the district court erred in instructing the jury on reasonable doubt. To the extent he alleges error by the district court, such error is procedurally barred in this postconviction action, as it could have been raised on direct appeal. Moreover, the instruction given by the district court was the NJI Crim. 14.08 standard instruction on reasonable doubt. The constitutionality of such instruction was confirmed by this court during the pendency of Nesbitt's trial in *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986), and has been reaffirmed by this court in *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), *abrogated on other grounds*, *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995), and *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), *overruled on other grounds*, *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). See, also, *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

Nesbitt further alleges that he drafted a proposed instruction on reasonable doubt that was not submitted by his counsel at the jury instruction conference. He alleges that the failure of his counsel to submit the instruction resulted in ineffective assistance of counsel. Nesbitt's proposed instruction provided:

The jury are [sic] instructed that the guilt of the accused is not to be inferred because the facts are consistent with guilt, but, on the contrary, before there can be a verdict of guilty you must believe from all the legal evidence when taken together and beyond a reasonable doubt on each and every material element that the facts proved are inconsistent with his innocence.

Proof beyond a reasonable doubt is proof so great and convincing that you would not hesitate to act upon it in the most important and graver transactions of life.

If from all the legal evidence when taken together produces only a firm belief or conviction about the existence of any one or more material elements then you must acquit the accused, or, if two conclusions can readily or reasonably be drawn from the legal evidence, one of innocence and one of guilt, you should adopt that of innocence. Furthermore you must remember that facts or evidence

based on suspicion, speculation or mere conjecture may never support your verdict.

As noted, the instruction given by the district court has been consistently found by this court to be adequate and constitutional and, thus, a sufficient definition of reasonable doubt. Because the standard jury instruction already defines reasonable doubt, Nesbitt cannot show that his trial counsel was ineffective in failing to propose his instruction. The district court did not err in denying an evidentiary hearing on this ground.

(f) Multiple Witnesses

Finally, Nesbitt alleges that although the district court, via instruction No. 17, instructed the jury regarding the credibility of the witnesses and the weight to be given their testimony, it omitted an instruction concerning the number of witnesses that testified for each party. To the extent this is alleged as error by the district court, it could have been brought on direct appeal and is now procedurally barred in this postconviction action.

Nesbitt also alleges, however, that his counsel was ineffective in failing to bring the relevant instruction to the attention of the court. He alleges the proper instruction to be:

The weight to be given to any particular legal evidence is not necessarily determined by the number of witnesses testifying on behalf of each side. You may find that the testimony of a smaller number of witnesses for one side is more credible than the testimony of a greater number of witnesses for the other side.

Nesbitt alleges that trial counsel's failure to make certain that this instruction was given resulted in prejudice because it allowed the jury to erroneously presume that the number of witnesses testifying for each side was "an automatic determinant factor for their consideration in the weight to be given the evidence." Nesbitt does not allege facts relating to how such an erroneous presumption, even if made, would have had a reasonable probability of affecting the outcome of the proceedings and has therefore failed to properly plead ineffective assistance of counsel in this regard. The district court did not err in denying an evidentiary hearing on this ground.

Nesbitt also alleges that the district court erred in its failure to either admonish, limit, or strike the "inadmissible prejudicial testimony" of certain witnesses after defense counsel properly objected. Nesbitt has alleged only error by the district court, which could have been raised on direct appeal and is now procedurally barred.

In a subsequent section of his motion, Nesbitt alleges that trial counsel was ineffective generally regarding the jury instruction issues and that appellate counsel ineffectively raised the corpus delicti issue on direct appeal. These allegations are substantially related to those set forth above or to his acquittal/double jeopardy argument and are without merit for the reasons outlined.

14. SUFFICIENCY OF EVIDENCE

Nesbitt contends in this section of his motion that the trial court and this court on direct appeal failed to properly analyze his sufficiency of the evidence claim. Much of his argument in this regard is related to his acquittal/double jeopardy argument, which we have concluded is without merit. This claim is also procedurally barred, as the issue was raised and litigated on direct appeal. *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987).

Nesbitt also alleges that his counsel was deficient at trial and on direct appeal in failing to properly litigate the sufficiency of the evidence issues. Again, much of his argument in this regard is related to his unsound acquittal/double jeopardy theory, and counsel therefore was not deficient in not asserting it at trial or on appeal. Notably, Nesbitt also admits that his attorney directly raised the sufficiency of the evidence issue in the double jeopardy context in a motion for rehearing filed after the direct appeal. That motion was denied by this court.

15. DIRECT APPEAL

In this section of his motion, Nesbitt alleges that he was denied his fundamental right, granted by Neb. Const. art. I, § 23, to personally file a direct appeal from his conviction. He alleges that he never knowingly and voluntarily acquiesced to the filing of the direct appeal by his counsel and now asserts that his postconviction motion should be considered as his direct appeal.

Nesbitt's argument in this regard is both legally and factually inaccurate. Article I, § 23, of the Nebraska Constitution grants "an aggrieved party" the right to appeal. Such language does not restrict counsel from filing an appeal on behalf of an aggrieved party. Moreover, throughout his motion, Nesbitt alleges that he directed counsel to raise certain issues in the direct appeal. These allegations are a direct contrast to his assertion that he never authorized the filing of the direct appeal. The direct appeal filed by counsel on Nesbitt's behalf sufficiently satisfied his right to a direct appeal, and this argument is without merit.

Nesbitt also alleges that he was denied access to his counsel during the preparation of the direct appeal because he was removed from the jurisdiction and collect telephone calls from him to his attorney's office were refused. He contends that he was thus denied the opportunity to give advice and suggestions to counsel on how to proceed on direct appeal. Once again, this factual allegation directly conflicts with Nesbitt's other assertions that he specifically directed counsel to raise certain issues on appeal. Nesbitt has failed to allege a constitutional violation and is not entitled to an evidentiary hearing on this matter.

16. § 29-2308

In this section of his motion, Nesbitt appears to attack the constitutionality of Neb. Rev. Stat. § 29-2308 (Reissue 1995). That statute provides in relevant part:

No judgment shall be set aside, new trial granted, or judgment rendered in any criminal case on the grounds of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure if the appellate court, after an examination of the entire cause, considers that no substantial miscarriage of justice has actually occurred.

Nesbitt generally argues that any harmless error analysis undertaken by this court pursuant to § 29-2308 on his various post-conviction claims violates his right to a trial by jury. To the extent this argument is not procedurally barred due to Nesbitt's failure to raise it on direct appeal, it is without merit, as subsequent review by a court does not infringe upon a party's initial right to a jury trial.

17. PRESENTENCE INVESTIGATION REPORT

[15] In this section of his motion, Nesbitt initially alleges that Neb. Rev. Stat. § 29-2261(6) and/or (7) (Reissue 1995) is unconstitutional on its face and as applied. This issue was not raised before the district court prior to sentencing. A constitutional question not properly raised in the trial court will not be considered on appeal. *State v. Victor*, 259 Neb. 894, 612 N.W.2d 513 (2000). Because this argument was not raised prior to sentencing, it is now procedurally barred.

Moreover, in *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), we held that § 29-2261 did not violate the constitutional right to confrontation. To the extent Nesbitt alleges ineffective assistance of counsel with respect to his constitutionality claim, it is therefore without merit.

Nesbitt next alleges that the district court erred in denying him an opportunity to review the presentence investigation report and in refusing to append it with information necessary to negate improper factual allegations within the report. Any alleged error by the district court could have been raised on direct appeal and is procedurally barred in this postconviction action.

Nesbitt also alleges, however, that his counsel was ineffective in failing to consult with him regarding the contents of the report and failing to make it available for Nesbitt's review. Two hearings were held in this case in connection with Nesbitt's sentencing. At an April 4, 1986, hearing at which Nesbitt was present, Nesbitt's counsel objected to portions of the presentence investigation report and the district court heard arguments regarding aggravating and mitigating circumstances. Nesbitt was also present at an April 17 sentencing hearing. Prior to imposing sentence on April 17, the judge asked if either defense counsel or the defendant wished to address the court and Nesbitt made a statement generally attacking the judicial process involved in his trial. He did not complain at that time that he had not been given an opportunity to review the presentence investigation report.

In *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 defendant filed a postconviction motion alleging he received ineffective assistance of counsel because he

was not given the opportunity to review the presentence investigation report prior to sentencing. At his sentencing hearing, Plant's attorney addressed concerns with the presentence investigation report, and immediately thereafter Plant was asked whether he wished to address the court. Plant addressed the court, but did not mention that he had not personally reviewed the presentence investigation report.

On appeal, we noted that a defendant has a qualified right to personally review his presentence investigation report with his counsel, subject to the district court's supervision. We found, however, that a defendant waives that right by failing to notify the district court when given an opportunity that the defendant has not personally reviewed the report and wishes to do so. Because the record before us affirmatively establishes that Nesbitt had an opportunity to inform the district court that he had not personally reviewed the report but failed to do so, he has waived his right to review the presentence investigation report. Due to this waiver, Nesbitt's ineffective assistance of counsel argument is without merit. The district court did not err in denying an evidentiary hearing on this ground.

18. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

In this section of his postconviction motion, Nesbitt first alleges that the standard announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), adopted by this court for analyzing ineffective assistance of counsel claims is partially unconstitutional. He alleges that because the prejudice prong of this standard requires a demonstration of a reasonable probability that but for counsel's deficient performance the result of the proceeding would have been different, his right to a trial by a jury of his peers was unconstitutionally infringed. Nesbitt appears to argue that if a court instead of a jury is allowed to review the record to determine whether the result of the proceeding would have been different, there is a violation of his constitutional rights. We find this argument to be without merit, as any subsequent review by a court does not deny a defendant his original right to a trial by jury.

Nesbitt also generally alleges that he received ineffective assistance from his trial counsel. In this regard, he lists 10 "issues

of error regarding defense counsel's deficient and or ineffective performances." After reviewing this list, we conclude that it is nothing more than a summation of the ineffective assistance arguments previously addressed throughout his postconviction motion and determined in other portions of this opinion. There is no need to repeat or reconsider them here.

Nesbitt also alleges in this section of his motion that his counsel was deficient on direct appeal. In this regard, he alleges that counsel engaged in a "feeble" attempt on direct appeal to raise the issues of inadequate corpus delicti, admissibility of the prior bad acts evidence, and sufficiency of the evidence. To the extent these issues have not been addressed by previous portions of this opinion, we note that Nesbitt does not allege how counsel was deficient and does not allege what prejudice resulted due to any deficiency. He has thus failed to adequately plead ineffective assistance of counsel. His allegation that counsel deficiently raised the acquittal/double jeopardy argument on rehearing to this court is similarly without merit, as we have determined that the argument itself is without substance.

Nesbitt finally alleges that his appellate counsel failed to request and have prepared an adequate bill of exceptions at the time of the direct appeal and that those portions of the bill of exceptions that were properly requested were not provided to this court for that appeal. He argues that the omitted portions were necessary for a plain error review of the factual issues related to his "acquittal." Because we have determined that Nesbitt's "acquittal" argument is without legal merit, any error by counsel in failing to provide this court with such portions of the bill of exceptions could not have resulted in prejudice to Nesbitt.

We note that Nesbitt lists in his motion all of the portions of the bill of exceptions and records in this case that had not been transcribed at the time he filed his postconviction motion. Many of these portions relate to arguments made by counsel, and many more have subsequently been transcribed and are now part of the record before this court. We conclude that none of the missing portions of the record are necessary to the resolution of any of Nesbitt's postconviction claims.

19. AMENDMENT

Nesbitt argues that because certain records were not transcribed at the time his motion was filed, he should be allowed to amend his motion. As noted, we conclude that the missing portions of the record are not germane to any viable postconviction claim alleged by Nesbitt.

Moreover, we note that pursuant to Neb. Rev. Stat. § 25-852 (Reissue 1995), "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, permit a party upon motion to amend any pleading, process, or proceeding by . . . inserting other allegations material to the case" See, also, *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000). The decision to grant or deny an amendment to a pleading rests in the discretion of the court. See *id.* On the record before us, it is clear that the district court did not abuse its discretion. We note that Nesbitt has failed to file an amended petition at any time in the last 10 years even after having at least four different counsel appointed for the express purpose of assisting him in that task.

20. APPOINTMENT OF POSTCONVICTION COUNSEL

Nesbitt also assigns as error the failure of the district court to appoint counsel to represent him in this proceeding. The record reflects that Nesbitt is currently represented by experienced counsel who appeared on his behalf at oral argument before this court. Accordingly, the issue of whether the district court should have appointed counsel is moot.

V. CONCLUSION

Nesbitt has alleged sufficient facts to entitle him to an evidentiary hearing on his postconviction claim that his trial counsel was ineffective in not asserting *Doyle* objections to certain questions asked by the prosecutor during his cross-examination of Nesbitt which were sufficiently broad to be construed as challenging his post-*Miranda* silence. We therefore reverse the order of the district court to the extent that it denied Nesbitt an evidentiary hearing on this issue because the files and records before us do not affirmatively establish that Nesbitt is not entitled to postconviction relief. We agree with the district court that all other grounds for postconviction relief asserted by Nesbitt

are either procedurally barred, based upon inadequate factual allegations, or shown by the files and records to be without merit, and we therefore affirm the dismissal of those claims.

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

STATE OF NEBRASKA, APPELLEE, v.
RUSSELL W. HARMS, APPELLANT.
650 N.W.2d 481

Filed September 13, 2002. No. S-00-1157.

SUPPLEMENTAL OPINION

Appeal from the District Court for Nemaha County: DANIEL BRYAN, JR., Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

James R. Mowbray and Robert W. Kortus, of the Nebraska Commission on Public Advocacy, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

PER CURIAM.

This matter is before us on the motion for rehearing of the appellant, Russell W. Harms, regarding our opinion reported at *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002). Harms claims, in seeking rehearing, that we applied an incorrect standard of review in analyzing whether the erroneous admission of certain testimony relating to his post-*Miranda* request for an attorney and post-*Miranda* refusal to speak to a police officer was harmless beyond a reasonable doubt. We overrule the motion for rehearing, but substitute for the present analysis following the subheading "3. HARMLESS ERROR," *id.* at 831-37, 643 N.W.2d at 375-78, the following language:

Having determined that portions of the testimony of Dr. Sanat Roy and Officer Daniel White were improperly admitted pursuant to *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), the issue becomes whether the erroneously admitted evidence is harmless. In this court's prior cases analyzing *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), we have stated that "[b]ecause the nature of a *Doyle* error is so egregious and so inherently prejudicial, reversal is the norm rather than the exception." *State v. Lofquest*, 227 Neb. 567, 571, 418 N.W.2d 595, 597 (1988), quoting *Williams v. Zahradnick*, 632 F.2d 353 (4th Cir. 1980). However, *Doyle* and *Wainwright* violations constitute "trial error" and are subject to a harmless error analysis. *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). See, also, *Lofquest*, 227 Neb. at 570-71, 418 N.W.2d at 597 (applying "'harmless beyond a reasonable doubt" standard to *Doyle* violations').

Generally, "erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact." *State v. Ildefonso*, 262 Neb. 672, 686, 634 N.W.2d 252, 265 (2001). At Harms' trial, the trier of fact was the district court. In such a context, this court has stated:

In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury.

State v. Lara, 258 Neb. 996, 1002, 607 N.W.2d 487, 491-92 (2000). We explained in *Lara* that the burden rests on the appellant in a bench trial because of the "presumption" that the trial court, sitting as the fact finder, disregards inadmissible evidence. See *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991). Our examination of the evidence and the district court's findings are in accordance with these standards.

We begin our analysis by examining those portions of the testimony of Dr. Roy and White that were inadmissible pursuant to *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986). Dr. Roy's testimony that "when [Harms] was explained his Miranda rights, he said, 'I'm not going to talk without my lawyer,'" is essentially identical to the statement in Dr. Roy's written evaluation, admitted without objection, that "Mr. Harms refused to talk to the police officer without the present [sic] of his lawyer." Accordingly, we find Dr. Roy's testimony cumulative. Similarly, White's testimony regarding Harms' post-Miranda requests for counsel and failure to mention anything about hearing voices or having hallucinations is repeated without objection in Adams' testimony, which provides virtually the same answers to the same questions posed by the State. Because of this repetition, we also find White's testimony cumulative. Thus, the evidence properly considered by the trial court contained exactly the same evidence that was improperly before the court.

In addition, although Harms argues to the contrary, the record does not indicate that the district court relied upon the inadmissible evidence. The district court in its findings does not refer to Harms' post-Miranda silence, either as a basis for its finding of sanity or for any other purpose. The court stated:

There's two elements in the insanity defense, and one being that defendant had a mental disease, defect, disorder at the time that the act is charged. Again, the State concedes that, at least as to this part of the defense, the defendant has that particular disorder. That would be the schizophrenia of paranoid type.

We get into the next part of that and that is that— and which means not only do you have to prove that the person has that particular disease, but the defense must also show that the mental disease, the paranoid schizophrenia impaired his mental capacity to such an extent that either (1) he did not understand the nature or consequences of what he was doing or (2) that he did not know that— he did not know the difference between right or wrong with respect to what he was doing.

Now, either one of those has to be proved by the greater weight of the evidence. And if that's the case, the defense has met their burden of proving by preponderance of the evidence that he was insane. Like most of these cases, you have two experts with credentials coming into this room and they both give opposite opinions. And, of course, it has to be confusing to the lay witnesses from the standpoint that how two professionals can come up with two different types of opinion. On the other hand, I think it's pointed out by [defense counsel], his expert relied heavily— remember there was actually— well, they talked about four particular phases which didn't include the interview but they talked about his history prior to the actual incident and then the actions thereafter as part of the mix in making their determination regarding his— the issue of his knowing the nature and consequences of what he was doing or the difference between right and wrong.

Again, I know that Dr. Logan emphasized strongly the historical pattern up to the shooting which would leave a basis for his opinion as to the actual, you know, state of mind of the defendant at the time of the shooting. Now, we know the actions of the defendant at the time based on the evidence that's been submitted. And we don't know what was going on in his mind and that's the problem the Court has. Okay, we've got— somebody's got to make a decision as to what was going on in his mind at the time. We know his actions thereafter and, of course we know the cliches are brought about because they're generally there for all of us to hear, like the cliché actions speak louder than words. What he did do at the time, what he did do thereafter and, of course, [defense counsel] is saying what have we also got in the beginning of this, also to look from the standpoint of his actions, Judge, also to consider it.

There's no question that he did have a history of some delusions. And it seems like the historical pattern— now [defense counsel]'s explaining the reason and maybe given the facts and reason, he didn't— Well, let me go back here. The historical pattern seems to suggest that when Mr. Harms had a problem and felt a— whatever he called that,

anxiety coming on, he usually was able to control it to some extent and maybe it was his own feeling that the mental professionals had let him down, to not help himself any further, I don't know.

But it seems like from the history that was given, that throughout that history he was constantly telling them that he had these hallucinations or delusions and yet what I note in this particular case is, is that even Dr. Logan testified that there were no command voices that he was given at the time of the incident. And yet he, for whatever reason, he said he didn't know whether— said he believed he was— he said he was guarded. One's left to speculate as to what was going on in his mind. It's odd to me that the person that's been able to talk about all these voices all of a sudden, you know, does not— clams up when it comes to a particular factual pattern that's now very serious now confronting him.

Even after time passes he's not communicating that at least to the satisfaction of the doctor. I know that Dr. Roy on the other hand disregarded the historical context and didn't put as much weight on it and put more weight on the actual incident and he weighed also, I'm sure, his actions thereafter.

To be quite honest with both parties, it's the Court's opinion that both these professionals have left me with a lot more questions than I have answers for. And I guess what I'm saying to the defendant is that I do not believe you met your burden you have of proving yourself insane even by the greater weight of the evidence.

There is no other indication in the record that the court specifically relied upon the inadmissible evidence.

Moreover, the State offered a substantial amount of evidence regarding Harms' sanity at trial. Several individuals testified to Harms' calm demeanor immediately after the shooting. Shawn Clark, an eyewitness to the shooting, stated that Harms drove away after the shooting at a normal rate of speed and was "[n]ot [in] a real big hurry." Kenneth Hatten, another eyewitness, also testified that Harms did not hurry to leave the area after shooting Tennyson Kelsay, but, rather, drove away "[s]low, deliberate, like watching." Both White and Eric Adams, the police officers,

described how Harms behaved calmly, normally, and without agitation at the time of his arrest. Adams specifically noted that Harms' "normal" demeanor on the day of the shooting differed significantly from an angry encounter Adams had had with Harms in 1994. Holly Plager, a dispatcher for the Nemaha County Sheriff's Department, discussed how Harms was not excited or agitated when she spoke with him after the shooting and how he had asked for his attorney without any mention of hallucinations or command voices.

Dr. Roy's statements at trial and in his written evaluation of Harms, excluding inadmissible portions in violation of *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), also provided the court with evidence of Harms' sanity at the time of the shooting. Dr. Roy found that Harms' thoughts prior to the shooting, such as "'this old guy looks like he had a lot of good years,'" were distinguishable from command voices ordering Harms to kill someone. He testified that when he interviewed Harms, Harms denied "any auditory hallucination, delusional thinking, or any paranoia related to" Kelsay because "he has no connection with that man." Dr. Roy also compared the behavior of someone who was actively hallucinating with Harms' behavior on the day of the shooting. Dr. Roy testified that an individual in Harms' circumstance who was actively hallucinating or experiencing delusions would have exhibited "bizarre" behavior, such as engaging in a random shooting spree with multiple victims or driving at an extremely high rate of speed, and would have been incapable of acting rationally. Dr. Roy contrasted this scenario with Harms' actions, specifically, Harms' ability to slowly drive to his trailer, pick up the telephone, dial 911, speak with the dispatcher, and ask the dispatcher for his attorney. In sum, Dr. Roy testified that a person who was actively hallucinating could not have behaved the way Harms did after the shooting. Dr. Roy further testified that Harms' call to the dispatcher with a request for his attorney demonstrated that Harms knew that shooting Kelsay was wrong and would subject him to legal proceedings.

Portions of the testimony offered by Dr. William Logan, Harms' expert witness, also support a finding of sanity. Dr. Logan stated that Harms, in shooting Kelsay, "knew he was firing a gun," "knew he was shooting an elderly gentleman," and was acting

with deliberation and premeditation “[t]o the extent that he had to take out a rifle and shoot him numerous times.” Dr. Logan also concluded that Harms “knew what he was doing” and “certainly knew the number he was dialing” when he called 911 with a request for his attorney.

While we recognize that Harms also presented considerable evidence at trial on the issue of his sanity, based upon the cumulative nature of the inadmissible evidence, the court’s articulated findings, and the admissible evidence evaluated as a whole, we determine that Harms has failed to establish that the district court resolved the factual issue of his sanity through the use of the erroneously admitted evidence. For these reasons, we determine that the *Wainwright* errors which occurred at trial were harmless beyond a reasonable doubt.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

ADRIAN R. REGIER, BY LORIE REGIER, GUARDIAN AND
CONSERVATOR, APPELLANT, V. GOOD SAMARITAN HOSPITAL,
KEARNEY, NEBRASKA, A CORPORATION, ET AL., APPELLEES.

651 N.W.2d 210

Filed September 20, 2002. No. S-01-631.

1. **Demurrer: Pleadings: Appeal and Error.** 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.
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.
3. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
4. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.

5. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally, and if, as so construed, the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled.
6. ____: _____. When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.

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

Larry C. Johnson, of Johnson, Vaughan & Welch, P.C., for appellant.

Patrick G. Vipond and Shun Lee Fong, of Lamson, Dugan & Murray, L.L.P., for appellee John Finkner, M.D.

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

MILLER-LERMAN, J.

NATURE OF CASE

Lorie Regier (Regier), the guardian and conservator of Adrian R. Regier (Adrian), appeals from the order of the district court for Buffalo County which sustained the demurrer of John Finkner, M.D., and dismissed Regier's cause of action against Finkner without leave to replead. We reverse.

STATEMENT OF FACTS

On January 8, 2001, Regier filed a petition against various defendants, including Finkner. This appeal is limited to the dismissal of Regier's cause of action against Finkner, without leave to replead. We summarize the facts alleged by Regier in her petition. Adrian was born on July 6, 1980, and lives in Perkins County, Nebraska. Regier is Adrian's mother. On September 26, 1997, Adrian sustained a concussion while playing high school football. He was taken from the field to the Community Hospital in McCook, Nebraska, where he was admitted to the emergency room at approximately 9:45 p.m. and treated by Corrine Phillips-Ward, M.D., and Elizabeth Edwards, M.D. At approximately 11:45 p.m., Phillips-Ward contacted the Good Samaritan Hospital (Good Samaritan) in Kearney, Nebraska, and spoke with Finkner. Good Samaritan is a "regional referral center"

and has "specialized capabilities," including helicopter ambulance service, a shock-trauma unit, and neurosurgery expertise. Although paragraph 10 of the petition alleges that Finkner is an employee of the "Community Hospital," given the remaining allegations in the petition and the parties' briefs, we understand this statement to be an allegation that Finkner is an employee of Good Samaritan. It is alleged that notwithstanding the fact that Good Samaritan had the specialized capabilities or facilities needed by Adrian and the "'capacity'" to treat Adrian, upon receiving the call from Phillips-Ward, Finkner refused to accept Adrian's transfer from the Community Hospital to Good Samaritan. There is no suggestion in the petition that in this telephone call, Finkner said anything of medical substance. Adrian was not taken to Good Samaritan.

Sometime after 3:45 a.m. on September 27, 1997, Adrian was transferred to Lincoln General Hospital in Lincoln, Nebraska. Upon arrival, his intracranial pressure was measured at 60. A CAT scan of his head revealed severe cerebral edema due to his head injury. Despite efforts by the medical staff at Lincoln General Hospital to relieve Adrian's intracranial pressure by controlled ventilation and intermittent mannitol, Adrian did not make significant neurological improvement and sustained severe traumatic brain injury.

With respect to Finkner, the petition alleges, *inter alia*, that Finkner's refusal to accept the transfer of Adrian was in violation of Good Samaritan's hospital standards, bylaws, rules, and regulations regarding the acceptance of transfer patients and that it also violated the general industry standard regarding the acceptance of transfer patients. The petition does not recite or suggest the substance of the standards, bylaws, rules, and regulations or that Finkner had agreed to adhere to them.

On February 12, 2001, Finkner filed a demurrer claiming, *inter alia*, that the petition failed to state a cause of action against him. On March 19, the district court held a hearing on Finkner's demurrer. In an order dated May 7, the district court sustained Finkner's demurrer. The district court stated that Finkner had not been an attending physician for Adrian and that "no physician-patient relationship ha[d] been or could be alleged." The district court concluded that Finkner had no liability to Adrian, because Adrian

had never been received by or entered into Good Samaritan for treatment. Based upon these determinations, the district court dismissed Regier's cause of action against Finkner, stating:

The Court finds that [Regier] has failed to state a cause of action against defendant Finkner. It also appears to this Court that it will not be possible for [Regier], given the facts presented in the petition, to set forth sufficient facts upon which a cause of action against . . . Finkner can be alleged. The Court therefore dismisses this cause of action. The district court entered its order dismissing Regier's cause of action against Finkner without leave to amend. Regier appeals.

ASSIGNMENTS OF ERROR

On appeal, Regier assigns two errors. Regier claims, restated, that the district court erred (1) in sustaining Finkner's demurrer and (2) in dismissing Regier's cause of action against Finkner without leave to amend.

STANDARDS OF REVIEW

[1,2] 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. *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002); *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002). 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. *Shirley v. Neth*, ante p. 138, 646 N.W.2d 587 (2002); *Spradlin v. Dairyland Ins. Co.*, 263 Neb. 688, 641 N.W.2d 634 (2002); *Mulinix v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001). Whether a petition states a cause of action is a question of law regarding which an appellate court has an obligation to reach a conclusion independent of the inferior court. *Shirley*, *supra*.

ANALYSIS

[3,4] At issue in this case is whether Regier's petition states a cause of action against Finkner and, if not, whether the district

court should have granted leave to Regier to replead. In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Spradlin, supra*.

[5,6] In determining whether a cause of action has been stated, the petition is to be construed liberally, and if, as so construed, the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled. *Chambers, supra*; *Spradlin, supra*. When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002).

The relevant portions of the petition regarding Finkner are paragraphs 10 and 36. Paragraph 10 reads as follows: "At all times pertinent hereto, Defendant FINKNER was an employee and/or agent of the Defendant COMMUNITY HOSPITAL [sic] acting within the scope and course of such employment and/or agency in the rendition of his medical services." Paragraph 36 alleges the following:

Defendant FINKNER was negligent in his medical care and treatment of Adrian in one or more of the following particulars:

a) in failing to accept the transfer of Adrian to the Defendant GOOD SAMARITAN given Adrian's medical condition and the capacity and the specialized capabilities of Defendant GOOD SAMARITAN to treat that condition in violation of the applicable standard of care in the provisions of 42 U.S.C. §1395dd [(1994), Emergency Medical Treatment and Active Labor Act];

b) in failing to accept the transfer of Adrian to the Defendant GOOD SAMARITAN given Adrian's medical

condition and the Defendant hospital's specialized capabilities and capacity to treat that condition in violation of hospital standards, bylaws, rules and regulations for the acceptance of transfer and care of patient's [sic] in Adrian's condition;

c) in failing to accept the transfer of Adrian to the Defendant GOOD SAMARITAN given Adrian's medical condition and said Hospital's specialized capabilities and capacity to treat that condition in violation of industry standards for the acceptance of transfer and care of patients in Adrian's condition.

In her brief before this court, Regier asserts that "the facts alleged in the Petition support both a general negligence claim and a medical malpractice claim against . . . Finkner." Brief for appellant at 12. Regier acknowledges that Finkner did not "treat" Adrian; however, Regier asserts that "Finkner, as the emergency room physician, [was] contractually obligated to provide emergency room services . . . and owed a duty to Adrian." Brief for appellant at 13.

This court has previously recognized that generally, a physician's duty to exercise the required skill or standard of care must arise out of the physician-patient relationship and that the relationship can be said to arise when the physician undertakes treatment of the patient. *Flynn v. Bausch*, 238 Neb. 61, 469 N.W.2d 125 (1991). See, also, *Gallion v. Woytassek*, 244 Neb. 15, 504 N.W.2d 76 (1993). We have also previously stated that the "existence of a physician-patient relationship is normally a question of fact" and "the party claiming the existence of the relationship must allege some facts to show that the relationship came into existence." *Id.* at 20, 504 N.W.2d at 80. In *Flynn*, we acknowledged that "[s]ome courts . . . have held that a physician-patient relationship is not a necessary prerequisite for sustaining an action in medical malpractice, and have grounded liability upon the traditional duty analysis for negligence." *Id.* at 65, 469 N.W.2d at 128. We noted, however, that under the facts of the *Flynn* case, nothing was called to our attention to support the imposition of such a duty, and, therefore, it was not necessary to determine in *Flynn* the general question of whether liability can exist absent an underlying physician-patient relationship.

In the instant case, Regier alleges in her petition that Finkner was "negligent in his medical care and treatment of Adrian." The petition contains no allegations, however, that Finkner undertook to provide any medical care or treatment to Adrian. See *id.* To the contrary, the petition alleges that Finkner refused to accept the transfer and thus alleges facts that no physician-patient relationship based on treatment came into existence. Finally, although in her brief Regier claims that the allegations in the petition support a general negligence claim against Finkner, the petition fails to allege facts establishing that under existing Nebraska jurisprudence, Finkner owed a duty to Adrian. See *id.*

We acknowledge that there are allegations that Finkner's refusal to accept Adrian's transfer was in violation of Good Samaritan's bylaws, rules, and regulations, although the substance of such bylaws, rules, and regulations are not alleged. The petition alleges that Finkner is an employee and agent of Good Samaritan; however, it does not allege that he was subject to a contract which obligated him to follow the bylaws, rules, and regulations which might have benefited Adrian. The allegations against Finkner do not state what, if any, undertakings Finkner assumed.

As noted, the petition fails to allege facts setting forth a physician-patient relationship between Finkner and Adrian. Furthermore, the petition sets forth no facts establishing a duty Finkner owed to Adrian. Accordingly, the petition does not adequately plead a cause of action under Nebraska law against Finkner, and the district court correctly so ruled.

When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002). While the current allegations in the petition fail to state a cause of action against Finkner, it is possible that Regier might be able to amend the petition by alleging facts imposing a duty on the part of Finkner in favor of Adrian. Accordingly, the district court erred in denying Regier leave to replead.

CONCLUSION

The petition does not adequately plead a cause of action against Finkner. However, a reasonable possibility exists that

amendment will correct the defect. Although the district court correctly sustained Finkner's demurrer to the petition, it erred when it denied leave to replead. We, therefore, reverse the district court's order.

REVERSED.

WRIGHT, J., not participating.

JOSHUA FISCHER, APPELLANT, v.
ASHLEIGH CVITAK, APPELLEE.
652 N.W.2d 274

Filed September 20, 2002. No. S-01-711.

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. **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, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Actions: Final Orders: Appeal and Error.** An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of incidental matters.

Appeal from the County Court for Lancaster County: JEAN A. LOVELL, Judge. Appeal dismissed.

Eddy M. Rodell, of Wolgamott & Rodell, P.C., for appellant.

Susan Kubert Sapp and Pamela K. Epp, of Cline, Williams, Wright, Johnson & Oldfather, P.C., for appellee.

HENDRY, C.J., CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LEMAN, JJ.

CONNOLLY, J.

Joshua Fischer appeals the county court's order dismissing his petition to establish paternity, awarding attorney fees against him for filing a frivolous pleading, and awarding fees to a guardian ad litem. Fischer filed this appeal more than 30 days after the order awarding attorney fees was entered but within 30 days of the

order granting fees to the guardian ad litem. The appellee, Ashleigh Cvitak, contends that the final order was the order awarding attorney fees against Fischer for filing a frivolous pleading and that because Fischer did not appeal within 30 days of that order, this appeal was filed late. We agree and dismiss for lack of jurisdiction.

BACKGROUND

On December 21, 2000, Fischer signed a receipt in the presence of a notary public. In the receipt, Fischer acknowledged that he had received notice that a child had been born; that Cvitak, as the biological mother, intended to relinquish the child for adoption; and that he was identified as a possible biological father. Fischer further acknowledged that he received by hand delivery the documents required to be served on him by Neb. Rev. Stat. §§ 43-104.08, 43-104.12, and 43-104.13 (Reissue 1998 & Cum. Supp. 2000). He also acknowledged that he was aware that he had the right to file a notice of intent to claim paternity under Neb. Rev. Stat. § 43-104.02 (Reissue 1998). The receipt stated, "I hereby acknowledge and accept service of such documents and expressly waive the notice and service by registered or certified mail, or by publication, that I may be entitled to receive under Neb. Rev. Stat. §§ 43-104.08, 43-104.12 and 43-104.13 (1995)." Fischer does not deny that he received the proper documents. The record shows that Fischer was given the documents in person by Cvitak's attorney.

On January 3, 2001, the Nebraska Department of Health and Human Services Finance and Support certified that 5 days had passed since the birth of the child and that a notice of intent to claim paternity had not been filed. On February 9, Fischer filed a notice of intent to claim paternity, and on March 15, he filed a petition to establish paternity. Cvitak moved for summary judgment and requested attorney fees for Fischer's filing of a frivolous pleading.

On April 9, 2001, the county court sustained the motion for summary judgment and dismissed the case. On April 13, the court sustained the motion based on a frivolous pleading and awarded attorney fees.

On May 11, 2001, the guardian ad litem moved for payment of her fees. On May 23, the county court awarded fees to the guardian ad litem as a charge upon Lancaster County.

Fischer filed his notice of appeal on June 18, 2001. In July, Cvitak moved for summary dismissal, contending that Fischer failed to timely file a notice of appeal.

ASSIGNMENTS OF ERROR

Fischer assigns that the county court erred in (1) sustaining the motion for summary judgment and (2) ordering him to pay attorney fees.

STANDARD 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. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Id.*

ANALYSIS

Fischer contends that the county court's order did not become final until the court awarded fees to the guardian ad litem. Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000) requires a notice of appeal to be filed within 30 days of a final order. Here, if the order awarding attorney fees was a final order, Fischer filed his appeal too late. But, if the order awarding fees to the guardian ad litem prevented the earlier order from becoming final, Fischer filed his appeal in time.

Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000) provides:

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.

The guardian ad litem was not a party to the action, and the guardian's fees did not constitute a "claim" that would make § 25-1315 applicable. Thus, we analyze the problem under Neb. Rev. Stat. § 25-1902 (Reissue 1995), which provides:

An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

[3] We have stated that an order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of incidental matters. *Dorshorst v. Dorshorst*, 174 Neb. 886, 120 N.W.2d 32 (1963).

Here, there was no motion outstanding for the guardian's fees when the action was dismissed and the award of attorney fees was made. The April 13, 2001, order determined all the issues in the action, and nothing was reserved for decision by the court. The award of the guardian's fees was incidental to the orders dismissing the case and awarding attorney fees. Fischer was required to file his notice of appeal within 30 days of the order awarding attorney fees. Because he failed to timely file a notice of appeal, this court lacks jurisdiction over the appeal. The appeal is dismissed.

APPEAL DISMISSED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL L. JONES, APPELLANT.
650 N.W.2d 798

Filed September 20, 2002. No. S-01-854.

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, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **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.
3. **Courts: Affidavits.** Challenges to the ability of a defendant to proceed in forma pauperis are to occur in the district court, and the district court is charged with the responsibility of granting or denying a motion to proceed in forma pauperis.
4. **Courts: Jurisdiction: Appeal and Error.** Lower courts are divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected.
5. **Jurisdiction: Affidavits: Appeal and Error.** An in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and an affidavit of poverty.
6. **Postconviction: Constitutional Law: Proof.** When a motion for postconviction relief properly alleges an infringement of a defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief.
7. **Postconviction: Effectiveness of Counsel: Public Officers and Employees: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by lawyers employed by the same public defender's office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.
8. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Michael L. Jones, pro se.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

WRIGHT, J.

NATURE OF CASE

Michael L. Jones seeks review of the order of the Douglas County District Court denying his motion for postconviction relief.

SCOPE OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002).

[2] 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. Dean*, ante p. 42, 645 N.W.2d 528 (2002).

FACTS

Jones filed a motion for postconviction relief pursuant to Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995) on June 7, 2001. Jones alleged that he had been charged by information on July 26, 1989, with 17 counts of robbery and 16 counts of use of a firearm to commit a felony. In October 1989, he pled guilty to four of the counts, and under the terms of a plea agreement, the other counts were dismissed. He was then found guilty of three counts of robbery and one count of use of a firearm, and he was sentenced to a term of 25 to 50 years in prison. A detailed statement of facts regarding the trial court's acceptance of Jones' plea is set forth in the analysis section of this opinion.

In his postconviction motion, Jones asserts that he was not fully apprised of the consequences of accepting the plea agreement. He claims that the trial court did not explain his rights to him and that his counsel did not inform him in detail of the consequences of the plea agreement. Jones claims that he would have insisted on a trial if he had been better informed.

Jones also asserts that an evidentiary hearing is warranted because his counsel provided ineffective assistance during the plea agreement, sentencing, and the appeal process. Jones claims that his court-appointed counsel, who was employed by the Douglas County public defender's office, "appeared to be [only]

a go-between for arranging a plea bargain” and that he felt compelled to plead guilty. Jones alleges that at the plea hearing, the trial court did not advise him of his right to effective assistance of counsel and that his attorney “stood moot [sic] and allowed this unconstitutional oversight to occur without objection.”

Jones also alleges that his counsel advised him to state on the record that he had committed the robberies. He suggests that his sentence was to 20 more years in prison than had been represented to him by counsel.

The district court denied Jones’ motion for postconviction relief without a hearing, and Jones timely appealed.

ASSIGNMENTS OF ERROR

Jones assigns two errors: (1) The district court erred in denying his rights under article I, § 13, of the Nebraska Constitution, which provides that all courts shall be open and every individual shall have a remedy by due course of law, and (2) the district court erred in finding that any issues raised by Jones were or could have been raised on direct appeal.

ANALYSIS

JURISDICTION

We first address the State’s position that this court lacks jurisdiction over the instant appeal because there is no order in the record granting Jones permission to proceed in forma pauperis. The following statutes are applicable:

An order sustaining or overruling a motion filed under sections 29-3001 to 29-3004 shall be deemed to be a final judgment, and an appeal may be taken from the district court as provided for in appeals in civil cases. A prisoner may, in the discretion of the appellate court and upon application to the appellate court, be released on such recognizance as the appellate court fixes pending the determination of the appeal. § 29-3002.

Any county or state court, except the Nebraska Workers’ Compensation Court, may authorize the commencement, prosecution, defense, or appeal therein, of a civil or criminal case in forma pauperis. An application to proceed in forma pauperis shall include an affidavit stating that the affiant is

unable to pay the fees and costs or give security required to proceed with the case, the nature of the action, defense, or appeal, and the affiant's belief that he or she is entitled to redress.

Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2000).

(1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application: (a) Has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. The objection to the application shall be made within thirty days after the filing of the application. Such objection may be made by the court on its own motion or on the motion of any interested person. The motion objecting to the application shall specifically set forth the grounds of the objection. An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. . . . If an objection is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal. In any event, the court shall not deny an application on the basis that the appellant's legal positions are frivolous or malicious if to do so would deny a defendant his or her constitutional right to appeal in a felony case.

Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2000).

[3] In *State v. Dallmann*, 260 Neb. 937, 947, 621 N.W.2d 86, 96 (2000), we addressed the timing of a jurisdictional challenge in a case in which a party wished to proceed in forma pauperis: "Section 25-2301.02 makes clear that challenges to the ability of a defendant to proceed in forma pauperis are to occur in the district court and that the district court is charged with the responsibility of granting or denying the motion to proceed in forma pauperis."

[4,5] We also stated:

"We have uniformly held that lower courts are divested of subject matter jurisdiction over a particular case when an

appeal of that case is perfected. . . . [W]e [have] held that an in forma pauperis appeal is perfected when the appellant timely filed a notice of appeal and an affidavit of poverty.

"Although jurisdiction is vested in the appellate court upon timely filing of a notice of appeal and an affidavit of poverty, some duties are still required of the lower court. . . . For example, the lower court must forward to the appellate court the notice of appeal, requests for the transcript and the bill of exceptions, and the docket fee or poverty affidavit. Sections 25-2301 and 25-2308 require the lower court to act if it determines that the allegations of poverty are untrue or if it determines that the appeal is not taken in good faith.

"Generally, appellants are entitled to the benefits of an in forma pauperis appeal when the affidavit of poverty and notice of appeal are filed and stand uncontradicted and unobjected to. If there is no hearing on the poverty affidavit and the appeal, or when there is a hearing and the evidence is uncontradicted, the trial court has a duty to allow the appellant to proceed in forma pauperis."

Dallmann, 260 Neb. at 947-48, 621 N.W.2d at 96.

In *In re Interest of N.L.B.*, 234 Neb. 280, 450 N.W.2d 676 (1990), the appellant had filed both a notice of appeal and a poverty affidavit within the time prescribed by statute. However, the trial court did not enter an order authorizing the appellant to proceed in forma pauperis within 30 days. The appellee claimed that in addition to filing a poverty affidavit, the party appealing must also obtain authorization from the trial court to proceed in forma pauperis.

In rejecting the appellee's contention, we stated:

[A]lthough it may be customary and a mark of prudence for an appellant to obtain authorization of the trial court in order to forestall any finding of a lack of good faith and possible dismissal of the appeal, contrary to appellee's assertion, there is no statutory requirement that such authorization be obtained in order to make the affidavit effective.

Id. at 282, 450 N.W.2d at 679. We held, based on the statute in effect at the time, that this court obtained jurisdiction when a party filed a notice of appeal and an affidavit of poverty.

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002). In the present case, the record contains no order granting or denying Jones' in forma pauperis request. Nor does it contain any objection to the request. The absence of an order allowing a party to proceed in forma pauperis does not divest this court of jurisdiction over an appeal. See *In re Interest of N.L.B.*, *supra*. This court obtained jurisdiction over the appeal upon the timely filing of a notice of appeal and a proper in forma pauperis application and affidavit. The State's assertion that this court lacks jurisdiction has no merit, and we therefore proceed to consider the merits of the postconviction motion.

POSTCONVICTION MOTION

[6] Jones argues that the district court violated article I, § 13, of the Nebraska Constitution, which provides that the courts shall be open to all, when it refused to grant him an evidentiary hearing on his motion for postconviction relief. When such a motion properly alleges an infringement of a defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief. See *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

Jones claims that at trial, he was represented by an attorney who worked in the Douglas County public defender's office and that he was represented on direct appeal by a second attorney from the Douglas County public defender's office. The only issue raised on direct appeal was excessiveness of the sentence. Jones asserts that because both attorneys worked for the same entity, appellate counsel was not able to raise any claim of ineffectiveness of trial counsel on direct appeal.

[7] We have held that when a defendant was represented both at trial and on direct appeal by lawyers employed by the same public defender's office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief. See *State v. Soukharith*, 260 Neb. 478, 618

N.W.2d 409 (2000). Therefore, Jones' claim of ineffective assistance of counsel is properly before us.

Jones' brief does not provide specifics as to errors allegedly made by his trial counsel. 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. Dean*, ante p. 42, 645 N.W.2d 528 (2002).

In his postconviction motion, Jones suggests several items which he believes demonstrate ineffective assistance of his trial counsel: (1) Jones did not enter his plea voluntarily, knowingly, and intelligently, and counsel did not object when the trial court failed to adequately inform Jones of his constitutional rights; (2) if counsel had provided better information to him, Jones would have insisted on going to trial; (3) counsel advised Jones to expressly state in open court on the record that he committed the robberies; and (4) counsel failed to object to Jones' sentence, which was to 20 more years in prison than had been represented to him by counsel. Jones states that he was charged with a number of crimes which allegedly occurred during a 2-week crime spree "wherein several [r]obberies were committed with the use of a hand gun, but one which was subsequently agreed among the parties to have been inoperable."

We first consider Jones' assertion that his plea was not entered voluntarily, knowingly, and intelligently. We have held that in most cases, a voluntary guilty plea waives all defenses to a criminal charge. However, in this case, the postconviction action brought by Jones, who was convicted on the basis of a guilty plea, may be considered on the allegation that the plea was the result of ineffective assistance of counsel. See *State v. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002).

When Jones entered his plea, the trial court informed him that he had originally been charged with one count of second degree forgery, 18 counts of robbery, and 16 counts of use of a firearm to commit a felony. The State indicated that the plea agreement provided for Jones to enter guilty pleas to four counts and that the remainder of the charges would be dropped. Jones indicated that he understood the agreement. Jones' trial counsel noted that another charge could be filed in Iowa, but it was understood that

Iowa would await resolution of the Nebraska charges before taking further action, and Jones indicated that he understood.

The trial court informed Jones of his constitutional rights and asked whether he was satisfied with his attorney and whether he had had a chance to talk to the attorney about the case. Jones was informed of the possible penalties for the charges. The court asked Jones whether any promises had been made to him in exchange for the guilty plea and whether he had consumed any alcoholic beverages or taken any drugs or medication in the previous 24 hours.

The trial court proceeded to review for Jones the constitutional rights he was waiving by entering a guilty plea, including the right to a public trial by jury, the right to an attorney at no cost, the right to cross-examine witnesses, the right to a speedy trial, the right to testify in his own defense, the right to remain silent, the right to subpoena witnesses, and the right to be presumed innocent until the State proved each and every element of the crimes beyond a reasonable doubt. Jones indicated that he understood each of these rights.

The trial court also informed Jones that if he pled guilty, he would waive the right to require the State to prove that any statement he made to police had been made of his own free will after he was advised of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and after a knowing and intelligent waiver of those rights. Jones indicated he understood that right as well.

Jones entered guilty pleas to three charges of robbery and one charge of use of a firearm to commit a felony. The trial court then asked Jones to state the factual basis for the charges. Jones stated that he robbed the clerk at the Travel Inn on July 4, 1989. Jones showed a gun to the clerk, but it was not loaded, it had no trigger, and the side panel was torn off. The victim did not know the gun was inoperable, Jones said.

On June 19, 1989, Jones asked the clerk at the Colonial Hotel for change and then demanded the money in the cash register when it was opened. On July 3, Jones and a friend went into the Rodeway Inn and asked for a room. When the clerk rang up the amount and opened the cash register, Jones' friend brandished a pistol and Jones took the money from the cash register. The

State indicated that the evidence would show that the victims were able to identify Jones and that he made a statement to a police officer.

Jones' counsel noted that he had discussed with Jones the possibility of using the defense of being under the influence of a controlled substance, but counsel believed that Jones' impaired state could serve only as a mitigating factor. Jones indicated to the trial court that he understood he was waiving the legal defense of intoxication by entering a guilty plea.

The trial court found a factual basis for the guilty pleas and found that they were made knowingly, understandingly, and intelligently. The remaining counts were dismissed.

At sentencing, Jones' counsel asked the trial court to impose consecutive sentences of 3 to 5 years in prison. Jones stated that he had a problem with cocaine, and he expressed remorse and asked for an opportunity to return to society in the future.

The trial court noted that Jones was originally facing a sentence of 400 to 1,200 years in prison based on the number of charges. The maximum sentence for the charges to which Jones pled guilty was 60 to 170 years in prison. The court then entered this sentence:

On Count VII, that of robbery, it's the sentence of The Court that you be confined in the Nebraska Department of Correctional Services in Lincoln for a period of not less than 10 nor more than 20 years. On Count VIII, use of a firearm in the commission of a felony, that you be confined in the Nebraska Department of Correctional Services in Lincoln for a period of not less than 5 nor more than 10 years, to be consecutive. On Count IX, that of robbery, that you be confined in the Nebraska Penal—or Nebraska Department of Correctional Services at Lincoln for a period of not less than 10 nor more than 20 years, to be consecutive. The final count of robbery is going to be concurrent with all the other sentences. That's 15 to 30 years, to be concurrent with any other sentence imposed. I'm also giving you credit from the date of your arrest, from July 6th, 1989, until the date of sentence.

In *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), this court first specified the requirements for finding that a guilty plea

has been entered freely, intelligently, voluntarily, and understandingly. We held that the court must inform and examine the defendant to determine that he or she understands (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also show that there is a factual basis for the plea and that the defendant knew the range of penalties for the crime with which he or she was charged. We have often reiterated these requirements. See, e.g., *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997).

The record in this case shows that Jones was informed of all of his rights as required by *Irish*. Jones was told that he had originally been charged with one count of second degree forgery, 18 counts of robbery, and 16 counts of use of a firearm to commit a felony and that the plea agreement provided that the majority of the charges would be dropped if Jones entered guilty pleas to four counts. He indicated he understood that he had the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination. Jones provided a factual basis for the plea when he explained the circumstances of each of the crimes. He stated that he understood the range of penalties for the crimes and indicated that he understood the rights as explained to him by the trial court. The record affirmatively shows that Jones entered his plea freely, intelligently, voluntarily, and understandingly, and there is no basis for a claim that he would not have entered the plea if counsel had properly objected when Jones was allegedly inadequately informed of his constitutional rights.

Jones also complains because his trial counsel advised him to expressly state in open court on the record that he committed the robberies. Under *Irish*, there must be a factual basis stated for the plea. The trial court asked Jones to describe the crimes in order to provide that factual basis. If Jones had refused to provide the information, the State would have been able to provide the details of the crimes. This allegation provides no basis for postconviction relief.

In addition, Jones asserts that his trial counsel provided ineffective assistance by failing to object to the sentence, which

was to 20 more years in prison than had been represented to him by counsel. The trial court had informed Jones of the possible penalties for the crimes with which he was charged. Counsel requested a sentence of 3 to 5 years in prison for each count. The alleged excessiveness of the sentence was raised on direct appeal, and the sentence was affirmed. Since the issue was decided on direct appeal, it will not be considered further. This assignment of error has no merit.

[8] Jones also asserts that the district court erred in denying his motion for postconviction relief when it found that all his alleged errors were or could have been raised on direct appeal. As this court has often held, a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). Jones' claims on postconviction relate to the entry of his guilty plea and to his sentencing. The sentencing issue was raised on direct appeal, and the sentence was affirmed. Any issues related to the guilty plea were known to Jones at the time of the direct appeal and could have been raised then. Those issues can be raised now only if Jones received ineffective assistance of counsel on appeal. The records and files affirmatively show that Jones is entitled to no relief.

The district court did not err in denying an evidentiary hearing or in denying the postconviction motion.

CONCLUSION

The record supports the judgment of the district court, which denied Jones' motion for postconviction relief without an evidentiary hearing. The judgment of the district court is affirmed.

AFFIRMED.

BRAXTON D. REICHENEKER, A MINOR, BY AND THROUGH
MICHAEL L. REICHENEKER, HIS FATHER AND
NEXT FRIEND, APPELLANT, V. LOIS A. REICHENEKER
AND EUGENE F. REICHENEKER, WIFE AND
HUSBAND, APPELLEES.
651 N.W.2d 224

Filed September 27, 2002. No. S-01-493.

1. **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.
2. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
3. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion.
4. **Pleadings.** Amendment of a petition is not a matter of right.
5. **Invitor-Invitee: Words and Phrases.** An invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant for the mutual advantage of both parties.
6. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

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

Steven W. Dowding, of Dowding, Dowding & Dowding, for appellant, and, on brief, Denzel Rex Busick.

William T. Wright and Trent W. Steele, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellees.

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

WRIGHT, J.

NATURE OF CASE

Braxton D. Reicheneker, a minor, filed suit by and through Michael L. Reicheneker, his father and next friend (collectively referred to as "the plaintiffs"), against Lois A. Reicheneker and Eugene F. Reicheneker (the defendants). The plaintiffs alleged that on August 5, 1993, Braxton was injured while under the care and supervision of Lois, his grandmother, and that such injuries were proximately caused by the negligence of the defendants. The plaintiffs' motion for directed verdict was overruled, and they appeal from a jury verdict in favor of the defendants.

SCOPE OF REVIEW

[1] 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. *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002).

FACTS

On August 5, 1993, Braxton visited the home of his grandparents, the defendants. At that time, Eugene operated a carpet laying business out of his home. While preparing for work on the day before Braxton's visit, Eugene used a carpet knife to pry open a container of carpet paste located in an unfinished storage room in the basement. His practice was to return any knife to a toolbox on the shelf. However, on this day, he left the knife on a bucket of paste in the room.

The defendants often babysat for Braxton, who at the time was almost 3 years old. On August 5, 1993, Michael called Lois and asked if she would watch Braxton while Braxton's mother went swimming. Lois let Braxton play outside and then took him inside because she was waiting for a telephone call. Braxton followed Lois into the basement storage room, where she had gone to get some clothes.

Lois testified that she did not remember seeing the carpet knife when she entered the storage room. After she removed some clothes from a barrel, she heard Braxton cry. She turned and saw him holding a carpet knife. When Lois picked Braxton up, she noticed that there was blood on his cheek. She then realized that Braxton had injured his eye. It was later determined that his cornea was lacerated, and a part of his lens had to be surgically removed.

In their petition, the plaintiffs alleged that the defendants were negligent (1) in failing to exercise reasonable care to keep the carpet knife in a location safely out of Braxton's reach, (2) in failing to warn Braxton or his parents that the knife was present, and (3) in failing to exercise reasonable care in watching or supervising Braxton in their home.

At the close of the evidence, the plaintiffs' motion to amend the pleadings to conform to the evidence was overruled. The plaintiffs also moved for a directed verdict. As a part of the motion, they requested a jury instruction defining a business invitee, which the trial court denied. The defendants also moved for a directed verdict, claiming that the plaintiffs had failed to prove a prima facie case. The motion was sustained in part as to the theory of premises liability as it related to Lois.

The jury was instructed that the claim against Lois was based on a failure to supervise Braxton. The instructions stated that the claim against Eugene was based on maintaining an unsafe premises for a child. The jury subsequently returned a verdict in favor of the defendants.

The plaintiffs moved for judgment notwithstanding the verdict or, in the alternative, for new trial. They argued that certain parts of the defendants' testimony at trial were judicial admissions that bound both defendants. The trial court overruled the motion, and the plaintiffs timely appealed.

ASSIGNMENTS OF ERROR

The plaintiffs' assignments of error can be summarized and restated as follows: The trial court erred in (1) overruling their motion for directed verdict, motion for judgment notwithstanding the verdict, and alternative motion for new trial; (2) partially

sustaining the defendants' motion for directed verdict; (3) denying their motion to amend the petition; (4) refusing to instruct the jury on the theory that Braxton was a business invitee or to otherwise modify its instruction as to the defendants' duties; and (5) failing to instruct the jury under the standards of *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

ANALYSIS

We initially point out that the plaintiffs' cause of action accrued in 1993, and therefore, our decision in *Heins* does not apply. In *Heins*, this court abolished the common-law distinction between licensees and invitees for determining the duties owed to persons entering premises. The court announced a new rule setting forth a list of factors "to be considered in evaluating whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors." *Id.* at 761, 552 N.W.2d at 57. The new rule was made prospective in application, as the court stated it would be applied to causes of action arising after the filing of *Heins*. The rule set forth in *Heins* does not apply here.

The plaintiffs first argue that the defendants' trial testimony constituted judicial admissions of negligence and that, therefore, the trial court erred in not granting the plaintiffs' motion for a directed verdict on the issue of liability and in not granting the plaintiffs' posttrial motion for judgment notwithstanding the verdict on the same issue.

At trial, Eugene testified that he had made a mistake in failing to put away the knife and that he felt he was negligent and responsible for Braxton's accident. Lois testified that she felt she was negligent in failing to inspect the room before allowing Braxton to enter.

The plaintiffs assert both defendants also admitted that they knew Braxton did not appreciate the dangers of a carpet knife and that they had made a mistake in protecting him from such danger. The plaintiffs claim that the above statements were judicial admissions and therefore entitled them to a directed verdict on the issue of liability.

[2] A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true. *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998). The plaintiffs rely on *Southwestern Truck Sales & Rental Co. v. Johnson*, 165 Neb. 407, 417, 85 N.W.2d 705, 711 (1957), in which we stated:

[W]here a party testifies clearly and unequivocally to a fact which is within his own knowledge, such testimony may be considered as a judicial admission. That rule has particular application where, as here, the parties so testifying made no effort to retract, qualify, or otherwise explain the positive force of their own evidence.

It is not disputed that both the defendants believed they were at fault for Braxton's injury. The issue is whether such statements entitled the plaintiffs to a judgment on the issue of liability.

Here, the defendants' statements that they felt responsible for the accident were their opinions, which may be considered by the jury. The statements are evidence of the parties' state of mind as to how they felt. However, these statements were not judicial admissions which would require a court to direct a verdict on the issue of liability.

Although their statements were admissible, they did not constitute judicial admissions which require the directing of a verdict against the defendants. The trial court did not err in denying the motion for a directed verdict based upon the defendants' statements that they felt they were negligent.

The plaintiffs next argue that the trial court erred in sustaining a partial directed verdict in favor of Lois. 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. *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002).

The plaintiffs had requested that jury instruction NJI2d Civ. 8.51 be read to the jury with regard to both the defendants. NJI2d Civ. 8.51 (2001) states in relevant part:

**INJURY TO CHILDREN, WHETHER TRESPASSER,
LICENSEE OR BUSINESS VISITOR**

Before the plaintiff can recover against the defendant . . . the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That there was (a, an artificial) condition on defendant's (premises), at a place where the defendant knew, or had reason to know, children were likely to be;

2. That the defendant knew, or had reason to know, of the existence of this condition;

3. That the defendant knew, or had reason to know, that the condition involved an unreasonable risk of death or serious bodily harm to children likely to be there.

The question is whether there was any evidence from which to infer that Lois knew or should have known that a dangerous condition existed. Lois stated that she knew Eugene had used a carpet knife in the storage room the night before the accident but that she did not have any reason to believe that the carpet knife had not been put away. Lois testified that she knew Eugene kept tools for his carpet business in a toolbox in the storage room. Eugene had not previously left knives lying around and had always put away the knives. Lois had never before seen a knife within Braxton's reach.

Giving all reasonable inferences to the plaintiffs, we cannot say that Lois knew or had reason to know of this dangerous condition. The trial court did not err in refusing to give the instruction to the jury regarding premises liability as to Lois or in granting a partial directed verdict on this issue.

[3,4] The plaintiffs next assert that the trial court erred in denying their motion to amend the petition. Permission to amend a pleading is addressed to the discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion. *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997), *overruled on other grounds*, *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000).

Amendment of a petition is not a matter of right. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998).

At the close of the evidence, the plaintiffs moved to amend their petition to insert a business invitee allegation. The trial court sustained the defendants' objection because the amendment restructured the petition and contained a theory of recovery involving Lois on both supervision and premises liability. The court stated that all theories of recovery would be appropriately charged to the jury but later decided not to submit to the jury the plaintiffs' theory that Braxton had the status of a business invitee.

The plaintiffs argue that based on the evidence adduced at trial, Braxton was a business invitee because consideration had been paid or furnished by Michael for the babysitting services which the defendants had provided to Braxton. The defendants testified that Lois babysat as often as two or three times a week for short periods and that Michael would occasionally pay cash or sometimes do work for the defendants. Lois testified that she did not receive payment on this particular occasion. She enjoyed the opportunity to spend time with Braxton. The plaintiffs claim this arrangement was a quid pro quo and that the defendants received sufficient consideration to clothe Braxton with the status of being a business invitee while on the premises for babysitting purposes.

[5] In *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 415, 513 N.W.2d 495, 502 (1994), we stated: "In general, an invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant for the mutual advantage of both parties." In *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001), we stated that if the invitation relates to the business of the one who gives it, or is given for the mutual advantage of a business nature for both parties, the party receiving the invitation is an invitee.

Contrary to the plaintiffs' assertion, we find that the evidence did not establish that Braxton was a business invitee or that the defendants were involved in a babysitting business. We cannot conclude that because the defendants enjoyed the company of Braxton, there was a mutual advantage of a business nature

between the parties. Braxton's visits to the defendants' home did not relate to a babysitting business operated by the defendants, and the relationship between the defendants and Braxton did not constitute a business venture. Thus, the trial court did not abuse its discretion in denying the plaintiffs' motion to amend their petition.

[6] The plaintiffs also claim that the trial court erred in refusing to instruct the jury on the theory that Braxton was a business invitee or, in the alternative, in refusing to modify the instruction to include a duty to inspect the premises and protect Braxton from any dangerous conditions. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Mobeco Indus. v. City of Omaha*, 257 Neb. 365, 598 N.W.2d 445 (1999).

As previously discussed, there was no evidence to establish that Braxton was a business invitee on the defendants' premises. The plaintiffs failed to establish that this instruction was warranted by the evidence. Therefore, the trial court properly refused to so instruct the jury.

The plaintiffs argue that if the jury was not given a business invitee instruction, then the instruction given should have been modified to include a duty to inspect. The plaintiffs claim that even though the original petition did not specifically allege a failure to inspect, the other allegations of negligence are broad enough to encompass the duty to inspect. The plaintiffs argue that the instruction given by the trial court did not provide as much protection as the business invitee instruction and was therefore contrary to the law and public policy aimed at the protection of young children. The plaintiffs assert that in premises liability cases involving children, the jury should be instructed that the owner or occupier had a duty to inspect the premises.

The jury was instructed to assess whether Lois had negligently supervised Braxton. Lois testified that Eugene always put away his tools in the storage room and that he never left sharp items lying in low places. The evidence does not establish that Lois knew or should have known that there was a dangerous

condition existing on the premises which would impose a duty on her to inspect the home.

CONCLUSION

For the reasons set forth above, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MIGUEL CASTILLO ZARATE, APPELLANT.

651 N.W.2d 215

Filed September 27, 2002. No. S-01-1175.

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. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court.
3. **Postconviction: Prisoners: Standing: Probation and Parole: Words and Phrases.** Court-ordered probation constitutes "custody under sentence" for postconviction relief remedies under the Nebraska Postconviction Act.
4. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
5. **Constitutional Law: Effectiveness of Counsel: Proof.** In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant.
6. **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 on the basis of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
7. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based on a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that, but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
8. **Effectiveness of Counsel: Presumptions.** In determining whether counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.

9. **Criminal Law: Pleas: Effectiveness of Counsel.** Where a defendant is represented by counsel during the plea process and enters a plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.
10. ____: ____: ____: A defendant who pleads guilty upon the advice of counsel may attack only the voluntary and intelligent character of the guilty plea by showing that the advice received from counsel was not within the range of competence demanded of attorneys in criminal cases.
11. **Attorney and Client: Pleas.** When a defendant pleads guilty on the advice of counsel, the attorney has the duty to advise the defendant of the available options and possible consequences.
12. **Pleas: Effectiveness of Counsel.** A guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising the defendant regarding the consequences of entering a guilty plea and of the feasible options.
13. **Pleas: Words and Phrases.** Direct consequences of a guilty plea are those which result in a definite, immediate, and largely automatic effect on the range of the defendant's punishment.
14. **Pleas: Courts: Constitutional Law.** Trial courts are free to advise defendants of the collateral consequences of their pleas, but are constitutionally obligated only to advise them of the direct consequences, and the failure to inform a defendant of a collateral consequence does not render the plea involuntary or unintelligent.
15. **Pleas.** A defendant's incomplete awareness of collateral consequences of a guilty plea does not render that plea involuntary.
16. ____: If a consequence flowing from a plea is "collateral," then the defendant need not be informed of it before entering the plea.
17. **Pleas: Courts: Effectiveness of Counsel.** Since the collateral consequences doctrine provides a test for determining the voluntary and intelligent character of a plea, it is applied both to the trial court, as a measure of its performance in establishing the voluntary and intelligent nature of the plea before accepting it, and to defense counsel, as a measure of his or her performance in providing a defendant with the information necessary to render the plea voluntary and intelligent.
18. **Pleas: Effectiveness of Counsel: Constitutional Law.** The possibility of deportation is a collateral consequence of a guilty plea, and counsel's alleged failure to inform a defendant of the possibility of deportation does not render the defendant's guilty plea involuntary or unintelligent for constitutional purposes.

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

Sean J. Brennan for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

GERRARD, J.

NATURE OF CASE

The defendant, Miguel Castillo Zarate, appeals from the district court's denial, without an evidentiary hearing, of Zarate's motion for postconviction relief. The sole question presented by this appeal is whether Zarate is entitled to an evidentiary hearing on the claim that Zarate's counsel was ineffective in not advising Zarate that pleading guilty to attempted possession of a controlled substance could result in deportation.

BACKGROUND

Zarate was charged by information on May 2, 1997, with possession of a controlled substance with intent to deliver in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1995). Zarate was found guilty pursuant to a guilty plea and, on September 14, 1998, was sentenced to probation for a period of 3 years and fined \$1,500.

Zarate filed a motion for postconviction relief on March 26, 2001, alleging that he was denied his constitutional right to effective assistance of counsel. Zarate alleged that he is not a U.S. citizen and that his attorney was aware of that fact. Zarate further alleged that he was not aware at the time of his guilty plea, and his attorney did not advise him, that Zarate could be deported from the United States as a consequence of his conviction of the crime alleged in the information. Zarate alleged that had he known that deportation was a possible consequence of a criminal conviction, he would not have entered a plea of guilty. Zarate claimed that the performance of his attorney was deficient because Zarate's attorney failed to inform Zarate of the immigration consequences of a guilty plea. The parties have stipulated that the sentencing court made no inquiry regarding Zarate's citizenship during the taking of Zarate's plea.

The district court denied Zarate's motion without an evidentiary hearing, and Zarate appealed. We moved the appeal to our docket and granted Zarate's motion to expedite the appeal because of imminent deportation proceedings pending against Zarate.

ASSIGNMENT OF ERROR

Zarate assigns that the district court erred in denying Zarate an evidentiary hearing and dismissing Zarate's motion for postconviction relief.

STANDARD OF REVIEW

[1,2] 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. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). However, when reviewing a question of law, an appellate court reaches a conclusion independent of the lower court. *Id.*

ANALYSIS

[3] We first note that although Zarate was not sentenced to incarceration, court-ordered probation constitutes "custody under sentence" for postconviction relief remedies under the Nebraska Postconviction Act. See, Neb. Rev. Stat. § 29-3001 (Reissue 1995); *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992). At the time that Zarate's postconviction motion was filed, his term of probation had not yet expired and he was in "custody" for postconviction purposes. The record also reflects that the State had filed a motion for revocation of Zarate's probation, which was pending at the time the instant appeal was taken. Consequently, we conclude that on the record presented to us, Zarate is entitled to ask for postconviction relief. See *id.*

[4,5] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Dean*, ante p. 42, 645 N.W.2d 528 (2002). In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant. *Thomas*, supra.

[6,7] Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted on the basis of a guilty plea, a court will consider an allegation that the plea was the result of ineffective

assistance of counsel. *State v. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002). When a conviction is based on a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that, but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *Thomas, supra*. In this case, Zarate has alleged that he would have insisted on going to trial had he been informed of the possibility of deportation. For purposes of determining whether he is entitled to an evidentiary hearing, Zarate properly alleged facts sufficient to satisfy the prejudice requirement of an ineffective assistance of counsel claim.

[8] The initial question, however, is whether Zarate's counsel was deficient—that is, whether counsel failed to perform at least as well as a criminal lawyer with ordinary training and skill in the area. See *State v. Long*, *ante* p. 85, 645 N.W.2d 553 (2002). In determining whether counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

[9,10] Stated more specifically, the question presented is whether Zarate's guilty plea was "involuntary" or "unintelligent" as a result of ineffective assistance of counsel, because Zarate's counsel failed to supply Zarate with relevant information regarding the consequences of the plea. "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), quoting *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). "[A] defendant who pleads guilty upon the advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.'" *Hill*, 474 U.S. at 56-57, quoting *Tollett v. Henderson*, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973).

[11,12] When a defendant pleads guilty on the advice of counsel, the attorney has the duty to advise the defendant of the available options and possible consequences. *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981). A guilty plea must represent the

informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising the defendant regarding the consequences of entering a guilty plea and of the feasible options. *Id.*

[13-15] In conducting this inquiry, federal courts and many state courts have adopted an analysis that distinguishes between the direct and collateral consequences of a guilty plea, for purposes of determining those consequences of which a defendant must be informed for the plea to be intelligent and voluntary. This court recently engaged in such an analysis in *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002), in determining of which consequences a court must advise a defendant before accepting his or her guilty plea. Direct consequences are those which result in a definite, immediate, and largely automatic effect on the range of the defendant's punishment. *Id.*, citing *U.S. v. Amador-Leal*, 276 F.3d 511 (9th Cir. 2002), *cert. denied* 535 U.S. 1070, 122 S. Ct. 1946, 152 L. Ed. 2d 849. Trial courts are free to advise defendants of the collateral consequences of their pleas, but are constitutionally obligated only to advise them of the direct consequences, and the failure to inform a defendant of a collateral consequence does not render the plea involuntary or unintelligent. See *Schneider*, *supra*. See, also, *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). A defendant's incomplete awareness of collateral consequences of a guilty plea does not render that plea involuntary. *U.S. v. Del Rosario*, 902 F.2d 55 (D.C. Cir. 1990).

[16,17] If a consequence flowing from a plea is "collateral," then the defendant need not be informed of it before entering the plea. *Santos v. Kolb*, 880 F.2d 941 (7th Cir. 1989). Since this doctrine provides a test for determining the voluntary and intelligent character of the plea, it is applied both to the trial court, as a measure of its performance in establishing the voluntary and intelligent nature of the plea before accepting it, and to defense counsel, as a measure of his or her performance in providing a defendant with the information necessary to render the plea voluntary and intelligent. *Id.* Cf. *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992) (guilty plea not involuntary where counsel failed to advise defendant of possibility of restitution,

because restitution is condition of probation rather than criminal penalty).

A review of the relevant law demonstrates—and the pending deportation proceedings against Zarate empirically substantiate—that Zarate's guilty plea to attempted possession of a controlled substance with intent to deliver rendered him vulnerable to deportation. See 8 U.S.C. § 1227(2)(B)(i) (Supp. IV 1998) (“[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State . . . relating to a controlled substance . . . is deportable”). The fact that Zarate was sentenced only to probation is of no matter. See, *Kolios v. Immigration and Naturalization Service*, 532 F.2d 786 (1st Cir. 1976); *Gonzalez de Lara v. United States*, 439 F.2d 1316 (5th Cir. 1971). Deportation was a potential consequence of Zarate's guilty plea.

The overwhelming majority of courts to have addressed the question, however, have held that deportation is a collateral consequence of the criminal process, and hence that, nothing else appearing, the failure to advise the defendant of the possibility of deportation does not amount to ineffective assistance of counsel. See, *U.S. v. Banda*, 1 F.3d 354 (5th Cir. 1993); *Varela v. Kaiser*, 976 F.2d 1357 (10th Cir. 1992); *U.S. v. Del Rosario*, *supra*; *U.S. v. George*, 869 F.2d 333 (7th Cir. 1989); *U.S. v. Yearwood*, 863 F.2d 6 (4th Cir. 1988); *United States v. Campbell*, 778 F.2d 764 (11th Cir. 1985); *United States v. Santelises*, 509 F.2d 703 (2d Cir. 1975); *State v. Muriithi*, 273 Kan. 952, 46 P.3d 1145 (2002); *State v. Montalban*, 810 So. 2d 1106 (La. 2002); *People v. Davidovich*, 463 Mich. 446, 618 N.W.2d 579 (2000); *People v. Ford*, 86 N.Y.2d 397, 657 N.E.2d 265, 633 N.Y.S.2d 270 (1995); *State v. Dalman*, 520 N.W.2d 860 (N.D. 1994); *People v. Huante*, 143 Ill. 2d 61, 571 N.E.2d 736, 156 Ill. Dec. 756 (1991); *Com. v. Frometa*, 520 Pa. 552, 555 A.2d 92 (1989); *State v. Ginebra*, 511 So. 2d 960 (Fla. 1987); *Mott v. State*, 407 N.W.2d 581 (Iowa 1987); *Tafoya v. State*, 500 P.2d 247 (Alaska 1972); *State v. Rosas*, 183 Ariz. 421, 904 P.2d 1245 (Ariz. App. 1995); *State v. Santos*, 136 Wis. 2d 528, 401 N.W.2d 856 (Wis. App. 1987); *State v. Chung*, 210 N.J. Super. 427, 510 A.2d 72 (1986). See, generally, Annot., 90 A.L.R. Fed. 748 (1988); Annot., 65 A.L.R.4th 719 (1988). But

see *People v. Pozo*, 746 P.2d 523 (Colo. 1987) (en banc). As explained by the Seventh Circuit:

[A]ctual knowledge of consequences which are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea. A deportation proceeding is a civil proceeding which may result from a criminal prosecution, but is not a part of or enmeshed in the criminal proceeding. It is collateral to the criminal prosecution. While the Sixth Amendment assures an accused of effective assistance of counsel in "*criminal prosecutions*," this assurance does not extend to collateral aspects of the prosecution.

(Emphasis in original.) *George*, 869 F.2d at 337. Accord *Varela*, *supra*. As further stated by the Supreme Court of Florida:

The focus of whether counsel provided constitutionally effective assistance in the context of a plea is whether counsel provided his client "with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial." . . . A defendant's lack of knowledge that a plea of guilty may lead to deportation does nothing to undermine the plea itself which is, in effect, "a confession in open court as to the facts alleged."

(Citation omitted.) *Ginebra*, 511 So. 2d at 961-62. Accord *Rosas*, *supra*.

[18] We agree with the foregoing analysis, and likewise hold that the possibility of deportation is a collateral consequence of a guilty plea and that counsel's alleged failure to inform a defendant of the possibility of deportation does not render the defendant's guilty plea involuntary or unintelligent for constitutional purposes. Compare *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002). Because the facts alleged in Zarate's motion for postconviction relief, even if proved, would be insufficient to establish that Zarate's guilty plea was involuntary or unintelligent, Zarate is not entitled to an evidentiary hearing. See *State v. Dean*, *ante* p. 42, 645 N.W.2d 528 (2002).

In arguing to the contrary, counsel for Zarate relies primarily on four cases from state appellate courts. See, *Pozo*, *supra*; *People v. Padilla*, 151 Ill. App. 3d 297, 502 N.E.2d 1182, 104 Ill. Dec. 522 (1986), *disapproved*, *People v. Huante*, 143 Ill. 2d 61,

571 N.E.2d 736, 156 Ill. Dec. 756 (1991); *Com. v. Wellington*, 305 Pa. Super. 24, 451 A.2d 223 (1982), *disapproved*, *Com. v. Frometa*, 520 Pa. 552, 555 A.2d 92 (1989); *Edwards v. State*, 393 So. 2d 597 (Fla. App. 1981), *disapproved*, *State v. Ginebra*, 511 So. 2d 960 (Fla. 1987). Of these cases, only *Pozo*, *supra*, remains good law. Zarate's brief does not mention that the other three decisions, from state intermediate appellate courts, have each been expressly disapproved by their respective state supreme courts. See, *Huante*, *supra*; *Frometa*, *supra*; *Ginebra*, *supra*. Courts are not well served when attorneys attempt to rely on authority which has been overruled.

We also note that the circumstances of Zarate's guilty plea, as evidenced by the record, do not serve to overcome the strong presumption that counsel acted reasonably. See *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). According to the presentence investigation, Zarate was driving a rented vehicle on Interstate 80 in Lancaster County when he was stopped for speeding by the Nebraska State Patrol. Zarate gave permission for the officer to search the vehicle, and approximately 62 pounds of marijuana were found in the trunk. Zarate was initially charged by information with a Class III felony, punishable by a maximum of 25 years' imprisonment, a \$25,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Reissue 1995).

Given those circumstances, a sentence of 3 years' probation and a \$1,500 fine appears to be advantageous to the defendant, and it is difficult to say that counsel would have acted deficiently in recommending or permitting the acceptance of such a plea agreement. In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel. *People v. Ford*, 86 N.Y.2d 397, 657 N.E.2d 265, 633 N.Y.S.2d 270 (1995).

We observe that the circumstances of the instant case are distinguishable from situations in which a defendant has been offered affirmative misadvice or misstatements regarding the immigration consequences of a guilty plea. Federal and state courts have recognized that counsel's affirmative misadvice or misstatements regarding deportation or other collateral consequences of a plea may, under certain circumstances, constitute

ineffective assistance of counsel. See, e.g., *In re Resendiz*, 25 Cal. 4th 230, 19 P.3d 1171, 105 Cal. Rptr. 2d 431 (2001); *People v. McDonald*, 296 A.D.2d 13, 745 N.Y.S.2d 276 (2002) (citing cases). Zarate has not made such an allegation in the present case.

Finally, although it is not pertinent to our disposition of the instant appeal, we note that several jurisdictions require, by statute or court rule, that prior to acceptance of a plea of guilty or nolo contendere, trial courts must advise defendants of the immigration consequences of the plea. See 2 Austin T. Fragomen, Jr., et al., *Immigration Law and Business* § 6.13 (2002) (listing jurisdictions). Nebraska has recently adopted such a law, making this (in all likelihood) a case of last impression. See 2002 Neb. Laws, L.B. 82. However, L.B. 82 came into effect on July 20, 2002, well after the acceptance of Zarate's plea in the present case. In any event, Zarate has not presented us with any claim based on the trial court's failure to advise him of the consequences of his plea.

CONCLUSION

Zarate's allegation, that his counsel failed to inform him of the immigration consequences of his guilty plea, does not support a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution. Zarate has not alleged facts which, if proved, would constitute an infringement of his rights under the Nebraska or federal Constitution. Therefore, the district court did not err in dismissing Zarate's motion without an evidentiary hearing. The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF ANTHONY R. ET AL.,
CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, v. TAMMY R.,
APPELLANT, AND DAVID A., APPELLEE.
651 N.W.2d 231

Filed September 27, 2002. No. S-01-1252.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the

trial court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another.

2. **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. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, 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.
4. **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.
5. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a special proceeding for appellate purposes.
6. **Final Orders: Appeal and Error: Words and Phrases.** To be final and appealable, an order in a special proceeding must affect a substantial right. A substantial right is an essential legal right, not a mere technical right.

Appeal from the Separate Juvenile Court of Douglas County:
GERALD E. ROUSE, Judge. Appeal dismissed.

Craig H. Borlin for appellant.

James S. Jansen, Douglas County Attorney, and Kim B. Hawekotte for appellee State of Nebraska.

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

STEPHAN, J.

Significant amendments to the Nebraska Juvenile Code were effected by the enactment of 1998 Neb. Laws, L.B. 1041. One of these amendments, codified at Neb. Rev. Stat. § 43-292.02 (Reissue 1998), requires the State to file a petition to terminate parental rights in the case of a juvenile who has been in foster care under the responsibility of the State for 15 or more months of the most recent 22 months, unless a court determines that the case falls within one of the exceptions specified in the statute. Following an evidentiary hearing, the separate juvenile court of Douglas County determined that Anthony R., Tamarrah R., and David A., Jr., all of whom had previously been adjudicated under Neb. Rev. Stat. § 43-247(3) (Reissue 1998), had been in

out-of-home placement for the requisite period and that the facts did not fall within any of the statutory exceptions. The court therefore ordered that the matter be referred to the State for the filing of a motion to terminate parental rights. Tammy R., the mother of the three children, seeks appellate review of that order. We conclude that the order is not final and appealable and, therefore, dismiss the appeal for lack of jurisdiction.

FACTS

On November 16, 1999, the State filed an amended petition for adjudication in the separate juvenile court of Douglas County. The amended petition alleged that all three children lacked proper parental care by reason of the faults or habits of their mother and that two of the children lacked proper parental care by reason of the faults or habits of the mother's boyfriend with whom she and the children resided. Specifically, the amended petition alleged, *inter alia*, that the mother had subjected Anthony to inappropriate physical discipline and that both the mother and her boyfriend had subjected Anthony to inappropriate sexual contact. The State also alleged that the mother and her boyfriend engaged in domestic violence in the presence of the children, placing them at risk for harm. After a trial, the juvenile court adjudicated all three children to be within the meaning of § 43-247(3)(a) and ordered that the children remain in the temporary custody of the Nebraska Department of Health and Human Services (DHHS).

After conducting a dispositional/permanency planning hearing with respect to the three children on August 18, 2000, the juvenile court adopted the proffered DHHS case plan and determined that the permanency objective was reunification with the mother. The court further determined, however, that for health and safety reasons, it was in the children's best interests to remain in the temporary custody of DHHS. On August 28, 2000, the juvenile court issued an order *nunc pro tunc* correcting an error that was made in its previous adjudication order. The mother perfected an appeal from this order which, on the mother's motion, was dismissed before submission.

On May 4, 2001, the juvenile court held another review and permanency hearing regarding the three children. At this hearing, the court received several exhibits, including a case plan and

court report prepared by Kelli Mitchell, the DHHS child protection and safety worker assigned to the case. The case plan recommended that the mother participate in, *inter alia*, a sex offender/victimization program and a specialized parenting therapy program. The case plan also recommended that the court find an exception to the termination requirement of § 43-292.02 on the ground that the mother had “not had ample opportunity to resolve the conditions that brought the case to Court.” The court accepted the recommendations of the case plan and found that a “compelling reason” existed pursuant to § 43-292.02(3)(b) not to refer the matter to the State for the filing of a motion to terminate the mother’s parental rights. The court also found that reasonable efforts had been made to reunify the children with their mother; that due to safety concerns, visitation should be suspended until the mother achieved progress in her prescribed therapeutic program; and that temporary custody of the children should remain with DHHS. Finally, the court ordered the mother to participate in and successfully complete the programs referenced in the case plan.

On October 12, 2001, another review hearing was held. The State offered several exhibits, one of which was an updated case plan and court report created by Mitchell. The updated plan recommended a primary permanency objective of reunification with the mother and an alternative plan of adoption. The case plan again recommended that the court find an exception to the § 43-292.02(1) termination filing requirement because the mother “has not had adequate time to participate in services that may correct the conditions adjudicated.” Both the State and the guardian ad litem disagreed with the case plan’s recommendation that an exception or “compelling reason” be found. The State and the guardian ad litem argued that the children had been in out-of-home placement for over 2 years, that the mother continued to maintain that she had not abused the children, and that the mother had not taken reasonable steps to complete her therapy.

In an order filed October 17, 2001, the separate juvenile court found that the children had been in out-of-home placement for the requisite time period under § 43-292.02(1)(a) and, contrary to the recommendation of the case plan, concluded that there

was no sufficient reason to suspend the requirement that the State file a motion to terminate the mother's parental rights with respect to the three children. The court ordered that the matter be referred to the State for that purpose. The mother perfected an appeal from this order, and we removed the case to this court's docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

The mother assigns, rephrased and reordered, that the separate juvenile court erred (1) in determining that a "compelling reason" did not exist to prevent referral of the case to the State for the filing of a motion to terminate her parental rights, (2) in referring the case to the State for the filing of a motion to terminate her parental rights in the absence of a finding that termination would be in the best interests of the children, (3) in conducting a permanency hearing less than annually from the date of the previous permanency hearing, and (4) in ordering the suspension of supervised visitation in its May 4, 2001, order.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001); *In re Interest of Kiana T.*, 262 Neb. 60, 628 N.W.2d 242 (2001).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, 263 Neb. 544, 641 N.W.2d 55 (2002); *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002); *In re Change of Name of Davenport*, 263 Neb. 614, 641 N.W.2d 379 (2002).

ANALYSIS

The juvenile code, as amended by L.B. 1041, operative July 1, 1998, provides at § 43-292.02:

(1) A petition shall be filed on behalf of the state to terminate the parental rights of the juvenile's parents . . . if:

(a) A juvenile has been in foster care under the responsibility of the state for fifteen or more months of the most recent twenty-two months[.]

. . . .

(3) The petition is not required to be filed on behalf of the state . . . if:

(a) The child is being cared for by a relative;

(b) The Department of Health and Human Services has documented in the case plan or permanency plan, which shall be available for court review, a compelling reason for determining that filing such a petition would not be in the best interests of the juvenile; or

(c) The family of the juvenile has not had a reasonable opportunity to avail themselves of the services deemed necessary in the case plan or permanency plan approved by the court if reasonable efforts to preserve and reunify the family are required under section 43-283.01.

Neb. Rev. Stat. § 43-292.03(1) (Reissue 1998) provides:

Within thirty days after the fifteen-month period under subsection (1) of section 43-292.02, the court shall hold a hearing on the record and shall make a determination on the record as to whether there is an exception under subsection (3) of section 43-292.02 in this particular case. If there is no exception, the state shall proceed as provided in subsection (1) of section 43-292.02.

As we noted in *In re Interest of Dewayne G. & Devon G.*, 263 Neb. 43, 54-55, 638 N.W.2d 510, 519 (2002), the purpose of L.B. 1041 was to change the emphasis of the juvenile code “‘from reunification of the family . . . to the primary criteria of the health and safety of the child,’” and to help resolve the problem of “‘children being left too long in foster care, often for many years.’” Quoting Floor Debate, L.B. 1041, 95th Leg., 2d Sess. 11548 (February 12, 1998).

The order we are asked to review in this case is one made pursuant to § 43-292.03(1). The separate juvenile court found no basis for an exception to the § 43-292.02 requirement that the State file a petition to terminate parental rights as to children who have been in foster care for the requisite period of time. We have not previously decided whether such an order is final and appealable. The State argues that it is not. In the alternative, the State argues that any appeal from such an order must be reviewed by a three-judge juvenile court review panel pursuant to Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Reissue 1998) before it can be considered by an appellate court.

[3,4] In a juvenile case, as in any other appeal, 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. *In re Interest of Dustin H. et al.*, 259 Neb. 166, 608 N.W.2d 580 (2000); *In re Interest of Alycia P.*, 258 Neb. 258, 603 N.W.2d 7 (1999). See, also, *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). 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. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001); *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000).

[5,6] A proceeding before a juvenile court is a special proceeding for appellate purposes. *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000); *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000). To be final and appealable, an order in a special proceeding must affect a substantial right. *Id.* A substantial right is an essential legal right, not a mere technical right. *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998).

In support of her argument that the order is final and appealable, the mother relies upon *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998). That case was decided under the juvenile code as it existed prior to the enactment of L.B. 1041 and did not involve an appeal from an order pursuant to § 43-292.03(1). In *In re Interest of Tabatha R.*, we held that an

initial dispositional order which did not include a rehabilitation plan for either parent deprived them of any opportunity for reunification with their child and thus affected a substantial right. In the present case, it is clear that the mother was given an opportunity for reunification through a case plan approved by the juvenile court which had been in effect for more than a year prior to the October 17, 2001, order referring the matter to the State for the filing of termination proceedings. *In re Interest of Tabatha R.* does not support the argument that the order before us affected a substantial right of the mother.

To determine appealability of an order of the juvenile court finding no compelling reason to further suspend the statutory obligation of the State to file a motion to terminate parental rights pursuant to § 43-292.02(1), we must consider the nature of the order and what parental rights, if any, it affected. See *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999). We conclude that the order altered the procedural posture of this juvenile proceeding but did not adjudicate or affect any substantial right of the mother. The filing of a petition to terminate parental rights, standing alone, does not affect any parental right. If such a petition is filed in this case pursuant to the court's order, the mother will receive notice and an opportunity to be heard in accordance with statutorily prescribed procedures. See Neb. Rev. Stat. §§ 43-291 and 43-292 (Reissue 1998). If the filing of a petition for termination of parental rights ultimately results in an order adverse to the mother, it is well established that such an order is final and appealable. See, e.g., *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Clifford M. et al.*, *supra*. Accordingly, we conclude that the order before us does not affect a substantial right of the mother.

For these reasons, we conclude that the order entered by the separate juvenile court on October 17, 2001, pursuant to § 43-292.03(1) is not a final and appealable order, and we are therefore without jurisdiction to review it.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
GEARY L. DANDRIDGE, APPELLANT.
651 N.W.2d 567

Filed October 4, 2002. No. S-01-239.

1. **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.
2. **Postconviction: Constitutional Law: Proof.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the state or federal Constitution.
3. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
4. **Postconviction: Appeal and Error.** An appellate court will not entertain a successive postconviction motion unless the motion affirmatively shows on its face that the ground for relief could not have been asserted at the time the movant filed the prior motion.
5. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
6. **Postconviction: Constitutional Law: Effectiveness of Counsel.** There is no constitutional guarantee of effective assistance of counsel in a postconviction action.

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

Geary L. Dandridge, pro se.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

HENDRY, C.J.

INTRODUCTION

In April 2000, Geary L. Dandridge filed a second motion for postconviction relief, pro se, in Lancaster County District Court. The district court denied the motion without a hearing, determining that the claims asserted by Dandridge were procedurally barred. Dandridge timely appealed. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTUAL BACKGROUND

In 1992, Dandridge was convicted of possession of a controlled substance and being a felon in possession of a firearm. Dandridge's resulting sentences were enhanced upon a finding that Dandridge was a habitual criminal. Dandridge's convictions and sentences were affirmed by the Nebraska Court of Appeals. *State v. Dandridge*, 1 Neb. App. 786, 511 N.W.2d 527 (1993). Dandridge retained private counsel during his trial, but was represented by the Lancaster County public defender during his direct appeal.

In 1996, Dandridge filed his first motion for postconviction relief, pro se. In this motion, Dandridge raised two issues. First, Dandridge asserted that his conviction for possession of a controlled substance violated double jeopardy. Second, Dandridge asserted that his trial counsel was ineffective. Dandridge did not assert, however, that his direct appeal counsel was ineffective. The district court dismissed the motion without an evidentiary hearing.

After filing an appeal of the district court's decision, Dandridge filed a motion in the district court for appointment of counsel to assist him on appeal. The district court granted the motion, appointing the Lancaster County public defender. On appeal, Dandridge again asserted double jeopardy and ineffective assistance of trial counsel claims. This court concluded that Dandridge was procedurally barred from asserting either claim, since both claims could have been raised on direct appeal. *State v. Dandridge*, 255 Neb. 364, 585 N.W.2d 433 (1998).

In April 2000, Dandridge filed his second motion for postconviction relief, pro se, in which he asserted three claims. First, Dandridge asserted that his direct appeal counsel was ineffective. Dandridge argues that this claim is not procedurally barred because counsel appointed to represent him during the appeal of his first postconviction motion could not have raised this claim due to a conflict of interest. Second, Dandridge asserted that his postconviction appeal counsel was ineffective. Third, Dandridge asserted that under the plain error doctrine, his conviction for possession of a controlled substance was void on double jeopardy grounds. The district court denied Dandridge's motion without a hearing. Dandridge appealed.

ASSIGNMENTS OF ERROR

Dandridge assigns, rephrased, that the district court erred in (1) failing to find that due to a conflict of interest created when the Lancaster County public defender was appointed to represent him in his first postconviction appeal, Dandridge was unable to assert an ineffective assistance of direct appeal counsel claim during the first postconviction proceeding, and (2) failing to find that his postconviction counsel was ineffective.

STANDARD OF REVIEW

[1] 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. *Hall v. State*, ante p. 151, 646 N.W.2d 572 (2002).

[2] A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the state or federal Constitution. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

[3] An appellate court does not consider errors which are argued but not assigned. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995).

ANALYSIS

INEFFECTIVE ASSISTANCE OF DIRECT APPEAL COUNSEL

Dandridge asserts his direct appeal counsel rendered ineffective assistance. According to Dandridge, his direct appeal counsel was ineffective for failing to (1) assert that his conviction for possession of a controlled substance violated double jeopardy, (2) assert that his trial counsel was ineffective, (3) adequately challenge his felon in possession of a firearm conviction, and (4) adequately challenge his habitual criminal sentence enhancement.

[4,5] We first must determine whether Dandridge is procedurally barred from asserting this claim. An appellate court will not entertain a successive postconviction motion unless the motion affirmatively shows on its face that the ground for relief could not have been asserted at the time the movant filed the prior motion. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). The need for

finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *Hall v. State, supra*.

Dandridge argues that his claim is not procedurally barred because his second postconviction motion presented his first opportunity to raise this claim. According to Dandridge, since the Lancaster County public defender represented him during his direct appeal, the district court created a conflict of interest by again appointing the Lancaster County public defender to represent him during his first postconviction appeal. Dandridge contends that due to this conflict of interest, this is his first opportunity to assert an ineffective assistance of direct appeal counsel claim.

This court considered a similar situation in *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). There, the defendant's first postconviction motion requested relief on the ground that he had received ineffective assistance from trial counsel. The defendant was represented by attorneys from the Sarpy County public defender's office, both at trial and on direct appeal. This court held that the defendant's claim was not procedurally barred since "his first opportunity to assert ineffective assistance of trial counsel was in his motion for postconviction relief." *Id.* at 483-84, 618 N.W.2d at 415.

Unlike *Soukharith*, the record here indicates that Dandridge had an earlier opportunity to assert his ineffective assistance claim. In Dandridge's first postconviction motion, which he filed pro se, he did not allege ineffective assistance of direct appeal counsel. It was only after Dandridge appealed the dismissal of that motion that the district court appointed the Lancaster County public defender to represent him. Dandridge could have asserted the ineffective assistance claim at the time he filed his first postconviction motion, but he failed to do so. Nothing on the face of Dandridge's motion affirmatively contradicts this conclusion. See *State v. Ryan, supra*.

Because Dandridge was not represented by the Lancaster County public defender during the period in which his first postconviction motion was filed, considered, and ruled upon by the district court, we find no merit to Dandridge's conflict of interest argument. Therefore, we determine that Dandridge is procedurally barred from asserting the ineffective assistance of direct

appeal counsel claim and that Dandridge's arguments to the contrary are without merit.

INEFFECTIVE ASSISTANCE OF POSTCONVICTION APPEAL COUNSEL

Dandridge next asserts that his postconviction appeal counsel was ineffective. As support for this argument, Dandridge argues that in 1993, the Nebraska Legislature amended Neb. Rev. Stat. § 29-3004 (Reissue 1995) to provide that attorneys appointed to represent a defendant in a postconviction proceeding "shall be competent and shall provide effective counsel."

[6] A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the state or federal Constitution. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001). In *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001), we ruled that notwithstanding the 1993 amendment to § 29-3004, there is no constitutional guarantee of effective assistance of counsel in a postconviction action. *State v. Hunt*, *supra*. Dandridge's ineffective assistance of postconviction counsel claim, premised upon § 29-3004, is without merit.

OTHER ISSUES

Finally, Dandridge raises two other issues in his brief. Dandridge argues that the district court erred in (1) failing to grant him an evidentiary hearing on his motion and (2) rejecting his argument that under the plain error doctrine, his conviction for possession of a controlled substance constituted a double jeopardy violation. We do not consider these issues because neither issue was assigned as error by Dandridge. An appellate court does not consider errors which are argued but not assigned. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995).

CONCLUSION

For these reasons, we affirm the decision of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
SHIREEN D. TYMA, APPELLANT.
651 N.W.2d 582

Filed October 4, 2002. No. S-01-1070.

1. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
2. **Trial: Convictions: Appeal and Error.** A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.
3. **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.
4. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
5. **Statutes: Probation and Parole: Words and Phrases.** The plain and ordinary meaning of the language of Neb. Rev. Stat. § 29-2262.01 (Reissue 1995) prohibits those placed on probation by a court of this state and inmates who have been released on parole by any court from acting as undercover agents for, or employees of, law enforcement agencies. The exclusionary rule provided by § 29-2262.01 does not apply unless the informant is both (1) in jail, on probation, or on parole and (2) acting as an undercover agent or employee of a law enforcement agency.
6. **Criminal Law: Conspiracy: Statutes.** Neb. Rev. Stat. § 28-202 (Reissue 1995) adopts the unilateral approach to the agreement element of conspiracy as found in the Model Penal Code. Under the unilateral approach, only the defendant need agree with another person; the second party can feign agreement.
7. **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.
8. **Speedy Trial: Pretrial Procedure: Final Orders: Notice: Appeal and Error.** A necessary concomitant to the right to immediately appeal from the denial of a motion to discharge, based upon an alleged violation of the right to a speedy trial, is the right to an appropriate pretrial disposition of the motion. Where a motion to discharge on speedy trial grounds is submitted to a trial court, that motion is inferentially denied where the trial court proceeds to trial without expressly ruling on the motion. At that point, the denial of the defendant's motion is a final, appealable order, and the defendant must secure his or her rights to appellate review by filing a timely notice of appeal.
9. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
10. _____. Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it

uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

Robert Wm. Chapin, Jr., for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

STEPHAN, J.

Shireen D. Tyma (Tyma) was charged by information in the district court for Hall County with conspiracy to commit murder in the first degree, a Class II felony. The object of the alleged conspiracy was Tyma's estranged husband, Tim Tyma (Tim). Following a bench trial, Tyma was convicted and sentenced to incarceration for 8 to 15 years. She perfected this direct appeal from her conviction and sentence. We removed the appeal 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).

BACKGROUND

Prior to the filing of the information, the county court for Hall County issued three search warrants based upon affidavits submitted by Officer Kelly Williams of the Grand Island Police Department. The first warrant authorized the search of Tyma's residence in Grand Island and any vehicles registered to Tyma and/or Jasper and Shirley Leago, her parents. The execution of this warrant resulted in the seizure of various items of personal property from the residence, including videotapes, notes, notebooks, and 21 rolls of undeveloped 35-mm film. The second search warrant authorized the search of the Leagos' residence in Grand Island. Its execution resulted in the seizure of a .38-caliber Smith & Wesson five-shot revolver, serial No. J53212, in a brown holster with four rounds in the cylinder. The third search warrant was accompanied by an order requiring Tyma to submit a handwriting sample, which was subsequently obtained.

After she was charged but prior to trial, Tyma filed a motion to suppress the handwriting sample, all evidence seized from her residence, and any other evidence seized from "any other place in which she had an expectation of privacy." After conducting an evidentiary hearing, the district court entered an order suppressing the handwriting sample as violative of Neb. Rev. Stat. § 29-3303(3) (Reissue 1995), which provides that in order to obtain a warrant for evidence of "identifying physical characteristics," the affidavit must affirmatively show that the identified or described individual has refused to voluntarily provide the desired evidence. The court also suppressed all evidence seized from Tyma's residence based upon its determination that the factual assertions set forth in Williams' affidavit were not sufficiently corroborated and that the affidavit therefore failed to show probable cause. The court also determined that Tyma lacked standing to challenge the search of the Leagos' residence and the resulting seizure of the .38-caliber revolver and thus overruled the motion to suppress as to that evidence.

The State perfected an interlocutory appeal of the district court's ruling on Tyma's motion to suppress to a single judge of the Nebraska Court of Appeals pursuant to the summary review procedure provided by Neb. Rev. Stat. § 29-824 (Cum. Supp. 2000). In an unpublished opinion, the reviewing judge determined that Williams' affidavits established probable cause to believe that a crime had been committed and that evidence thereof would be found in Tyma's residence. *State v. Tyma*, No. A-00-764, 2000 WL 1673125 (Neb. App. Oct. 31, 2000) (not designated for permanent publication). The judge therefore reversed that part of the district court's order suppressing the evidence seized at Tyma's residence. However, the judge affirmed that part of the district court's order suppressing the handwriting sample for failure to comply with § 29-3303(3) and remanded the cause to the district court for proceedings consistent with the opinion.

Following remand but prior to trial, Tyma filed a motion to dismiss on the ground that her right to a speedy trial had been violated. At a pretrial hearing on July 27, 2001, the State offered a "Waiver of Right to Speedy Trial" executed by Tyma and her attorney, which was received without objection. At the conclusion of the hearing, the court took the motion under advisement.

A bench trial was held on August 1, 2001. The State called several witnesses, including Tim, Kenneth Moore, and Leo Purvis. Tim identified Tyma's handwriting on several documents offered in evidence by the State. Moore and Purvis testified concerning their oral and written communications with Tyma regarding the planned killing of Tim, which we will discuss in greater detail in our analysis of Tyma's assignment of error challenging the sufficiency of the evidence to support her conviction.

Tyma called two witnesses at trial. Williams, the police officer who had executed the affidavits upon which the search warrants were issued, testified that during the investigation, he asked Purvis on two occasions to "[w]ear a wire" in order to surreptitiously record conversations with Tyma. On the first occasion, no tape recording was made because of a technical malfunction. On the second occasion, a recording was made and subsequently transcribed by Williams. Tyma offered the transcript of that conversation, which was received in evidence.

Jasper Leago testified he had been in possession of the .38-caliber revolver for approximately 25 years before it was seized from his residence pursuant to the search warrant. He stated that he was unaware the weapon had been removed from his home during 1999. He explained that the weapon did not appear to have been moved from the location in the home where he stored it, that he kept the house locked when he was away, and that Tyma did not have keys to the residence. Leago testified that he had never seen the weapon in the possession of Tyma or Moore, but he said that during a conversation with Moore in early 1999, he mentioned the fact that he owned a .38-caliber Smith & Wesson revolver, which he described in some detail.

The record includes a docket entry dated August 21, 2001, stating: "Motion to Dismiss overruled. Defendant found guilty. Sentencing 9/25/01." The sentence was pronounced from the bench at a sentencing hearing on September 25, 2001, and in a journal entry bearing the same date.

ASSIGNMENTS OF ERROR

Tyma assigns that "the Court of Appeals erred when modifying the lower courts [sic] decision to grant Appellant's Motion

to Suppress in total by ruling that the handwriting samples had not been improperly seized." She further assigns, restated, that the district court erred in (1) allowing Tim to identify her handwriting, (2) failing to exclude Purvis' testimony pursuant to Neb. Rev. Stat. § 29-2262.01 (Reissue 1995), (3) finding that she had conspired with Moore and Purvis to murder Tim when no evidence of any agreement between herself and Moore or Purvis was adduced, (4) holding that her right to a speedy trial had not been denied, and (5) finding that her due process rights had not been denied by the conduct of the State.

STANDARD OF REVIEW

[1] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002); *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[2] A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Davlin*, *supra*; *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002); *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001).

ANALYSIS

MOTION TO SUPPRESS

Tyma's argument with respect to the disposition of her motion to suppress is somewhat imprecise. Her first assignment of error refers only to her contention that the handwriting samples she was ordered to submit should have been suppressed. In fact, they were. In the ruling on the State's interlocutory appeal from the suppression order, the single judge of the Court of Appeals held:

Having found that the affidavits establish probable cause to believe that a crime has been committed and that evidence thereof will be found in Tyma's residence, I reverse the district court's order suppressing the evidence secured in the search of her residence. *However, having found that the affidavit submitted in support of the order to obtain handwriting samples did not comply with the identifying physical characteristics act, I uphold the district court's suppression of the handwriting exemplars.* I remand the cause to the district court for Hall County for further proceedings consistent with this opinion.

(Emphasis supplied.) *State v. Tyma*, No. A-00-764, 2000 WL 1673125 at *10 (Neb. App. Oct. 31, 2000) (not designated for permanent publication). The handwriting samples were not offered at trial.

[4] Tyma also argues that the evidence seized from her home should have been suppressed due to the inadequacy of the affidavits upon which the search warrants were based. This argument fails for two reasons. First, Tyma's assignments of error do not refer to the ruling of the Court of Appeals with respect to evidence seized from Tyma's home. An appellate court does not consider errors which are argued but not assigned. *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998); *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996). Second, Tyma does not identify any evidence seized from her home which was received at trial, and our review of the record reveals none. The State did offer several photographic prints made from undeveloped rolls of film seized from Tyma's residence, but the district court sustained Tyma's objections to the offer of these exhibits and did not receive them.

Although Tyma argues briefly that the affidavits did not contain a sufficient description of the weapon seized from the Leagos' home, she does not specifically assign error with respect to the refusal of the district court to suppress this evidence. Moreover, there is nothing in the record which would indicate that Tyma had a reasonable expectation of privacy in the Leagos' home. Tyma's first assignment of error is without merit.

HANDWRITING IDENTIFICATION

In her second assignment of error, Tyma contends that the district court erred in permitting Tim to testify, over her foundational

objection, that her handwriting appeared on several documents which authorities obtained from Moore and Purvis. Neb. Rev. Stat. § 27-901 (Reissue 1995) provides in pertinent part:

(1) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(2) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

....

(b) *Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.*

(Emphasis supplied.)

In *State v. Schwartz*, 239 Neb. 84, 474 N.W.2d 461 (1991), we held that the trial court did not err in permitting a motel clerk to testify that certain initials on motel register receipts were written by her coworkers. The clerk testified that her identification of the initials was based upon her familiarity with the handwriting of her coworkers gained in the course of her employment. We noted that because the clerk's familiarity with her coworkers' handwriting was not acquired for purposes of litigation, the requirements of § 27-901 were met and that the testimony was properly admitted.

The record in this case clearly establishes that Tim was familiar with the handwriting of Tyma and that this familiarity was not acquired for purposes of litigation. He testified that during the years that they lived together as a married couple, he observed Tyma's handwriting on a daily basis on notes written to him, calendars, and other family documents. This testimony satisfied the foundational requirements of § 27-901, and the district court did not err in receiving the testimony over Tyma's foundational objection.

PURVIS TESTIMONY

In her third assignment of error, Tyma argues that the district court erred in permitting Purvis to testify at trial because he was an "inmate" within the meaning of § 29-2262.01, which provides:

A person placed on probation by a court of the State of Nebraska, an inmate of any jail or correctional or penal facility, or an inmate who has been released on parole, probation, or work release shall be prohibited *from acting as an undercover agent* or employee of any law enforcement agency of the state or any political subdivision. Any evidence derived in violation of this section shall not be admissible against any person in any proceeding whatsoever.

On July 26, 2001, Tyma filed a motion in limine requesting that the court prohibit the State from calling Purvis as a witness. She asserted in the motion that Purvis' testimony would be in violation of § 29-2262.01 because he was "an inmate in a correctional or penal facility and/or was on parole at the time he was used to acquire information from the defendant." At a hearing on this motion held on the following day, the court noted that it was presented with no evidence concerning the applicability of § 29-2262.01 to Purvis. Tyma's counsel stated that he would "like to check on that issue and reserve the right to put forth evidence regarding his status." There was no further discussion of the motion at that hearing, and the record reflects no ruling on the motion.

The issue of Purvis' testimony next arose on the first day of trial. The court acknowledged receipt of a motion in limine filed by defense counsel on the preceding day, but that motion does not appear in the transcript. The court permitted Tyma's counsel to offer evidence on the motion prior to the commencement of trial. Through the testimony of a Hall County corrections employee, it was established that Purvis was booked into the Hall County jail at 5:10 p.m. on December 15, 1999, and released on his own recognizance at 6 p.m. the same day. Defense counsel also elicited testimony from Williams, the investigating officer, with respect to the motion in limine. Williams testified that he first came into contact with Purvis at approximately 2 p.m. on December 15, after learning from Tyma's roommate that Purvis and Tyma were conspiring to kill Tim. Williams further testified that he went to Purvis' house to question him and that his first contact with Purvis lasted only 5 minutes. Williams stated that upon leaving Purvis' home, he was told by a police dispatcher that an outstanding warrant for Purvis' arrest existed because Purvis had failed to pay a

fine. Williams testified that he then placed Purvis under arrest and that Purvis was transported to the Hall County Safety Center.

Williams testified that he questioned Purvis at the police station for approximately 2 hours concerning his involvement in an alleged conspiracy with Tyma to kill Tim. Williams testified that he neither paid nor promised anything to Purvis in exchange for Purvis' statement. Williams told Purvis, however, that if he continued to cooperate, Williams would talk with the county attorney about obtaining Purvis' release on a recognizance bond and not filing charges against Purvis for possession of a weapon that was found in his home. Williams then testified that after he finished questioning Purvis, he booked him into jail and called the county attorney, who informed him that only a judge could order a recognizance bond but that she would forgo filing a weapons charge if Purvis continued to cooperate. Williams testified that he called a county judge and requested that Purvis be released on a recognizance bond, which subsequently occurred after Purvis had spent approximately an hour in jail.

Williams further testified that after Purvis was released from jail, Purvis voluntarily came back to the police station, at which time Williams asked Purvis to wear a concealed recording device in an effort to record a conversation with Tyma. Williams stated that Purvis wore the device on two occasions and indicated that the first attempt failed to produce a recording but that the second attempt yielded a partial recording of a conversation between Purvis and Tyma.

At the conclusion of this evidence, the district court took the motion in limine under advisement and commenced trial. The State called Purvis during its case in chief. The record reflects no ruling on the motion in limine prior to Purvis' testimony. On direct examination, Purvis testified that he met Tyma outside a bar 2 or 3 months before his December 1999 arrest. He testified that between September and December, he had conversations with Tyma in which she stated that she wanted Tim to be dead. Purvis identified a pistol that Tyma had given him and testified that she had given him money on several occasions "because she wanted her husband dead." Purvis admitted having several conversations with Tyma "about killing her husband" and testified that Tyma had shown him photographs of Tim. Purvis identified

several handwritten notes given to him by Tyma during this period. He admitted that during the period Tyma was giving him money and sex, he told her he would kill Tim, although he had no intention of doing so. Defense counsel did not object to any portion of Purvis' direct testimony on the basis of § 29-2262.01.

On cross-examination, Purvis testified that he and Tyma had agreed that he would be paid \$100,000 to kill Tim, but stated that he was interested only in continuing his sexual relationship with Tyma and had no intention of actually carrying out the murder. Purvis also confirmed that the State had agreed not to pursue certain criminal charges against him in exchange for his testimony. At the conclusion of Purvis' testimony, defense counsel stated that he was renewing the defense motion that Purvis' testimony be stricken pursuant to § 29-2262.01. The court overruled the motion, stating that it did not find the statute applicable.

[5] Assuming without deciding that the issue was raised in a timely and appropriate manner, we agree that § 29-2262.01 does not make Purvis' testimony inadmissible. In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Portsche*, 261 Neb. 160, 622 N.W.2d 582 (2001). The plain and ordinary meaning of the language of § 29-2262.01 prohibits those placed on probation by a court of this state and inmates who have been released on parole by any court from acting as undercover agents for, or employees of, law enforcement agencies. The exclusionary rule provided by § 29-2262.01 does not apply unless the informant is both (1) in jail, on probation, or on parole and (2) acting as an undercover agent or employee of a law enforcement agency. *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994), *abrogated on other grounds*, *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). Purvis' trial testimony elicited by the State related exclusively to his contacts with Tyma during the months preceding his arrest and brief incarceration on December 15, 1999. The record contains no evidence that Purvis was an inmate, parolee, or probationer or that he was acting as an undercover agent or employee of a law enforcement agency during this time period. Although Purvis arguably served as an undercover agent when he subsequently

agreed to wear a hidden recording device in order to record conversations with Tyma, the State did not offer any evidence obtained in this manner. We conclude that the district court correctly determined that § 29-2262.01 did not require the exclusion of Purvis' trial testimony.

SUFFICIENCY OF EVIDENCE

Tyma was convicted of criminal conspiracy, the elements of which are defined by Neb. Rev. Stat. § 28-202(1) (Reissue 1995) as follows:

A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:

(a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and

(b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

In her fourth assignment of error, Tyma contends that the district court erred in finding her guilty of criminal conspiracy because there was no evidence that she entered into an agreement with either Moore or Purvis.

[6] We have construed § 28-202 as adopting the unilateral approach to the agreement element of conspiracy as found in the Model Penal Code. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001). See, also, *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995); *State v. Knight*, 239 Neb. 958, 479 N.W.2d 792 (1992); *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982); Model Penal Code, § 5.03 (Tent. Draft No. 10, 1960). Under the unilateral approach, only the defendant need agree with another person; the second party can feign agreement. *Id.*

As noted above, our standard of review requires that we assess the sufficiency of the evidence to support a conviction by viewing it in a light most favorable to the State. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002). Moore testified that Tyma approached him in early 1999 and soon thereafter began stating in numerous conversations that she wanted Moore to kill Tim. Moore identified a number of notes given to him by Tyma which clearly indicated that she wanted and expected Moore to

commit the murder. Moore also testified that Tyma initially suggested that Moore run over Tim with his car and later suggested that Moore shoot Tim. Moore stated that Tyma tried to provide him with a gun on two separate occasions and that she did provide him with ammunition and eventually offered to pay him \$5,000 and then \$10,000 to kill Tim. Moore testified that Tyma stressed the importance of accomplishing the killing before her divorce became final. On cross-examination, the following relevant colloquy occurred between Tyma's counsel and Moore:

Q You never reached any agreement with the defendant to hurt anybody, had you?

A She wanted me to do it. I can't — I wasn't going to do it. She reached an agreement with me, wanting me to do it. I never reached an agreement with her because I — I never had an intention of doing it.

Moore also testified that he led Tyma to believe that he was proceeding with the plot to kill Tim so that she would not do so herself or find someone else to commit the crime.

The handwritten notes which Moore stated that he received from Tyma are consistent with Moore's testimony. The notes can reasonably be interpreted as complaints that Moore had not carried out the killing of Tim as agreed. One note states in part:

You lied to me again - no show all weekend. You know this thing w/Tim needs to be taken care of tomorrow. Get w/me & get \$. Get w/2 other guys & call friend & talk to those guys. They need to get to him now. 803 9th. St. Aurora. You've got pictures - need back. They need to go up to him & ask directions somewhere & get close enough to pull gun - slit throat. To be dead. Am I going to have to do this myself. I'm full w/kids. Help. You have time off work. This is a priority. I'll give you \$ after. There'll be. Let's move. Can I trust you. Nothing works out & you do opposite of what you say.

Purvis testified that he became involved with Tyma between September and December 1999 and that during that timeframe, Tyma repeatedly asked him to kill Tim. Purvis testified that Tyma showed him pictures of Tim and gave Purvis a .25-caliber pistol because she "wanted her husband dead." Finally, Purvis testified that between September and December, he told Tyma that he

would kill Tim as she requested, although he had no intention of doing so. Purvis further testified that Tyma was periodically paying him small amounts of money to commit the murder.

Tyma argues that neither Moore nor Purvis entered into any "agreement" with her under traditional concepts of contract law because they admittedly had no intention of killing anyone. Thus, she contends, there was no meeting of the minds and no agreement. This argument ignores the unilateral approach to the agreement element of criminal conspiracy adopted by § 28-202, whereby the requisite agreement can be established by evidence that the defendant reached an agreement with another person to commit a criminal act, even if the agreement of the other person is feigned. For example, in *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001), we affirmed a conviction for conspiracy to commit first degree sexual assault on a child based upon evidence of an agreement reached through electronic correspondence between the defendant and a police officer posing as a 14-year-old girl. Viewing the evidence in the present case in a light most favorable to the State, as our standard of review requires, we conclude that it is sufficient to establish that Tyma entered into agreements with both Moore and Purvis to murder Tim, notwithstanding the fact that both Moore and Purvis feigned agreement. This assignment of error is therefore without merit.

SPEEDY TRIAL

In her fifth assignment of error, Tyma contends that the district court erred in denying her motion to dismiss on the ground that she was denied her right to a speedy trial conferred by Neb. Rev. Stat. § 29-1207 (Reissue 1995). We treat the motion as one for an absolute discharge pursuant to Neb. Rev. Stat. § 29-1208 (Reissue 1995).

[7] The State argues that we lack jurisdiction as to this issue because Tyma did not perfect a timely appeal from the order denying the motion. The order in the record was entered after trial contemporaneously with the finding of guilt, but prior to sentencing. 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. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002); *State v. McLemore*, 261 Neb.

452, 623 N.W.2d 315 (2001). We therefore initially address the jurisdictional issue raised by the State.

In *State v. Gibbs*, 253 Neb. 241, 245, 570 N.W.2d 326, 330 (1997), we held:

Inasmuch as § 29-1207 confers a right to a speedy trial and § 29-1208 authorizes a special application to a court to enforce it, a ruling on a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated is a ruling affecting a substantial right made during a special proceeding and is therefore final and appealable.

In *Gibbs*, the motion for absolute discharge was denied prior to the scheduled commencement of trial and the defendant appealed the denial within 30 days. In concluding that the ruling affected a substantial right, we reasoned that the right to a speedy trial conferred by Nebraska statutes "would be significantly undermined if appellate review of nonfrivolous speedy trial claims were postponed until after conviction and sentence." *Id.*

In *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997), decided 1 week after *Gibbs*, we again considered a circumstance where a motion for absolute discharge was denied prior to the commencement of trial. In that case, however, the appeal was not perfected until after the trial was concluded and the defendant was convicted and sentenced. We affirmed the judgment of the Court of Appeals dismissing the appeal based upon a determination that the denial of the motion for an absolute discharge was a final, appealable order from which no timely appeal was perfected. Expanding upon our "substantial right" analysis in *Gibbs*, we reasoned that denial of a motion for discharge "effectively denies an appellant's speedy trial rights" and thus affects a substantial right. *Jacques*, 253 Neb. at 252, 570 N.W.2d at 335.

[8] In this case, the district court did not rule on the motion to dismiss on statutory speedy trial grounds until after the conclusion of trial. In *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999), we reasoned that a necessary concomitant to the right to immediately appeal from the denial of a motion to discharge, based upon an alleged violation of the right to a speedy trial, is the right to an appropriate pretrial disposition of the motion. We therefore held, prospectively, that

where a motion to discharge on speedy trial grounds is submitted to a trial court, that motion is inferentially denied where the trial court proceeds to trial without expressly ruling on the motion. At that point, the denial of the defendant's motion is a final, appealable order, and the defendant must secure his or her rights to appellate review by filing a timely notice of appeal.

Id. at 384, 597 N.W.2d at 619. Because there was no pretrial ruling on Tyma's speedy trial motion, it was inferentially denied when trial commenced on August 1, 2001. Under our holding in *Ward*, the notice of appeal filed on September 25, 2001, was untimely as to the speedy trial issue, and we therefore lack jurisdiction to consider its merit.

DUE PROCESS

In her sixth assignment of error, Tyma contends that her right to due process was violated by the failure of the State to make pretrial disclosure of two matters: (1) the fact that Purvis had been granted immunity and (2) the fact that a tape containing a covertly recorded conversation between Purvis and Tyma had been lost by law enforcement authorities. Tyma argues that the dictates of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), required the prosecution to make such facts known to her prior to trial and that the failure to do so necessitated a mistrial or an order excluding certain evidence. Tyma concedes, however, that she did not raise these issues at trial by appropriate motion or objection.

[9,10] In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995); *State v. Rust*, 247 Neb. 503, 528 N.W.2d 320 (1995). Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001); *State v. Gutierrez*, 260 Neb. 1008, 620

N.W.2d 738 (2001); *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000). It is not evident from the record that the lost tape contained anything different from or additional to the transcript of the tape which was offered by Tyma and received without objection. The immunity granted to Purvis was brought out during his testimony and was therefore available to the finder of fact in assessing the credibility of his testimony. Under these circumstances, we find no basis for review of the claimed *Brady* violations under the plain error doctrine, and we decline to do so.

CONCLUSION

For the reasons discussed, we lack jurisdiction to consider Tyma's assignment of error concerning the denial of her speedy trial motion. We conclude that her other assignments of error are without merit and affirm her conviction and sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAVID K. HARRISON, APPELLANT.
651 N.W.2d 571

Filed October 4, 2002. No. S-01-1304.

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. **Jurors: Trial.** The retention or rejection of a juror is a matter of discretion for the trial court.
3. **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.
4. **Criminal Law: Jury Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.
5. **Criminal Law: Trial: Jurors: Presumptions: Proof.** In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.
6. **Jury Misconduct: Proof.** Extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or

information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant.

7. **Constitutional Law: Effectiveness of Counsel: Proof.** In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
8. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.

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

Michael T. Levy and Kathy Pate Knickrehm for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

David K. Harrison appeals the order of the district court for Douglas County denying his motion for postconviction relief after an evidentiary hearing. In its order, the district court rejected Harrison's constitutional claims based on jury misconduct and ineffective assistance of counsel. We affirm.

II. STATEMENT OF FACTS

Harrison was convicted on January 11, 1985, of first degree murder for the shooting death of his wife, Maria F. Harrison. On February 1, he was sentenced to life imprisonment. Harrison appealed, and his conviction and sentence were affirmed. *State v. Harrison*, 221 Neb. 521, 378 N.W.2d 199 (1985).

On March 17, 1999, Harrison filed a motion for postconviction relief. In the motion, Harrison asserted that his constitutional rights had been violated due to jury misconduct at trial

and that he had received ineffective assistance of counsel at trial and on appeal. Harrison alleged three separate incidents of jury misconduct at the original trial. A postconviction evidentiary hearing was held July 20, 2000.

At the hearing, Harrison presented witnesses who testified regarding the three alleged incidents of jury misconduct. The first incident (referred to hereafter as the "January 9 elevator incident") involved a prospective juror who had been excused for cause but who had conversed about the case with, or in the presence of, two jurors and an alternate juror during the trial. At the evidentiary hearing in this postconviction action, Harrison entered into evidence an entry from the trial judge's minutes which was dated Thursday, January 10, 1985, and which stated as follows:

The Court conferred in chambers with [counsel for the State] and [counsel for Harrison]. The Court advised both counsel that it had been advised by three of the jurors that the juror who had been excused for cause . . . had conversed briefly about this case with, or in the presence of, two of the jurors and the alternate juror yesterday in the Courthouse after lunch. The Court, by agreement of both counsel, talked individually and separately with jurors The Court then advised both counsel of its conversations with the three jurors. Both counsel agreed that the jury should commence their [sic] deliberations.

J.J., a juror in Harrison's underlying trial, testified at the postconviction evidentiary hearing. J.J. testified that following lunch on January 9, 1985, at a time when evidence was still being introduced, he and some other jurors rode in an elevator with an excused juror who stated her opinion that Harrison was guilty. J.J. discussed the incident with the other jurors, and they decided to report it to the judge. J.J. reported the incident to the judge at the end of the day.

The next day, the trial judge conferred with J.J., and they discussed the specifics of the incident. J.J. could not recall whether a court reporter, counsel, or anyone else was present during his discussion with the trial judge. J.J. testified without objection that the trial judge had asked him whether the excused juror's comments would influence his decision process. J.J. testified that

he had replied that they would not and that he told the trial judge that he would instead decide the case based on the evidence. After J.J. so testified, the district court in the present postconviction evidentiary hearing asked J.J., "[I]s that what happened? You based your decision on the evidence at the time" Harrison objected to the district court's question on the basis that Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1995), prohibits a juror from testifying about deliberations, and J.J. did not answer the question. The district court then stated, "I'm not asking about the deliberations" and then restated its question, asking, "You stated that you told the judge, at the time, that you were going to base your decision on the evidence. Is that what happened in your . . . case?" J.J. replied, "Yes."

Depositions of the trial judge and Harrison's trial counsel were entered into evidence at the postconviction hearing. Trial counsel also served as counsel on appeal. Counsel testified that during the trial, he had heard from a relative of Harrison that someone had made comments about the case in the presence of jurors. Counsel brought the issue to the attention of the trial judge, and the trial judge informed him that jurors had reported the January 9 elevator incident and that the trial judge intended to speak individually with the affected jurors outside the presence of counsel and Harrison. The trial judge later informed Harrison's counsel and the State's counsel regarding his conversations with the jurors, and both counsel agreed that jury deliberations could proceed. Harrison's counsel testified, however, that the trial judge did not tell him either that the person making the comments was an excused juror or that the comments included expression of a belief that Harrison was guilty. Counsel testified that he had not moved for mistrial on the basis of the January 9 elevator incident because he believed that the incident, as he understood it, did not amount to jury misconduct or jury tampering and would not support a motion for mistrial. Counsel further testified that in his opinion, comments made by an excused juror concerning Harrison's guilt would be prejudicial to Harrison and could be grounds for mistrial. Counsel testified that at the time of trial, he informed Harrison of the January 9 elevator incident and the manner in which the trial judge had handled it.

The trial judge testified by deposition that he had no independent recollection of trial proceedings surrounding the January 9 elevator incident outside of that which was contained in the minute entry. He indicated that because he did not hold a hearing on the record, his discussions with the jurors must have satisfied him that no prejudice would result from the comments they had heard. The trial judge also testified that although he did not hold a hearing on the record in Harrison's case, his typical procedure in a similar situation would now be to hold a hearing on the record whether or not he thought there was prejudice.

Harrison alleged in his postconviction petition that after he learned of the January 9 elevator incident years after the trial, he hired an investigator who uncovered two other incidents of jury misconduct which were apparently not brought to the attention of the trial court.

Irene Nuno testified via affidavit attached to Harrison's motion and at the evidentiary hearing regarding one of the additional incidents (referred to hereafter as "the January 8 incident"). Nuno was related to the victim by marriage and had developed a close relationship with both the victim and Harrison. She attended portions of Harrison's trial. Following the January 8, 1985, trial session, Nuno was standing in the hallway outside the courtroom where an unidentified woman was loudly voicing her opinion that Harrison was "guilty as sin" and that she wished she was still on the jury. Shortly after the woman began voicing her opinion, three or four jurors, whom Nuno recognized from having attended the trial and who wore juror identification badges, exited the courtroom. The woman continued voicing her opinions in a manner that Nuno believed the jurors would have heard. Nuno further stated that when an elevator arrived, Nuno and her family, the woman, and the jurors got on the elevator. In the elevator, the woman told the occupants of the elevator that Harrison was guilty, "a nut case," and "crazy" and that a friend had told her that Harrison "was eventually going to kill someone because of his emotional condition." Nuno testified that on January 10, 1985, she telephoned Harrison's counsel to report the incident and that he told her that it had already been taken care of.

Joan Diane King testified in an affidavit and at the hearing regarding the other additional incident (referred to hereafter as "the January 9 hallway incident"). King is Nuno's sister. King stated that she attended the last day of Harrison's trial on January 9, 1985. King stated that during a morning recess, she joined a group of approximately five people smoking cigarettes. King recognized four of the five as jurors from having seen them in the jury box. King noted that all five were wearing juror badges. One woman was wearing a juror badge, but King did not recognize her as a juror. The woman was talking about the relationship between Harrison and the victim and stated that there had been a history of violence in their marriage and that each had been physically abusive toward the other. The woman told the jurors that she had learned this information from a friend who knew the victim. When a male juror expressed that he would never think by looking at Harrison that he could be a "cold killer," the woman responded that he "didn't know the half of the things [Harrison] had done to [the victim]" and that Harrison was "a first degree killer and murderer." King testified that she telephoned Harrison's attorney after the conclusion of trial that day and reported to him what she heard in the hallway during the morning recess. She testified that the attorney told her the woman had been excused from jury service and that the attorney "seemed otherwise unconcerned with the incident." Harrison's trial counsel testified in his deposition that although he recalled being advised by an unidentified person of the January 9 elevator incident, he did not recall that either Nuno or King had advised him of the additional incidents.

Harrison also offered his own deposition at the evidentiary hearing. Harrison testified that at the time of trial, he was not made aware of the January 9 elevator incident and was not aware of or present at the meetings between the trial judge and counsel and between the trial judge and jurors in regard to this incident. He testified that he did not become aware of the January 9 elevator incident until he reviewed the trial record in 1992 and that he did not become aware of the additional incidents reported by Nuno and King until he saw their affidavits in 1999. Harrison testified that if he had known of the January 9 elevator incident, he would have asked to be present

at a hearing regarding the incident and would have requested a mistrial. If he had been aware of the additional incidents reported by Nuno and King, he would have instructed counsel to report the incidents to the trial judge and would have asked counsel to move for a mistrial.

Following receipt of evidence in the instant case, the district court entered an order on November 2, 2001, denying Harrison's motion for postconviction relief. With reference to the three incidents described above, the district court rejected Harrison's 6th Amendment claims of a denial of his rights to trial by an impartial jury and to confrontation and his 5th and 14th Amendment claims of denial of due process. The district court further rejected Harrison's claim of ineffective assistance of counsel because it concluded that Harrison had not established any prejudice resulting from counsel's alleged deficient performance. Harrison appeals the district court's denial of his motion for postconviction relief.

III. ASSIGNMENTS OF ERROR

Harrison asserts, restated, that the district court erred in (1) failing to grant postconviction relief on the grounds asserted and (2) admitting J.J.'s testimony surrounding the nonjuror's comments during the January 9 elevator incident.

IV. 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. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

V. ANALYSIS

1. ADMISSION OF JUROR TESTIMONY

We first consider Harrison's second numbered assignment of error. Harrison asserts generally that the district court in this postconviction case erred under § 27-606(2) because the district court allowed J.J. to testify regarding the January 9 elevator incident. Harrison specifically claims that J.J. testified as to the influence upon him which resulted from the January 9 elevator incident and that such testimony is improper under § 27-606(2). As

explained below, the testimony at issue is neither the type of testimony covered nor prohibited by § 27-606(2), and Harrison's assignment of error is without merit.

Section 27-606(2) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

J.J. testified at the postconviction evidentiary hearing regarding the January 9 elevator incident in which he and other jurors heard an excused juror express her opinion that Harrison was guilty. J.J. also testified regarding his conversation with the trial judge about the incident. J.J. testified that during that conversation, the trial judge asked him whether the excused juror's comments would affect his decision and that he told the trial judge they would not. After J.J. gave this testimony at the postconviction evidentiary hearing, the district court in the postconviction evidentiary hearing asked J.J., "[I]s that what happened? You based your decision on the evidence at the time" Harrison objected to the district court's question on the basis that § 27-606(2) prohibits a juror from testifying about deliberations. J.J. did not answer the question. The district court indicated that it was "not asking about the deliberations" and then restated its question, and asked, "You stated that you told the judge, at the time, that you were going to base your decision on the evidence. Is that what happened in your . . . case?" J.J. replied, "Yes."

Referring to the above-quoted testimony, Harrison argues that J.J. was impermissibly allowed to testify in the postconviction hearing as to the influence the improper communication actually

had on the deliberations. The State responds that the district court in its reformulated question did not ask J.J. what the effect of the nonjuror's comments were on his decision, but, rather, the district court asked J.J. to reiterate whether or not he had told the trial judge at the time of the trial that he intended to base his decision on the evidence. We agree with the State's reading of the postconviction evidence.

A review of the testimony at issue shows that the substance of the testimony as a whole amounts to a recitation by J.J. stating, as a historical matter, what J.J. had told the trial judge, following which the district court in the postconviction evidentiary hearing asked J.J. to confirm, which he did, that J.J. had told the trial judge that he would base his decision on the evidence. The inquiry in the postconviction hearing referred to predeliberation matters in the trial court. In sum, the testimony by J.J. indicates that J.J. told the trial judge that he remained impartial, and the district court in the postconviction evidentiary hearing verified that J.J. had told the trial judge that he remained impartial prior to deliberations.

The testimony in question regarding J.J.'s predeliberation impartiality was not an inquiry into the validity of the verdict under § 27-606(2). Accordingly, the testimony was not prohibited by § 27-606(2). Instead, the testimony at issue reflects that the trial judge merely inquired as to whether the juror was able to render a fair and impartial verdict prior to deliberation, and recitation of the trial-level colloquy at the postconviction hearing neither implicated nor was prohibited by § 27-606(2).

[2] We have long observed that "The retention or rejection of a juror is a matter of discretion for the trial court." *State v. LeBron*, 217 Neb. 452, 458, 349 N.W.2d 918, 923 (1984) (quoting *State v. Robinson*, 198 Neb. 785, 255 N.W.2d 835 (1977)). We have approved of a trial court's action in which the trial court examined jurors with respect to their continued impartiality where the jurors have been exposed to a conversation relative to the criminal defendant. *Id.* Similarly, in the instant case, the testimony at the postconviction hearing reporting the trial court's inquiry into J.J.'s continued predeliberation impartiality was not error. Harrison's second assignment of error is without merit.

2. DENIAL OF POSTCONVICTION RELIEF

[3] We next consider Harrison's first numbered assignment of error in which he asserts that the district court erred in denying postconviction relief on the grounds set forth by Harrison. 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. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). In his motion for postconviction relief, Harrison alleged facts relating to the three incidents involving communications between a nonjuror and jurors during the course of his trial. Harrison also alleged that, with respect to the January 9 elevator incident, his trial counsel failed to preserve issues related to the incident for appeal and that the same counsel failed to raise the issues on appeal. Harrison essentially argues that these facts establish a denial or violation of his constitutional rights in two respects: (1) the three incidents involving nonjurors and jurors violated his due process and Sixth Amendment rights to trial by an impartial jury and to confrontation and (2) counsel's failures with respect to the January 9 elevator incident deprived him of effective assistance of counsel.

(a) Denial of Fair Trial: Jury Misconduct

Harrison asserts that each of the three incidents amounts to jury misconduct which denied him a fair trial. We note that in prior case law, this court has used the term "jury misconduct" to refer to at least two distinct types of misconduct: (1) misconduct involving an improper communication between a nonjuror and a juror and (2) misconduct by a member or members of the jury, including predeliberation discussions of the case. Different standards of proof apply to these distinct types of misconduct; therefore, we first note that we consider each of the three incidents in the present case to be misconduct involving an improper communication between a nonjuror and a juror and analyze them accordingly.

The January 8 incident and the January 9 elevator incident clearly fall under the category of nonjuror communications because they involved jurors' hearing the comments of a nonjuror

and there was no indication of a response by or discussion among the jurors. The January 9 hallway incident also involved comments by a nonjuror in the presence of jurors, but there was additional testimony that a juror responded to the nonjuror's comments by saying that he would never think by looking at Harrison that he could be a "cold killer." As we read the comment by the juror, it reflects that the juror had not decided the issue in the case; the nonjuror comments did not affect the juror and therefore did not amount to a predeliberation discussion or misconduct by the juror as asserted by Harrison. Accordingly, we analyze each of the three incidents as instances of misconduct involving an improper communication between a nonjuror and a juror.

[4] A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial. *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998). We review the district court's decision in this postconviction proceeding under a clearly erroneous standard. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

[5,6] In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome. *Jackson, supra*. Extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant. *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997). The question of whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror. *Id.* The test to determine whether extraneous material was prejudicial looks to the possible effect of the extraneous material on an average juror's deliberative process. *Id.*

We review the district court's determinations regarding Harrison's claims of jury misconduct in light of the above standards. Regarding the factual question whether misconduct

occurred in each of the three incidents alleged by Harrison, it is apparent that the district court found that the three incidents of communication between a nonjuror and jurors occurred because the district court continued the analysis in its order and evaluated whether prejudice resulted from such communications. From our review of the evidence presented at the evidentiary hearing, we determine that the district court's findings that the three incidents occurred were not clearly erroneous.

We next review the district court's determination that the three incidents were not prejudicial to Harrison's defense. We determine that the district court's determination that no prejudice occurred was not clearly erroneous.

Under the standards recited above, once a defendant has established by a preponderance of the evidence that jury misconduct involving improper communications between a nonjuror and a juror has occurred, a rebuttable presumption of prejudice arises which the State has the burden to overcome. The question whether the misconduct was prejudicial to the extent that the defendant was denied a fair and impartial trial is ultimately a question for the trial court and is to be resolved upon the basis of an independent evaluation of all the circumstances in the case and consideration of the effect of the communication on an average juror. *Williams, supra*.

The proper analysis with regard to each incident in the present case is to make an evaluation of all the circumstances to determine whether there was a reasonable possibility that the improper communication affected the jury's verdict. A review of the evidence presented at the evidentiary hearing shows that under all the circumstances at the underlying trial, there was not a reasonable possibility that the nonjuror communications to the jurors affected the verdict and that, therefore, the district court's determination that the three incidents were not prejudicial was not clearly erroneous.

The record shows that the communications at issue consisted mainly of the nonjuror's assertions of her belief that Harrison was guilty and that he was "crazy." The three incidents were pre-deliberation occurrences, and evidence was received subsequent to the incidents. In addition, we observe that prior to the jury's beginning its deliberations, and subsequent to the three incidents,

the trial court instructed the jury that “[i]n determining any questions of fact presented in this case, you should be governed solely by the evidence introduced before you.” See *State v. Anderson*, 252 Neb. 675, 564 N.W.2d 581 (1997). It is evident that the average juror would have heeded the trial court’s instructions to base his or her decisions on the evidence rather than on a comment by the nonjuror.

In light of all the circumstances, the communications of the nonjuror would not have affected the average juror’s decision and there was not a reasonable possibility that the communications by the nonjuror would have affected the jury’s verdict. We therefore determine that the district court was not clearly erroneous in determining that no prejudice resulted from the three incidents. We reject Harrison’s arguments with regard to jury misconduct and conclude that the district court did not err in dismissing Harrison’s claims related to such misconduct.

(b) Ineffective Assistance of Counsel

[7,8] Harrison argues that his trial counsel, who also served as his direct appeal counsel, was ineffective for failing to properly raise and preserve issues related to the three incidents. In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel’s performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel’s deficient performance, the result of the proceeding would have been different. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

As we have noted above, the district court was not clearly erroneous in determining that the three incidents did not result in prejudice to Harrison. Because the incidents themselves were not prejudicial, any claimed deficiencies of counsel due to purported failures on the part of counsel to raise, preserve, or

appeal issues related to the incidents did not prejudice Harrison's defense or impact the outcome. We therefore conclude the district court did not err in rejecting Harrison's claim of ineffective assistance of counsel.

VI. CONCLUSION

Juror J.J.'s testimony was not prohibited by § 27-606(2). The district court did not err in rejecting Harrison's motion for post-conviction relief. The district court did not err in rejecting Harrison's claim of ineffective assistance of counsel. We therefore affirm the district court's denial of Harrison's motion for post-conviction relief.

AFFIRMED.

IN RE COMPLAINT AGAINST LYN V. WHITE, COUNTY COURT JUDGE
OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF NEBRASKA.

STATE OF NEBRASKA EX REL. COMMISSION ON
JUDICIAL QUALIFICATIONS, RELATOR, V.
LYN V. WHITE, RESPONDENT.

651 N.W.2d 551

Filed October 4, 2002. No. S-35-010002.

1. **Judges.** The object of the Nebraska Code of Judicial Conduct is to delineate what conduct should be avoided for its prejudicial potential.
2. **Judges: Disciplinary Proceedings.** A clear violation of the Nebraska Code of Judicial Conduct constitutes, at a minimum, a violation of Neb. Rev. Stat. § 24-722(6) (Reissue 1995).
3. **Judges: Disciplinary Proceedings: Appeal and Error.** In a review of the findings and recommendations of the Commission on Judicial Qualifications, the Nebraska Supreme Court shall review the record de novo and file a written opinion and judgment directing action as it deems just and proper, and may reject or modify, in whole or in part, the recommendation of the commission. Upon its independent inquiry, the Nebraska Supreme Court must determine whether the charges against the respondent are supported by clear and convincing evidence and which, if any, canons of the Nebraska Code of Judicial Conduct and subsections of Neb. Rev. Stat. § 24-722 (Reissue 1995) have been violated. If violations are found, the Nebraska Supreme Court must then determine what discipline, if any, is appropriate under the circumstances.
4. **Appeal and Error.** As a general rule, a case is considered pending until the appellate process is complete.

5. **Judges: Disciplinary Proceedings: Appeal and Error.** Neb. Code of Jud. Cond., Canon 3B(7) (rev. 2000), still applies to a trial judge when a matter is pending on appeal.
6. **Judges.** A judge is acting in an official capacity, and not a personal capacity, when commenting on a case that the judge presided over in the course of his or her official duties.
7. _____. A judge's public statements shall be considered to be in an official capacity when the statements are part of an official duty, related to an official duty, or sought from or given by the judge because of his or her official position.
8. **Judges: Disciplinary Proceedings: Appeal and Error.** The limitations on public comments contained in Neb. Code of Jud. Cond., Canon 3B(9) (rev. 2000), apply where a trial judge comments on a matter that is before another trial judge or has been taken to an appellate court.
9. **Words and Phrases.** A matter is public if it is open and available to all, i.e., accessible to everybody.
10. **Judges: Appeal and Error.** A judge's defense of his or her own orders, prior to the resolution of appeal, may create the appearance of partiality.
11. **Judges: Disciplinary Proceedings.** While the disciplinary recommendation of the Commission on Judicial Qualifications is entitled to be given weight, it is incumbent upon the Nebraska Supreme Court to independently fashion an appropriate penalty.
12. _____. _____. The goals of disciplining a judge in response to inappropriate conduct are to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated.
13. _____. _____. The Nebraska Supreme Court disciplines a judge not for purposes of vengeance or retribution, but to instruct the public and all judges of the importance of the function performed by judges in a free society.
14. _____. _____. The discipline imposed on a judge must be designed to announce publicly the Nebraska Supreme Court's recognition that there has been misconduct. It must be sufficient to deter the respondent from engaging in such conduct again, and it must discourage others from engaging in similar conduct in the future.
15. _____. _____. The Nebraska Supreme Court weighs the nature of the offenses with the purpose of the sanctions and examines the totality of the evidence to determine the proper discipline for judicial misconduct.
16. _____. _____. The determination whether conduct is prejudicial to the administration of justice depends not so much on the judge's motives, but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers.
17. _____. _____. The misconduct of a judge in his or her official capacity is more culpable than extrajudicial misconduct.

Original action. Judgment of suspension without pay.

Susan Ann Koenig, of Law Office of Susan Ann Koenig, P.C.,
L.L.O., for respondent.

Anne E. Winner and Gary L. Young for relator.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LEMAN, JJ.

PER CURIAM.

The respondent, Lyn V. White, a judge of the county court for Douglas County, has been charged with several violations of the Nebraska Code of Judicial Conduct (Code). The charges are based on Judge White's conduct after a sentence that she imposed, in a case involving a domestic protection order, was reversed on appeal by the district court. This case is not about domestic violence or whether the sentence imposed by Judge White was appropriate. Rather, the issue in this case is whether Judge White's quarrel with the district court's decision caused Judge White to abandon the impartiality required of a judge no matter what accusations are made against those who appear before the court. We conclude that Judge White's unethical conduct warrants a 120-day suspension from office without pay.

PROCEDURAL BACKGROUND

The Nebraska Commission on Judicial Qualifications (Commission) initiated this original action against the respondent in a complaint filed June 1, 2001. An amended complaint filed August 17, 2001, alleged that the respondent had engaged in conduct that had been in violation of Neb. Code. of Jud. Cond., Canons 1, 2, and 3B(7) and (9) (rev. 2000), and that such conduct was prejudicial to the administration of justice and brought the judicial office into disrepute. See Neb. Rev. Stat. § 24-722 (Reissue 1995). An evidentiary hearing was held on October 1 before a special master appointed by this court. Based upon the record made before the special master, the Commission concluded that the respondent's conduct deviated from the standards for ethical conduct mandated by Canons 1, 2A, and 3B(7) and (9) of the Code, and the Commission recommended that the respondent be suspended from office, without pay, for a period of 45 days.

The Commission filed its findings and recommendation in this matter on March 18, 2002. Pursuant to Neb. Comm. on Jud. Qual. R. of Proc. 17(a) (rev. 2001), a respondent may file, within 20 days of the filing of the recommendation of the Commission, a petition, accompanied by a brief, asking this court to modify

or reject the recommendation of the Commission. Failure to file such a petition and brief within the time provided may be deemed a consent to determination on the merits, based upon the record filed by the Commission. See rule 17(b).

Pursuant to a motion by the respondent, the respondent was granted an extension of time until May 23, 2002, to respond to the Commission's findings and recommendation. On that date, the respondent filed a consent to the discipline set forth in the findings and recommendation of the Commission, along with a notarized statement and a waiver of oral argument. On June 3, counsel for the Commission filed a responsive motion, asking this court to adopt the findings and recommendation of the Commission and impose the recommended discipline, and acceding to the respondent's waiver of oral argument. On June 7, the respondent filed a response renewing her consent to discipline and waiver of oral argument and making clear her understanding that this court would review the record de novo and could accept, reject, or modify the recommendation of the Commission.

Upon consent of the respondent, an order of reprimand, discipline, suspension, retirement, or removal may be entered by this court at any stage of the proceedings. See Neb. Comm. on Jud. Qual. R. of Proc. 15(c) (rev. 2001). The respondent filed such a consent and filed neither a petition to modify or reject the recommendation of the Commission nor a respondent's brief. Accordingly, this court ordered the matter submitted to this court on the record filed by the Commission. As briefs have not been filed, the matter was submitted without oral argument. See, rule 17(c); Neb. Ct. R. of Prac. 11E(4) (rev. 2000).

STANDARDS

[1,2] Pursuant to § 24-722(6), a judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed 6 months, or removed from office for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The object of the Code is to delineate what conduct should be avoided for its prejudicial potential. Therefore, a clear violation of the Code constitutes, at a minimum, a violation of § 24-722(6). *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998).

[3] In a review of the findings and recommendations of the Commission, this court shall review the record de novo and file a written opinion and judgment directing action as it deems just and proper, and may reject or modify, in whole or in part, the recommendation of the Commission. See, Neb. Const. art. V, § 30(2); Neb. Rev. Stat. § 24-723 (Reissue 1995); Neb. Comm. on Jud. Qual. R. of Proc. 18 (rev. 2001); *In re Complaint Against Krepela*, 262 Neb. 85, 628 N.W.2d 262 (2001). Upon our independent inquiry, this court must determine whether the charges against the respondent are supported by clear and convincing evidence and which, if any, canons of the Code adopted by this court and subsections of § 24-722 have been violated. *In re Complaint Against Krepela, supra*. If violations are found, this court must then determine what discipline, if any, is appropriate under the circumstances. *Id.*

FACTUAL FINDINGS

The factual findings of the Commission have not been challenged before this court. Having reviewed the record de novo, we conclude that the factual determinations set forth in the Commission's findings and recommendation are well supported by the record and have been proved by clear and convincing evidence. See *id.* The following statement of the underlying facts of this case has been substantially adopted from the recitation of facts set forth by the Commission.

The incidents relevant to this opinion stem from a criminal proceeding originating in the Douglas County Court, State v. Brink, No. CR99-9443, which will be referred to generally as "the *Brink* case." The respondent presided over the *Brink* case at the county court level. The specific details of the criminal proceeding are significant only as background for the conduct of the respondent. Dayne R. Brink was charged with the misdemeanor offenses of violating a protection order and stalking. Pursuant to a plea agreement, Brink pled guilty to one protection order violation and the remaining charges were dismissed. On July 15, 1999, the respondent placed Brink on probation for 1 year. Subsequently, Brink was charged with violating his probation, and on December 16, Brink entered a guilty plea to this charge, again before the respondent. The respondent revoked

Brink's probation and sentenced him to the maximum statutory penalty of 180 days' confinement and a \$1,000 fine.

Brink appealed the sentence to the district court, alleging that the respondent had exhibited bias toward him at the time of his conviction and sentencing. The district court, on August 14, 2000, found that a reasonable person could question the respondent's impartiality, and the district court vacated Brink's sentence and remanded the case for resentencing by another county judge (August 14 order). The Commission noted, as does this court, that we are not concerned with whether the district court's decision in the *Brink* case was legally or factually correct. The issue in the instant case is not whether the district court acted correctly, but whether the respondent's response to the district court's decision violated the Code.

Tressa Alioth was employed by the Douglas County Attorney as a deputy county attorney and had been assigned the responsibility of representing the State in the *Brink* case. When the August 14 order was entered by the district court, Alioth was asked by a supervisor within her office to provide a copy of the August 14 order to the respondent to determine whether the respondent had any objections if the *Brink* case was appealed by the State to the Nebraska Court of Appeals. This contact with the respondent was apparently made because of a perception in the county attorney's office that the respondent might not want certain things "aired" that appeared on the record in the *Brink* case. Alioth gave the respondent a copy of the August 14 order while the respondent was on the bench handling unrelated matters. Alioth asked for the respondent's view on the possibility of a further appeal.

On the following day, the respondent encountered Alioth on the stairs; the respondent asked Alioth to come into the respondent's chambers. In chambers, the respondent engaged Alioth in a lengthy, detailed, and largely one-sided conversation during which the respondent itemized specific arguments as to why the August 14 order was erroneous, directed Alioth to take notes on the respondent's comments, and supplied Alioth with copies of cases to support the legal position supported by the respondent. Alioth's notes, and the cases provided to Alioth by the respondent, are present in the record. While the testimony of Alioth and

the respondent conflicts regarding when the conversation took place, the length of the conversation, and other details, there is no significant disagreement regarding the substance of the conversation. As the respondent later stated on the record:

I read the opinion and had a conference with Miss Alioth, and this was within days of the rendering of the opinion by [the district court]. I gave her case law and statutes demonstrating that as a judge I had followed the law in all respects, that none of my actions were unlawful, that there was no basis in law or in fact for a finding of bias against this Defendant.

I further pointed out to the County Attorney that in the event this matter was not appealed, that the criminal defense lawyers in this jurisdiction would be using it to have me recuse myself in other domestic violence cases. The County Attorney, Miss Alioth, acknowledged the Court's concerns and assured me that she would file an appeal.

I went through the opinion with her pointing out appeal issues.

The county attorney's office later determined that it would appeal the *Brink* decision; however, the county attorney's office inadvertently failed to file a timely notice of appeal. Alioth had been out of the office for an extended period of time and did not learn of the failure to appeal until after her return, when Brink's name appeared on a list for resentencing.

Within a day or two of the release of the August 14 order, Kelly Steenbock, an assistant public defender and Brink's counsel on the probation violation, was in the respondent's courtroom in connection with an unrelated proceeding. The respondent initiated a conversation with Steenbock regarding the *Brink* case. In this conversation, the respondent told Steenbock about the respondent's displeasure with the district court's decision in the *Brink* case, and the respondent advised Steenbock that the *Brink* case would be appealed by the county attorney. According to Steenbock, the respondent stated that the respondent had "ordered" the county attorney to file an appeal. The respondent referred to her prior contact with Alioth, but did not reveal that the respondent had provided the county attorney with arguments and authority intended to aid in the prosecution of the appeal.

On or shortly before October 27, 2000, the respondent again met Alioth in the hallway and initiated a conversation, during which the respondent gave Alioth the name of a resource person with a national organization from whom, in the respondent's words, "[Alioth] might want to seek additional information" to assist in the preparation of the appellate brief that the respondent evidently believed would be filed. Alioth did not immediately respond, but returned to her office, and at the direction of her supervisor, Alioth telephoned the respondent later that day and advised the respondent that an appeal had not been filed and that Brink had been resentenced.

By October 27, 2000, the respondent was aware that no appeal had been taken from the August 14 order. That afternoon, the respondent conversed with Douglas County District Court Presiding Judge Mary G. Likes, who was both a personal and professional acquaintance of the respondent. The subject of the August 14 order was discussed, including the content of the August 14 order and the county attorney's failure to appeal from the order. Over the following weekend, Judge Likes attempted to inform the respondent, through a family member, that Judge Likes would consider appointing a special prosecutor in the *Brink* case.

On October 30, 2000, the respondent came to Judge Likes' chambers with a request that Judge Likes appoint a special prosecutor for the purpose of pursuing an appeal in the *Brink* case. By this time, Brink had been resentenced by another judge of the county court, and the respondent believed that the final day for filing an appeal from the resentencing was either October 30 or 31. The county attorney's office had deliberately chosen not to appeal from Brink's resentencing. Judge Likes commenced the proceeding as follows:

We are here in a matter that is captioned the *State of Nebraska vs. Dayne R. Brink*. . . . It is an appeal from a County Court ruling . . . that was in the County Court of Douglas County.

I have the District Court file in front of me. I have reviewed both that file as well as the pleadings, bill of exceptions, from the County Court. Present in court is Judge Lyn White, County Court Judge from Douglas County. And,

Judge White, I will ask you to please recite for the record why you are here.

The record is clear that neither the State nor Brink was present or represented by counsel at the commencement of the October 30 district court proceeding, nor does the record indicate that either the State or Brink was notified personally or through counsel prior to the commencement of the hearing.

The respondent invoked Neb. Rev. Stat. § 23-1205 (Reissue 1997), which provides, in relevant part:

In the absence, sickness or disability of the county attorney and his deputies, or upon request of the county attorney for good cause, the court may appoint an attorney to act as county attorney in any investigation, appearance, or trial, by an order to be entered upon the minutes of the court

The respondent moved the district court for a finding that the County Attorney for Douglas County is either disabled or disqualified to prosecute the appropriate appeals in the case of Dayne — State vs. Dayne R. Brink, with the same Appellate numbers as have already been recited by the Court into the record.

. . . And I am asking you to appoint a Special Prosecutor to prosecute the appeals necessary in this case.

In support of this motion, the respondent explained several reasons why she believed that the August 14 order was in error.

The district court commented, at the conclusion of the October 30, 2000, proceeding, that a ruling would be reserved until the county attorney's position could be stated for the record. The hearing was resumed on October 31, and Alioth gave sworn testimony. Alioth said, on the record, "I'd like to note that I didn't have any notice of any kind of hearing . . . so I'm here kind of blind sided." The record reflects no attempt to notify Brink or his counsel about the October 31 hearing. The district court's disposition of the October 30 motion, if any, is not apparent from the record.

On December 21, 2000, the respondent, through personal counsel, filed a petition in the district court seeking the appointment of a special county attorney, pursuant to § 23-1205, "to review the content and law of the decision rendered by a judge

of this Court in State v. Brink, Doc. 149 No. 325, and render an advisory opinion" regarding that matter. The petition was served on both Alioth and Steenbock. Prior to hearing, this petition was voluntarily dismissed by the respondent.

ANALYSIS

COMMUNICATIONS WITH COUNTY ATTORNEY

We turn first to the respondent's contacts with Alioth. We determine that the respondent's contacts with Alioth, on the occasions set forth above, involved *ex parte* communications in violation of Canon 3B(7) of the Code, which provides, in relevant part:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . .

We first observe that the respondent's initial communications with Alioth regarding the August 14 order, when Alioth presented a copy of the district court's decision to the respondent, were *ex parte* communications for which the respondent is responsible, despite the fact that the communications were initiated by Alioth. Canon 3B(7) of the Code provides that a judge shall not "initiate, *permit*, or consider" *ex parte* communications. (Emphasis supplied.) While the contact was not initiated by the respondent, it was clearly permitted by her. The county attorney's lapse of judgment in initiating the communications did not excuse the respondent from her ethical responsibility to terminate the communications as soon as the nature of the communications became (or should have become) apparent to the respondent.

[4] We also determine that the respondent's communications with Alioth were impermissible *ex parte* communications despite the fact that the *Brink* case was not directly pending before the respondent. Although the district court ordered that the *Brink* case resentencing be performed by a different county court judge, the language of Canon 3B(7) simply proscribes *ex parte* communications concerning a "pending or impending" proceeding and does not limit that prohibition by reference to

the docket of a particular judge. As a general rule, a case is considered pending until the appellate process is complete. See, e.g., *Roberts v. Com'n on Judicial Performance*, 33 Cal. 3d 739, 661 P.2d 1064, 190 Cal. Rptr. 910 (1983) (rejecting contention that trial judge may participate personally in ex parte communications with real party regarding subsequent appellate proceedings reviewing judge's order), *disapproved on other grounds*, *Doan v. Commission on Judicial Performance*, 11 Cal. 4th 294, 902 P.2d 272, 45 Cal. Rptr. 2d 254 (1995); *Harrington v. State*, 584 N.E.2d 558, 561 (Ind. 1992) (trial court violated Canon 3, "forsaking his stance of neutrality" in writing letter to attorney general suggesting that attorney general file motion for rehearing of appellate decision reversing trial court). See, also, *In re White*, 53 Ala. App. 377, 300 So. 2d 420 (1974).

[5] The comments to Canon 3B(7) provide that "[i]f communications between the trial judge and the appellate court with respect to a proceeding appealed from that trial judge is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties." While the circumstances of the instant case do not involve communications between the trial judge and appellate court, the clear implication of the comment is that Canon 3B(7) still applies to a trial judge when a matter is pending on appeal.

Moreover, the stated purpose of the respondent's meetings with Alioth was to assist the county attorney in convincing a higher appellate court to reverse the judgment of the district court, thus reinstating the original sentence imposed by the respondent. If an appeal had been perfected and the State had prevailed, the case might have been remanded to the respondent for further proceedings. The potential that a case may be remanded to a trial judge provides an additional rationale for prohibiting ex parte communications between the trial judge and the parties even while the matter is on appeal.

We also conclude that the respondent's communications with Alioth represent clear violations of Canons 1 and 2A of the Code. We focus particularly on the second and third meetings between Alioth and the respondent, in which the respondent by her own admission provided Alioth with advice and authority intended to aid the county attorney in appealing the reversal of

Brink's sentence. In so doing, the respondent, figuratively speaking, stepped down from the bench and assumed the State's place at the prosecutor's table. See *In re White, supra*. See, also, e.g., *Disciplinary Proc. Against Aulik*, 146 Wis. 2d 57, 429 N.W.2d 759 (1988); *State v. Cash*, 867 S.W.2d 741 (Tenn. Crim. App. 1993).

Canon 1 is entitled "A Judge Shall Uphold the Integrity and Independence of the Judiciary" and provides, in relevant part, that "[a]n independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." Canon 2 is entitled "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities," and Canon 2A states that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

It is difficult to conceive of a more direct violation of these canons than the actions of the respondent in response to the August 14 order in the *Brink* case. The respondent injected herself into the proceeding as an advocate for one of the parties. "When a judge becomes embroiled in a controversy, the line between the judge and the controversy before the court becomes blurred, and the judge's impartiality or appearance of impartiality may become compromised." *In re Charge of Judicial Misconduct*, 47 F.3d 399, 400 (10th Cir. 1995). In this case, the respondent "'abandoned the judicial role to become an advocate for [her] own ruling.'" See *Fletcher v. Com'n on Judicial Performance*, 19 Cal. 4th 865, 910, 968 P.2d 958, 983, 81 Cal. Rptr. 2d 58, 83 (1998). Such behavior by the respondent "discloses an unhealthy and wholly improper concern with the protection of [her] own rulings from appellate reversal." See *Roberts v. Com'n on Judicial Performance*, 33 Cal. 3d 739, 747, 661 P.2d 1064, 1068, 190 Cal. Rptr. 910, 914 (1983), *disapproved on other grounds, Doan v. Commission on Judicial Performance*, 11 Cal. 4th 294, 902 P.2d 272, 45 Cal. Rptr. 2d 254 (1995). Simply stated, the individual judge of the court whose order is being reviewed is not a proper party to the proceeding. *Id.*

The responsibility of a judge is to decide matters that have been submitted to the court by the parties. The judge may not, having decided a case, advocate for or, as in this case, materially assist one party at the expense of the other. Such advocacy creates the appearance, and perhaps the reality, of partiality on the part of the judge. This, in turn, erodes public confidence in the fairness of the judiciary and undermines the faith in the judicial process that is a necessary component of republican democracy.

In response to the August 14 order in the *Brink* case, the respondent engaged in ex parte communications with the county attorney regarding a pending criminal proceeding, in a manner calculated to prejudice the defendant. That conduct was unethical, prejudicial to the administration of justice, and has brought the judicial office into disrepute. See § 24-722.

MOTION TO APPOINT SPECIAL PROSECUTOR

We next turn to the respondent's motion for the appointment of a special prosecutor to appeal from Brink's resentencing in the county court. We determine that the respondent's motion, made in a public record, violated Canon 3B(9) of the Code. That canon provides, in relevant part:

A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to interfere substantially with a fair trial or hearing. . . . This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge is a litigant in a personal capacity.

The comment to Canon 3B(9) further states in part:

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly.

[6,7] The respondent's motion for appointment of a special prosecutor involved public comment on the merits of a matter that was, at the time, pending before the county court. Those comments were intended to force an appeal from Brink's resentencing on behalf of the State—a result which would undoubtedly represent a substantial interference with a fair trial or hearing. The comment to 3B(9) makes plain that a judge is acting in an official capacity, and not a personal capacity, when commenting on a case that the judge presided over in the course of his or her official duties. The Nebraska Code of Judicial Conduct is based in part on the American Bar Association's Model Code of Judicial Conduct (1999), which has been adopted in several jurisdictions; other courts considering provisions similar to Canon 3B(9) have similarly concluded that a judge's public statements shall be considered to be in an official capacity when the statements are part of an official duty, related to an official duty, or sought from or given by the judge because of his or her official position. See, e.g., *Matter of Hey*, 188 W. Va. 545, 425 S.E.2d 221 (1992) (citing cases).

Canon 3B(9) does provide an exception permitting judges to make "public statements in the course of their official duties." We note that there is a significant distinction between comments made in an official capacity and statements made in the course of official duties. For instance, courts are often required, in resolving matters submitted to them, to criticize the decisions or reasoning of other courts. Here, however, the *Brink* case was not pending before the respondent and she had no official duties with respect to the disposition of the case—much less official duties that required any public statements to be made. While the respondent became involved in the *Brink* case in her official capacity as a county court judge, it cannot reasonably be said that her motion to appoint a special prosecutor, made after the respondent's official responsibility for the *Brink* case had been terminated, was made in the discharge of any official duty with respect to the case.

[8] Canon 3B(9) also plainly states that a judge's public comments are restricted while a proceeding is pending or impending "in any court." Given this unambiguous language, we conclude that Canon 3B(9)'s limitations on public comments apply where

a trial judge comments on a matter that is before another trial judge or has been taken to an appellate court. See, e.g., *Broadman v. Commission*, 18 Cal. 4th 1079, 959 P.2d 715, 77 Cal. Rptr. 2d 408 (1998); *In re Inquiry of Broadbelt*, 146 N.J. 501, 683 A.2d 543 (1996); *Matter of Hey*, *supra*; *Ryan v. Com'n on Judicial Performance*, 45 Cal. 3d 518, 754 P.2d 724, 247 Cal. Rptr. 378 (1988). In limiting the scope of commentary regarding pending cases in any court, the rule precludes the possibility of undue influence on the judicial process and the threat to public confidence posed by a judge from one court or jurisdiction criticizing the rulings or technique of a judge from a different jurisdiction. See *In re Inquiry of Broadbelt*, *supra*. Such comments could affect the outcome of the case, appear to exert pressure on a judge to decide a certain way, and undermine public confidence in judicial decisions. See *id.*

[9] We also conclude that the respondent's motion, and the stated basis for that motion, was "public comment" within the meaning of Canon 3B(9). A matter is public if it is open and available to all, i.e., accessible to everybody. *Broadman*, *supra*. While the respondent's comments were not made in a context as public as, for instance, a press conference called for the purpose of criticizing the August 14 order, the respondent nevertheless was in open court, thus making her comments in a public forum and preserving them as part of the public record. Such comments are, therefore, "public" within the meaning of Canon 3B(9).

We observe that contrary to the respondent's suggestion, § 23-1205 offers no basis for the appointment of a special prosecutor under the circumstances of the *Brink* case. Section 23-1205 gives the district court the authority to appoint an acting county attorney in the event of absence, sickness, or disability of the county attorney. *Stewart v. McCauley*, 178 Neb. 412, 133 N.W.2d 921 (1965). The term "disability" has been interpreted to cover situations where the county attorney by reason of prior employment disqualified himself to act in the new case. See *id.*

However, the respondent made no allegations in the *Brink* case to support a finding of "disability" on the part of the county attorney, other than the county attorney's failure to follow the course of action favored by the respondent. The respondent's

personal dissatisfaction with the performance of the county attorney's office does not constitute "disability" within the meaning of § 23-1205. The purpose of § 23-1205 is the protection of the public by making certain that a county attorney's duties shall not be influenced by private interests. *Stewart, supra*. When the respondent asked the district court to appoint a special prosecutor in the *Brink* case, essentially for the purpose of personal vindication, the respondent sought relief contrary to both the language and intent of § 23-1205.

In short, the respondent's motion for the appointment of a special prosecutor was without legal foundation, was made in a public forum while the *Brink* case was pending before the county court, and could reasonably have been expected (and was, in fact, intended) to unfairly interfere with the disposition of the *Brink* case. The content of that motion represents "public comment" that is prohibited by Canon 3B(9).

We also conclude, as did the Commission, that the hearing held on October 30 and 31, 2000, involved ex parte communications within the meaning of Canon 3B(7). The record reflects only belatedly successful attempts to inform the county attorney regarding the interference by the respondent in the *Brink* case, and no involvement by Brink or his appointed counsel. The fact that the district court may bear some responsibility for the ex parte nature of the proceedings does not absolve the respondent of her ethical duty, under Canon 3B(7), to neither "initiate" nor "permit" ex parte communications. Based on this reasoning and the analysis of Canon 3B(7) previously set forth, we conclude that the respondent's involvement in the October 30 and 31 hearing violated Canon 3B(7) of the Code.

[10] We further determine that the respondent's motion to appoint a special prosecutor eroded the integrity and independence of the judiciary and fostered both impropriety and the appearance of impropriety, in violation of Canons 1 and 2A of the Code. A judge's defense of his or her own orders, prior to the resolution of appeal, may create the appearance of partiality. See *In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001). See, also, *J & J Industries v. Carpet Showcase*, 723 So. 2d 281 (Fla. App. 1998). In the *Brink* case, the August 14 order was not even on appeal; instead, the respondent sought to force an appeal in

order to vindicate her original sentence. The respondent defended her decision not only through public comment, but attempted legal intervention. The respondent's abortive intervention not only made the appearance of partiality more acute, but pushed the respondent past appearances and into the realm of actual partiality.

By making public comments in an attempt to justify and defend a decision, and in seeking intervention from the district court to force appellate review of her decision, the respondent adopted the role of an advocate. See *Broadman v. Commission*, 18 Cal. 4th 1079, 959 P.2d 715, 77 Cal. Rptr. 2d 408 (1998). The respondent's inappropriate and unethical foray into the prosecution of a matter for the purpose of vindicating her prior ruling shattered the appearance of an impartial magistrate, and was an evident attempt to intrude into the authority of another branch of government. See *Ryan v. Com'n on Judicial Performance*, 45 Cal. 3d 518, 754 P.2d 724, 247 Cal. Rptr. 378 (1988). Such actions are, to an objective observer, prejudicial to public confidence in the integrity and impartiality of the judiciary. See, *Broadman, supra*; Canon 2A.

As previously stated, the respondent's motion to appoint a special prosecutor violated Canons 1, 2A, and 3B(9) of the Code. The October 30 and 31, 2000, hearing on the motion involved ex parte contacts in violation of Canon 3B(7) of the Code. This conduct, and the respondent's conduct in meeting with Alioth, were in clear violation of the Code. We therefore proceed to consider the appropriate sanction for the respondent's unethical conduct.

DISCIPLINE

[11] Section 24-722 provides, in relevant part, that a "judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed six months, or removed from office for . . . (6) conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The Commission recommended that the respondent be suspended from office, without pay, for a period of 45 days. While the recommendation of the Commission is entitled to be given weight, it is incumbent upon this court to independently fashion

an appropriate penalty. *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998).

[12,13] The goals of disciplining a judge in response to inappropriate conduct are to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated. *In re Complaint Against Empson*, 252 Neb. 433, 562 N.W.2d 817 (1997). We discipline a judge not for purposes of vengeance or retribution, but to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. *Id.*

[14,15] The discipline imposed must be designed to announce publicly our recognition that there has been misconduct. *In re Complaint Against Jones, supra*. It must be sufficient to deter the respondent from engaging in such conduct again, and it must discourage others from engaging in similar conduct in the future. *Id.* We weigh the nature of the offenses with the purpose of the sanctions and examine the totality of the evidence to determine the proper discipline. *Id.*

[16] We again emphasize that the issue in the instant case is not whether the sentence the respondent imposed on Brink was appropriate or whether the district court was correct in reversing the respondent's original judgment. Our sole concern in this proceeding is the conduct of the respondent in response to the August 14 order reversing the respondent's judgment. We have concluded that the respondent's conduct after the August 14 order violated several provisions of the Code. Moreover, the ethical violations of the respondent are grave, striking fundamentally at the integrity of the judicial system. The determination whether conduct is prejudicial to the administration of justice depends not so much on the judge's motives, but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers. *In re Complaint Against Jones, supra*. To a knowledgeable observer, the respondent's actions in response to the August 14 order are unethical, intolerable, and nearly inconceivable.

[17] We also note that the respondent's conduct is all the more serious because it was directly related to the performance of her official duties. The misconduct of a judge in his or her official capacity is more culpable than extrajudicial misconduct.

In re Complaint Against Kneifl, 217 Neb. 472, 351 N.W.2d 693 (1984). The respondent engaged in acts which were not only unethical and unauthorized by law, but which the respondent should have known were beyond her judicial authority and the scope of Nebraska law. The respondent's patent misunderstanding of her judicial responsibility serves not to mitigate, but to aggravate the severity of her misconduct. See *McCullough v. Com'n on Jud. Performance*, 49 Cal. 3d 186, 776 P.2d 259, 260 Cal. Rptr. 557 (1989).

That having been said, we take note of the respondent's testimony that she thought her actions were permitted by the Code and that she did not intend to violate the Code. Although we have concluded that the respondent was profoundly mistaken, we have no reason to question the respondent's veracity in stating that she intended, and intends, to abide by the Code. The record also shows no other acts of misconduct attributed to the respondent, nor any previous imposition of discipline. Thus, the record before us leads us to conclude that the respondent's conduct is indicative of serious lapses in judgment, but that those lapses, related to a single case, are not symptomatic of a defect in character that would disqualify the respondent from holding judicial office. The record does not show that the conduct at issue in this case is likely to be repeated.

Accordingly, we determine that removal from office is unwarranted. Because the respondent's misconduct was in her official capacity, however, and because of its serious nature, we conclude that a heavy sanction is necessary. Given the limitations imposed by § 24-722, we determine that the appropriate discipline is a 120-day suspension from office without pay.

CONCLUSION

The record reflects the respondent's concerns about domestic violence, its victims, and its effect on society. However, domestic violence is not the issue presented in this proceeding, and the respondent is not being disciplined for her stance relative to domestic violence. Instead, the respondent is being disciplined because she abandoned her judicial impartiality to assist the State's prosecution of a criminal case, and later attempted to intervene in, and influence the outcome of, that case. The respondent's

concerns about domestic violence, however well founded, cannot excuse the respondent's unethical conduct. The respondent's conduct, in reaction to the August 14 order of the district court reversing the respondent's judgment in the *Brink* case, was plainly in violation of Canons 1, 2A, and 3B(7) and (9) of the Nebraska Code of Judicial Conduct. As discipline, we impose a 120-day suspension from office without pay, effective on the issuance of the mandate.

JUDGMENT OF SUSPENSION WITHOUT PAY.

HENDRY, C.J., and McCORMACK, J., not participating.

DARYL E. MALENA AND AUDREY A. MALENA, HUSBAND AND WIFE,
APPELLEES, v. MARRIOTT INTERNATIONAL, INC.,
A DELAWARE CORPORATION, APPELLANT.
651 N.W.2d 850

Filed October 11, 2002. No. S-00-1285.

1. **Negligence: Actions: States: Appeal and Error.** In a personal injury action, the question of whether to apply the law of the state where the injury occurred or the law of another state is a question of law.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a trial court's refusal to give a requested instruction, an appellant must prove that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
3. **Judgments: Appeal and Error.** An appellate court decides a question of law independently of the conclusion reached by the trial court.
4. **Negligence: Damages: Mental Distress: Words and Phrases.** Parasitic damages are damages occasioned by anxiety specifically from a reasonable fear of a future harm attributable to a physical injury caused by the defendant's negligence.
5. **Negligence: Damages: Mental Distress: Proof.** Under Nebraska law, a plaintiff may adduce proof and potentially recover damages for the mental anguish of reasonably fearing acquired immunodeficiency syndrome resulting from a physical injury when the plaintiff may have been exposed, via a medically sufficient channel of transmission, to the tissue, blood, or body fluid of another in circumstances where the identity of the patient upon whom the contaminated needle or instrument was used is unknown, and when it is impossible or impracticable to ascertain whether any such tissue, blood, or body fluid may be tested positive for human immunodeficiency virus.
6. **Torts: Negligence: States.** In virtually all instances where the conduct and the injury occur in the same state, that state has the dominant interest in regulating that

conduct and in determining whether it is tortious in character and whether the interest affected is entitled to legal protection.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded for a new trial.

Melvin C. Hansen, Judith A. Wolf, and William Gilner for appellant.

James S. Mitchell, Kathryn J. Derr, and Clifford T. Lee, of Rasmussen & Mitchell, for appellees.

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

PER CURIAM.

Marriott International, Inc. (Marriott), appeals from a jury verdict in favor of the appellees, Daryl E. Malena and Audrey A. Malena, husband and wife, for damages sustained when Audrey was stuck by a needle in a California hotel room. Marriott contends that the district court erred in refusing to instruct the jury on California law concerning Audrey's damages for fear of testing positive for human immunodeficiency virus (HIV) and contracting acquired immunodeficiency syndrome (AIDS). We agree that there is a difference between Nebraska and California law and that California law should have been applied. Accordingly, we reverse, and remand for a new trial.

BACKGROUND

On September 22, 1994, the Malenas, who are residents of Nebraska, stayed at the San Francisco Marriott Hotel in California. While in the hotel room, Audrey placed the cap of a lotion bottle on the nightstand and it rolled off. Audrey reached under the nightstand, attempting to retrieve the cap, and felt a sharp jab in her hand. Audrey pulled her hand out from under the nightstand and saw a hypodermic needle and syringe stuck in her hand. The needle was through her skin and into the muscle. She also felt a cold tingling sensation moving up her arm.

Immediately after the incident, Daryl called several AIDS hotline numbers. Because of the information he received, Audrey went the next morning to a medical center in San Francisco,

where she was treated. The Malenas then returned to Nebraska, and Audrey saw her personal physician and an infectious disease specialist. Between September 1994 and February 1996, she underwent a series of blood tests to determine the presence of HIV, hepatitis antibodies, and syphilis. The results of the tests were negative. The needle and syringe were not tested.

At the time of the incident, the Malenas' daughter Rachel was ill with myelofibrosis, a disease of the bone marrow, and had previously received a bone marrow transplant from her sister to treat the illness. Because of the transplant, Rachel required blood platelet donations, which were more effective if she received them from her immediate family. From January 1994 until the incident in September, Audrey had donated platelets at least seven times. After the incident, Audrey was unable to donate platelets because of her potential exposure to HIV and other diseases. Rachel died in December 1994 from complications related to her disease. Before Audrey was stuck by the needle, she had been treated for depression and anxiety related to Rachel's illness.

The Malenas filed suit against Marriott alleging that Marriott was negligent in failing to protect them from dangerous conditions on the hotel premises caused by its failure to discover and remove the hypodermic needle and syringe. They alleged special damages in the amount of \$641.30 for Audrey's medical expenses. They further sought damages for Audrey's mental suffering because of her fear of contracting AIDS or hepatitis and for emotional distress for her inability to donate blood platelets. They also sought damages for Daryl's loss of companionship and consortium.

Marriott generally denied the allegations. Marriott moved for summary judgment alleging that the case was governed by the substantive law of California and that under California law, the Malenas were precluded from recovery. The motion was denied.

At trial, the district court determined that any damages attributable to Audrey's fear of contracting AIDS were controlled by Nebraska law. Marriott's requests for jury instructions on California law were denied. The jury found for the Malenas and awarded Audrey \$200,000 in damages. Daryl was awarded \$17,500 in damages. Marriott appeals.

ASSIGNMENTS OF ERROR

Marriott assigns, rephrased, that the district court erred in (1) failing to instruct the jury on the substantive law of California regarding fear of AIDS and parasitic damages, (2) refusing a requested instruction about whether Audrey's fear of infection was reasonable and genuine under Nebraska law, and (3) admitting certain exhibits into evidence.

STANDARD OF REVIEW

[1] In a personal injury action, the question of whether to apply the law of the state where the injury occurred or the law of another state is a question of law. See *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999).

[2] To establish reversible error from a trial court's refusal to give a requested instruction, an appellant must prove that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001). Whether a jury instruction given by a trial court is correct is a question of law. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001).

[3] An appellate court decides a question of law independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

Marriott contends that the jury should have been instructed on California law concerning parasitic damages for fear of contracting a disease. Marriott argues that under California law, Audrey cannot recover for fear of contracting a disease unless it is more likely than not that she will contract AIDS from her exposure to a substance in the needle. The Malenas contend that California and Nebraska laws do not conflict. In the alternative, they contend that Nebraska law should apply.

DIFFERENCE BETWEEN NEBRASKA AND CALIFORNIA LAW

[4] We first address the difference between Nebraska law and California law on the proof necessary to recover parasitic damages for fear of developing a future disease. "[B]efore entangling itself in messy issues of conflict of laws a court ought to

satisfy itself that there actually is a difference between the relevant laws of the different states.” *Barron v. Ford Motor Co. of Canada Ltd.*, 965 F.2d 195, 197 (7th Cir. 1992). Parasitic damages are damages occasioned by anxiety specifically from a reasonable fear of a future harm attributable to a physical injury caused by the defendant’s negligence. *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998).

In *Hartwig*, we addressed whether a plaintiff who sustains an injury such as a needle stick can recover parasitic damages for anxiety and mental suffering caused by fear of contracting AIDS without showing actual exposure to infected body fluids. In addressing the issue, we cited and discussed cases from other jurisdictions, including California, that require proof of actual exposure to infected body fluids before parasitic damages can be recovered. In particular, we noted that under California law:

[A]n ordinary needle stick does not give rise to parasitic damages for emotional distress and mental suffering unless a hazardous foreign substance is introduced into the body through the needle and causes detrimental changes to the body. Absent such detrimental change, in order to recover damages for a fear of contracting an illness, the plaintiff’s fear must result from knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop such illness in the future due to the exposure.

Id. at 786, 580 N.W.2d at 92, citing *Macy’s Cal., Inc. v. Superior Court*, 41 Cal. App. 4th 744, 48 Cal. Rptr. 2d 496 (1995).

[5] Noting that modern medicine treats a potential exposure the same as an actual exposure, we disagreed with the rule adopted by jurisdictions such as California. We adopted a different rule. Instead of requiring proof of actual exposure, we held:

[A] plaintiff may adduce proof and potentially recover damages for the mental anguish of reasonably fearing AIDS resulting from a physical injury when the plaintiff may have been exposed, via a medically sufficient channel of transmission, to the tissue, blood, or body fluid of another in circumstances where the identity of the patient upon whom the contaminated needle or instrument was used is unknown, and when it is impossible or impracticable to

ascertain whether any such tissue, blood, or body fluid may be HIV positive.

Hartwig, 254 Neb. at 790-91, 580 N.W.2d at 94.

We then held that when the elements are met, a plaintiff may adduce proof of, and potentially recover, parasitic damages for the "window of anxiety" during which the plaintiff's fear of HIV infection and contraction of AIDS was reasonable and genuine and resulted in mental suffering occasioned by a physical injury for which he or she could receive compensation. *Id.* at 791, 580 N.W.2d at 94.

California has specifically rejected the test that we adopted in *Hartwig*. In *Potter v. Firestone Tire and Rubber Co.*, 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993), a case involving exposure to toxic substances and fear of developing cancer, the California Supreme Court discussed concerns about the speculative nature of damages for fear of developing an illness based merely on exposure or a significant increase of the risk that the illness would develop. The court was particularly concerned about the possibility of an increase in unreasonable claims and the effect on society of an increase in the number of lawsuits. As a result, the court limited the availability of a plaintiff to recover. The court held that where there is an absence of present physical injury or illness, parasitic damages for fear of developing cancer may be recovered only if the plaintiff pleads and proves that

(1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens [illness]; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the [illness] in the future due to the toxic exposure.

Id. at 997, 863 P.2d at 816, 25 Cal. Rptr. 2d at 571. The court stated that the rule required more than knowledge of exposure or a significant increase in risk.

The "more likely than not test" set out in *Potter* was first applied to a case involving fear of AIDS in *Kerins v. Hartley*, 27 Cal. App. 4th 1062, 33 Cal. Rptr. 2d 172 (1994). The Court of Appeal in *Kerins* had initially adopted a "window of anxiety" test like the test followed in Nebraska, but on petition for review,

the California Supreme Court transferred the matter back with directions to vacate and reconsider in light of *Potter, supra*. The Court of Appeal then applied the "more likely than not" rule from *Potter*.

The *Potter* test was applied again in *Herbert v. Regents of Univ. of Cal.*, 26 Cal. App. 4th 782, 31 Cal. Rptr. 2d 709 (1994). In *Herbert*, a child was stuck or scratched by a needle while waiting in an examination room at a medical center. The child's mother brought suit and sought damages for fear that her child would contract AIDS, and the trial court granted the medical center's motion for summary judgment. On appeal, the mother argued that the "more likely than not" test from *Potter, supra*, should not be applied to a fear of AIDS case. For purposes of its discussion, the court assumed that the mother could establish direct victim or bystander liability, applied the more likely than not test from *Potter* to the case, and affirmed.

In *Macy's Cal., Inc. v. Superior Court*, 41 Cal. App. 4th 744, 48 Cal. Rptr. 2d 496 (1995), another division of the California Court of Appeal agreed that in the absence of a physical injury, the plaintiff was required to plead and prove that it was "more likely than not" that he or she would develop an illness. The plaintiff in *Macy's Cal., Inc.* was stuck by a needle that was left in the pocket of a jacket she was trying on in a department store.

The *Macy's Cal., Inc.* court discussed the definition of physical injury and whether the plaintiff was required to show that it was more likely than not that she would develop a disease. The court determined that the plaintiff was required to have "actual harm," *id.* at 756, 48 Cal. Rptr. 2d at 504, in order to escape the "more likely than not" test. The court stated:

The question before us is whether a routine needle stick constitutes harm for purposes of parasitic damages. We conclude it does not. In a routine needle stick, harm, if it occurs, takes place when a hazardous foreign substance, introduced to the body through the needle, causes detrimental change to the body. Only if the plaintiff proves detrimental change to the body may he or she recover parasitic emotional distress damages. Without such proof, the plaintiff must satisfy *Potter's* more likely than not test.

Id. at 756, 48 Cal. Rptr. 2d at 504.

The decision in *Macy's Cal., Inc.* illustrates that under California law, physical injury for purposes of parasitic damages does not occur when the needle punctures the skin or causes some form of injury not related to the feared disease. Instead, in order to escape from the "more likely than not" test, the plaintiff has to prove that a substance entered the body and caused a detrimental change to the body. Thus, as we recognized in *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998), the law of California is stricter than the rule in Nebraska. Nebraska does not require actual exposure to infected body fluids and allows recovery for a reasonable window of anxiety. California, however, requires an actual exposure under its definition of physical injury or harm in an incident where a needle punctures the skin. In the absence of actual exposure, California requires the plaintiff to prove that it is more likely than not that he or she will develop the feared illness. We recognized this distinction when we decided *Hartwig*. We determine that California law applies a different rule than the window of anxiety test we adopted in *Hartwig*. Accordingly, we next address which state law applies.

CHOICE OF LAW

Marriott contends that California law applies and that the district court erred in failing to instruct the jury on California's "more likely than not test." In choice-of-law determinations for personal injury claims, we have adopted Restatement (Second) of Conflict of Laws § 146 (1971). See *Harper v. Silva*, 224 Neb. 645, 399 N.W.2d 826 (1987). Section 146 is the starting point for any choice-of-law analysis in personal injury claims and provides:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Id. at 430. Under § 146, the presumption is that California law applies unless Nebraska has a more significant relationship to the parties and the occurrence with respect to a particular issue.

Although § 146 is the starting point, the Restatement, *supra*, § 158, comment *a.* at 485, specifically deals with “the circumstances under which there may be recovery for emotional distress . . . or that the distress be accompanied by some physical impact.” The Restatement provides that “the applicable law will usually be the local law of the state where the injury occurred,” § 158(2) at 484, and directs a court to apply the Restatement, *supra*, § 145, to select the law that determines whether “the interest affected is entitled to legal protection.” § 158(1) at 484.

Section 145 at 414 is the “most significant relationship” test used for determining the applicable law for specific tort claim issues. See Restatement, *supra*, §§ 156 to 174. Section 145(2) provides the contacts that a court should consider when determining which state has the most significant relationship to the parties and the occurrence under the general conflict of law principles stated in § 6(2) of the Restatement. The contacts under § 145(2) are as follows:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

Under § 145(2), Audrey’s injury and the conduct causing the injury occurred in California. To the extent the parties had a relationship, it is centered in California. The Malenas did not allege that Marriott induced them to spend their vacation at their hotel through advertising or other contacts in Nebraska. Thus, the only contact with Nebraska is the Malenas’ domicile. These contacts must be balanced in accordance with their significance to the general principles under § 6(2) at 10, which are as follows:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

But the more relevant principles under the Restatement (Second) of Conflict of Laws § 6 (1971) when dealing with tort claims are the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states *and particularly of the state with the dominant interest in the determination of the particular issue*, and ease in the determination and application of the law to be applied.

(Emphasis supplied.) Restatement, *supra*, § 145, comment *b.* at 416.

The underlying policy considerations of the conflicting recovery rules for Nebraska and California are important in deciding which state's policy has the most significant relationship. Nebraska has a policy interest in recognizing and placing a value on the injuries suffered by its domiciliaries. But California has counter policy reasons for its limitation on claims entitled to legal protection.

The California Supreme Court in *Potter v. Firestone Tire and Rubber Co.*, 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993), stated a concern that unreasonable lawsuits would occur if plaintiffs were able to offer proof of parasitic damages without proof of either actual exposure or that it was more likely than not that an illness would occur. One of the policy reasons for California's "more likely than not" standard is the protection of plaintiffs who actually contract an illness or develop a disease. California courts have feared that a proliferation of claims would result in the reduced ability of defendants and insurers to provide adequate compensation to victims suffering from permanent and serious physical injuries. See, *Potter, supra*; *Kerins v. Hartley*, 27 Cal. App. 4th 1062, 33 Cal. Rptr. 2d 172 (1994). California courts have also expressed concern that unrestricted claims would adversely affect the availability and affordability of liability insurance. *Potter, supra*. See *Kerins, supra*.

Thus, California has stated strong policy interests in protecting its plaintiffs that have a serious illness or injury, encouraging local insurance availability, and reliably defining the scope of liability for defendants within its borders. Those policy interests should be considered the dominant interests when the conduct and injury have occurred in California.

[6] In *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 30, 251 N.W.2d 383, 386 (1977), we cited the Restatement, *supra*, § 146, comment *d.*, and stated that “in virtually all instances where the conduct and the injury occur in the same state, that state has the dominant interest in regulating that conduct and in determining whether it is tortious in character, and whether the interest affected is entitled to legal protection.” Other courts hold that a foreign state has the dominant interest in having its tort rules applied when the forum state’s only interest in the litigation is compensating its residents. See, e.g., *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999); *Blakesley v. Wolford*, 789 F.2d 236 (3d Cir. 1986); *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970).

When a person travels to a destination in another state, the visitor should ordinarily anticipate that the foreign state’s law will govern any tort which results from conduct and injury occurring there. See *Spinozzi, supra*. “Inhabitants of a state should not be put in jeopardy of liability exceeding that created by their state’s laws just because a visitor from a state offering higher protection decides to visit there.” *Cipolla*, 439 Pa. at 567, 267 A.2d at 856-57.

Every state has an interest in compensating its domiciliaries for their injuries. But tort rules which limit liability are entitled to the same consideration when determining choice-of-law issues as rules that impose liability. See, *Crossley, supra*; Restatement (Second) of Conflict of Laws § 145, comment *c.* (1971).

A state’s choice-of-law rules should recognize a foreign state’s dominant interests in a fairly predictable manner. Otherwise, the rules will neither encourage harmonious, interstate relations nor ease the determination of which law to apply. Although we may disagree with California’s policy statements and underlying reasons for the “more likely than not” test, choice-of-law principles

also require us to respect California's laws when it has the dominant interest in applying its law.

We conclude that the law of California applies to this case. Thus, the trial court erred when it refused Marriott's requested jury instructions based on California law. We reverse, and remand for a new trial. Because we reverse on the issue of Marriott's requested jury instructions on California law, we do not address Marriott's remaining assignments of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

MILLER-LERMAN, J., concurring.

I concur. I write separately to state that I am puzzled as to how the principles enunciated in *Potter v. Firestone Tire and Rubber Co.*, 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993), driven by fear of cancer-related issues, became grafted in toto into the California jurisprudence regarding fear of AIDS. The course and profiles of cancer and AIDS are markedly different, and the fear of cancer due to generalized exposure and fear of AIDS due to a discrete event are not fungible. See, generally, *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998). I also observe that in the instant case, there is expert testimony that Audrey suffered a "puncture wound," unlike the "prick" in *Macy's Cal., Inc. v. Superior Court*, 41 Cal. App. 4th 744, 48 Cal. Rptr. 2d 496 (1995), which could serve as the physical injury forming the basis for parasitic damages under the jurisprudence of both California and Nebraska. Nevertheless, we are confronted with the pronouncements in *Macy's Cal., Inc.* which, although they may or may not foreshadow what the California Supreme Court would say under the facts of the instant case, we are bound to respect.

BERNARD HRADECKY, APPELLANT, v.
STATE OF NEBRASKA, APPELLEE.
LAURA HRADECKY, APPELLANT, v. STATE OF NEBRASKA,
DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE AND
CROSS-APPELLEE, AND BERNARD HRADECKY,
THIRD-PARTY DEFENDANT, APPELLEE
AND CROSS-APPELLANT.
652 N.W.2d 277

Filed October 18, 2002. Nos. S-01-582, S-01-583.

1. **Tort Claims Act: Appeal and Error.** A district court's findings of fact in a proceeding under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996 & Cum. Supp. 1998), will not be set aside unless such findings are clearly erroneous.
2. **Tort Claims Act: Damages: Appeal and Error.** The amount of damages awarded in a case pursuant to the State Tort Claims Act is a matter solely for the finder of fact, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved at trial.
3. **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.
4. **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.
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. **Actions: Pleadings: Parties.** Under Neb. Rev. Stat. § 25-331 (Reissue 1995), a third-party claim can be asserted by a defendant only if the trial court determines that the proposed third-party defendant is or may be liable to the defendant for all or part of the plaintiff's claim.
7. **Actions: Parties.** The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff.
8. **Pleadings: Parties: Appeal and Error.** A motion to sever a third-party claim pursuant to Neb. Rev. Stat. § 25-331 (Reissue 1995) is addressed to the discretion of the trial court, and an order granting or denying such motion is reviewed by an appellate court for abuse of discretion.
9. **Appeal and Error.** Errors assigned but not argued will not be addressed on appeal.
10. **Negligence: Words and Phrases.** Gross negligence is great or excessive negligence or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.

Appeals from the District Court for Kimball County: KRISTINE
R. CECAVA, Judge. Affirmed.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellants.

Jay L. Welch, of Locher, Cellilli, Pavelka & Dostal, L.L.C., and, on brief, Thomas D. Wulff, of Welch, White & Wulff, for appellee State of Nebraska.

Mary M. Schott and Edward F. Noethe, of Sodoro, Daly & Sodoro, for appellee Bernard Hradecky (case No. S-01-583).

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

STEPHAN, J.

Bernard Hradecky and Laura Hradecky, husband and wife, were injured on February 25, 1998, when a snowplow operated by an employee of the State of Nebraska struck a motor vehicle operated by Bernard in which Laura was a passenger. The Hradeckys filed separate personal injury actions against the State in the district court for Kimball County. In Laura's case, the State filed a third-party petition seeking contribution from Bernard. The cases were consolidated for trial, with fact issues in the third-party claim decided by a jury and all other issues decided by the court. Laura recovered damages on her claim, but Bernard did not. The State prevailed in its third-party claim against Bernard for contribution. The Hradeckys, as plaintiffs below, perfected timely separate appeals. Bernard, as the third-party defendant in Laura's case, cross-appealed. We moved the appeals to our docket and granted the Hradeckys' motions to consolidate the actions on appeal. We conclude that all assignments of error are without merit and affirm the judgments entered by the district court.

FACTS

PROCEDURAL HISTORY

After their claims were denied by the State Claims Board, the Hradeckys filed separate actions for negligence against the State pursuant to the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996 & Cum. Supp. 1998). Both alleged that they were injured when their vehicle, operated by Bernard, was struck from behind by a snowplow negligently operated by an employee of the State. The district court granted the Hradeckys'

partial motions for summary judgment in each case, finding the State negligent as a matter of law. The court denied the State's motions for summary judgment in both cases, but granted the State leave to file a third-party petition against Bernard in Laura's case.

The State's operative third-party petition alleged that the collision was proximately caused by Bernard's gross negligence and that the State was entitled to "be recompensed" for any amount for which it was held liable to Laura. The third-party petition also alleged that the State was entitled to an apportionment of fault between it and Bernard pursuant to Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995).

Laura filed a motion requesting the severance of the third-party claim for purposes of trial. In her motion, she alleged that the issues raised by the State in its third-party action were "functionally identical" to the issues raised by the State in its answer to the petition in Bernard's case, which was consolidated with Laura's case for the purpose of trial. She further alleged that she and Bernard would be prejudiced by a failure to sever the third-party claim because a jury would be confused if, at trial, Bernard were represented by one attorney on his primary claim and another on the third-party claim. The district court ruled that the State was entitled to a jury trial on the third-party claim and denied the motion for severance.

The consolidated cases proceeded to trial, with the Hradeckys' claims tried to the court and issues of fact in the State's third-party claim against Bernard tried to a jury. The Hradeckys, as plaintiffs, were represented by the same attorney, and a different attorney represented Bernard as the third-party defendant.

TRIAL

Trial commenced on December 13, 2000. Bernard testified that on the morning of February 25, 1998, he and Laura traveled from their home in Sterling, Colorado, to Kimball, Nebraska, in order to obtain title to a used vehicle. In ordinary weather and road conditions, the distance can be driven in approximately 1 hour 15 minutes. The Hradeckys left Sterling at 7 a.m., and at that time, the weather was clear but very windy and the roads were dry. Bernard drove.

The Hradeckys concluded their business in Kimball at approximately 9:10 a.m. Bernard testified that at that time, the wind was blowing and it was beginning to snow. Bernard decided to drive home via Interstate 80 rather than on Highway 71 due to the weather conditions. Bernard testified that he entered I-80 at the Kimball exchange at approximately 9:30 a.m. and that at that time, the gate to I-80 was open. Laura also testified that the gate was open at that time.

According to Bernard, weather conditions deteriorated as he drove east. He decreased his speed and began looking for an exit. Although Laura was helping him navigate and locate the exit, they missed the first available exit and continued driving east on I-80. Bernard testified that he was traveling at 25 to 30 miles per hour in the right lane when he heard a sudden rumble and was struck from behind by the snowplow. On cross-examination, he admitted that he saw no other traffic on I-80 prior to the accident.

Steve Sterling, an employee of the Nebraska Department of Roads and the road maintenance supervisor in Kimball, was called as a witness for the State. Sterling testified that he closed both the eastbound and westbound gates to I-80 at the Kimball exchange at 8:30 a.m. When the gates are closed, a "Road Closed" sign is displayed in the center of the gate and flashing lights on a nearby sign indicate the road is closed. The gates cover the entire access ramp, and when they are closed, it is impossible for a vehicle to enter I-80 without driving off the access road and around the closed gates. After closing the gates, Sterling made a sweep east on I-80 and encountered no traffic. He testified that by shortly after 9 a.m., the wind in Kimball was blowing 30 to 40 miles per hour and visibility was getting bad.

The February 25, 1998, entry from Sterling's work diary was admitted as an exhibit at trial. The diary includes an entry that Sterling closed the eastbound I-80 entrance at Kimball at 8:30 a.m., although the "8" is written very boldly and there appears to be text underneath it. Both parties offered expert testimony on the issue of whether the ink used to make the "8" was consistent with other ink on the page and what the text underlying the "8" was. The Hradeckys' expert testified that different ink was used to make the "8" and that the underlying text was the number 10. The State's expert agreed that different ink was used on the "8"

but found that different ink was also used on other entries in the diary on the same day. The State's expert disagreed that the underlying text was a 10 and opined that she could not determine what the text represented.

POSTTRIAL

At the conclusion of the testimony, the issues of whether Bernard was grossly negligent and whether any such negligence was a proximate cause of the accident were submitted to the jury. Utilizing a special verdict form returned on December 15, 2000, the jury answered both questions in the affirmative.

In an order entered in Laura's case on April 3, 2001, the district court determined that the verdict of the jury finding that Bernard was grossly negligent overcame the limitations of the Nebraska guest statute and permitted Bernard to be held liable for contribution with respect to Laura's claim. The court then apportioned 20 percent of the liability for Laura's injuries to the State and 80 percent to Bernard. The court assessed Laura's total damages at \$35,000 and entered judgment against the State and Bernard accordingly. The damage award included special damages proved by Laura in the amount of \$19,294.71, consisting entirely of medical expenses reasonably incurred as a result of her injuries. In assessing damages, the court found that Laura's injuries necessitated surgery and restricted her mobility.

In a separate order, also dated April 3, 2001, the court entered written findings on Bernard's action against the State. The court noted that Bernard was aware of the weather and road conditions at the time he entered I-80. The court specifically relied upon the testimony of Sterling and found that the I-80 gate was closed at 8:30 a.m. and that Bernard entered I-80 in spite of clear notice that it was closed. The court found Bernard negligent in entering a road that was closed, continuing on a closed road in zero visibility conditions, failing to exit the closed road when he had an opportunity to do so, failing to pull over when he could no longer maintain proper control, and stopping on I-80 in the left lane of traffic. The court held that Bernard's negligence was greater than that of the State and that he was thus barred from recovery on the basis of comparative negligence. See Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995).

The Hradeckys, as plaintiffs, filed motions for new trial. Bernard also filed a motion for new trial in his capacity as third-party defendant. Pursuant to a stipulation of the parties, the court modified its judgment on the third-party claim to apportion economic and noneconomic damages between the parties pursuant to § 25-21,185.10. The motions for new trial were overruled in all other respects.

ASSIGNMENTS OF ERROR

The separate appellate briefs filed by the Hradeckys set forth identical assignments of error. Each contends that the district court erred in (1) allowing the State to try its third-party action to a jury; (2) refusing to bifurcate and/or sever the trial of the State's third-party action from the trials of the Hradeckys' cases; (3) treating the jury in the third-party action as an advisory jury; (4) accepting the jury verdict when it was not supported by sufficient evidence; (5) committing multiple and cumulative errors that resulted in the denial of a fair trial which included (a) allowing the State to try the third-party claim to a jury, (b) denying the Hradeckys the right to participate in jury-related activities, (c) denying the Hradeckys the first and last argument during final argument, (d) presenting the jury with two cases wherein the same party was represented by two different attorneys which raised the issues of insurance and collateral sources, (e) allowing improper impeachment of Bernard, (f) allowing improper character evidence concerning the work habits of a State witness, and (g) refusing to permit the Hradeckys to cross-examine a State expert on her adherence to the discipline of graphology; and (6) denying their motions for new trial.

On cross-appeal, Bernard as the third-party defendant, assigns that the court erred in submitting the case to the jury because he was not grossly negligent as a matter of law.

STANDARD OF REVIEW

[1] A district court's findings of fact in a proceeding under the State Tort Claims Act, § 81-8,209 et seq., will not be set aside unless such findings are clearly erroneous. *Meyer v. State*, ante p. 545, 650 N.W.2d 459 (2002); *Goodenow v. State*, 259 Neb. 375, 610 N.W.2d 19 (2000).

[2] The amount of damages awarded in a case pursuant to the State Tort Claims Act is a matter solely for the finder of fact, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved at trial. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999).

ANALYSIS

Although these cases were consolidated for purposes of trial and appeal, we are asked to review two independent judgments. We do so separately, notwithstanding the fact that the Hradeckys' assignments of error in each case are identical.

CASE NO. S-01-583, LAURA'S PERSONAL INJURY CLAIM

In her first assignment of error, Laura contends that the district court erred in permitting a jury to decide issues of fact pertaining to the State's third-party claim against Bernard. Her position is based upon a provision in § 81-8,214 of the State Tort Claims Act which provides that "[t]he district court, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim." Laura argues that the third-party claim against Bernard was related to and dependent upon her claim against the State and that by virtue of the exclusive jurisdiction conferred by § 81-8,214, the State "had no right to a jury trial of its third-party action" against Bernard. Brief for appellant in case No. S-01-583 at 14.

[3-5] We do not reach the merits of this assignment of error because we conclude that Laura lacks standing to assert it. 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. *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). 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. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001). 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. *In re Estate of Dickie*, 261 Neb. 533, 623 N.W.2d 666 (2001).

Although we have characterized standing as a "jurisdictional component of a party's case," *Chambers v. Lautenbaugh*, 263 Neb. 920, 925, 644 N.W.2d 540, 546 (2002), we have also applied principles of standing to determine whether a party may assert specific issues in an action over which a court has subject matter jurisdiction. For example, in *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000), an action brought by a former city employee against the City of Omaha and the City of Omaha Employees' Retirement System to recover pension benefits, we held that the employee did not have standing to seek disqualification of a city attorney from representing both the city and the retirement system. Similarly, in *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998), a medical malpractice action against two physicians, we held that the plaintiff lacked standing to seek disqualification of an attorney representing one of the defendants on the ground that he had previously represented the other defendant. In *In re Adoption of Baby Girl H.*, *supra*, this court determined that a putative father who had not complied with statutory requirements for the assertion of parental rights lacked standing to assert judicial error in the entry of an adoption decree.

[6,7] It is true that the State's third-party claim is related to Laura's tort claim against the State in that the State sought contribution from the third-party defendant with respect to any liability it had to Laura. Under Neb. Rev. Stat. § 25-331 (Reissue 1995), a third-party claim can be asserted by a defendant only if the trial court determines that the proposed third-party defendant is or may be liable to the defendant for all or part of the plaintiff's claim. See *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000). However, none of the legal or factual issues presented in Laura's claim against the State were at issue in the third-party claim. The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff. *Id.*; *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 338 N.W.2d 601 (1983). Here, the district court, sitting without a jury pursuant to § 81-8,214, determined that Laura was entitled to recover damages in the amount of \$35,000, thereby completely resolving her claim. The jury's findings were utilized by the court only to determine whether the State would be responsible for all of

Laura's damages or whether it was entitled to contribution from Bernard based upon his conduct. The third-party claim thus involved the rights and interests of only the State and Bernard, not those of Laura. Thus, we conclude that she has no standing to raise the issue of whether the State had a right to a jury trial of its third-party claim.

In her second assignment of error, Laura contends that having resolved that the third-party claim could be tried to a jury, the district court erred in failing to bifurcate or sever the third-party claim for separate trials. Laura clearly does have standing to assert this issue. Section 25-331 provides in part:

The court on its own motion, *or motion of any party*, may move to strike the third-party claim, or for its severance or separate trial if the third-party claim should delay trial, might tend to confuse a jury, *or in any way jeopardize the rights of the plaintiff*.

(Emphasis supplied.) Laura could and did file a motion to sever the third-party claim for separate trials on the ground of potential jury confusion prejudicial to her interests as plaintiff. Although this motion does not recite that it was filed pursuant to § 25-331, we treat it as such.

[8] We have not previously identified the standard by which we review a trial court's ruling on a motion to sever a third-party claim. However, we have held that the matter of granting leave to file a third-party complaint pursuant to § 25-331 is within the discretion of the trial court. *Employers Reins. Corp. v. Santee Pub. Sch. Dist. No. C-5*, 231 Neb. 744, 438 N.W.2d 124 (1989); *Life Investors Ins. Co. v. Citizens Nat. Bank*, 223 Neb. 663, 392 N.W.2d 771 (1986). We therefore conclude that a motion to sever a third-party claim pursuant to § 25-331 is addressed to the discretion of the trial court, and an order granting or denying such motion is reviewed by an appellate court for abuse of discretion. See, *Swenson v. Suhl*, 19 F.R.D. 517, 519 (D. Neb. 1956) (holding that "motion for the vacation of an order allowing third-party procedure, as also a motion in the first instance for its allowance, is addressed to the mature and informed discretion of the court"); *Beach v. Smith*, 298 S.C. 424, 380 S.E.2d 869 (S.C. App. 1989) (holding whether to grant motion to strike third-party claim is addressed to sound discretion of trial court).

Implicit in the trial court's denial of the motion to sever was a belief that it could conduct a bench trial on the Hradeckys' consolidated personal injury claims and a jury trial on the State's third-party claim simultaneously without confusing the jury or otherwise prejudicing the rights of the Hradeckys. From our review of the entire record, we conclude that the trial court accomplished that objective. Throughout the trial, the court drew a clear line of distinction between fact issues which would be submitted to the jury and those to be decided by the court. In its opening remarks to the jury, the trial court stated that it would decide some issues of fact and the jury would decide other issues. The jury was excused during portions of the trial that pertained solely to the issue of the Hradeckys' damages. Prior to deliberations, the jury was specifically instructed: "The Court not you the jury will decide the issues involved in Laura Hradecky's claim against the State of Nebraska." The verdict form returned by the jury related solely to disputed issues of fact in the State's third-party claim against Bernard, with no reference to Laura's claim. The court made separate findings of fact with respect to Laura's entitlement to damages and the amount thereof.

Laura argues that because Bernard had separate counsel with respect to the third-party claim, "the common sense explanation for the presence of two attorneys for [Bernard] was that one was hired by an insurer while the other was hired by [Bernard] and [Laura]." Brief for appellant in case No. S-01-583 at 23. The record contains no reference to the subject of liability insurance. Whether the jury may have made the suggested inference from the fact that Bernard was represented by two lawyers is entirely speculative and, in any event, would have no bearing on Laura's case, which was decided by the court, not by the jury. We conclude that the district court did not abuse its discretion in denying Laura's motion to sever the third-party claim.

In her third assignment of error, Laura contends that the trial court erred in treating the jury that decided the State's third-party claim against Bernard in Laura's case as an advisory jury in Bernard's case, where all parties did not consent to an advisory jury and where counsel for Bernard was not allowed to voir dire, select, propose instructions, or argue to the jury. On its face, this assignment of error has no relationship to Laura's case. Moreover,

we find nothing in the record to suggest that the court utilized the jury in any "advisory" capacity. As discussed above, the record is clear that the jury decided two disputed issues of fact with respect to the third-party claim and had no other role in the trial. This assignment of error is without merit. Likewise, there is no merit to Laura's fourth assignment of error in which she contends that the district court erred in "accepting the jury's verdict as her own in the face of insufficient evidence to support the verdict." The record clearly reflects that the court made its own independent findings that Laura sustained and was entitled to recover damages in the amount of \$35,000.

[9] In her fifth assignment of error, Laura alleges that "[m]ultiple and cumulative errors" combined to deprive her of a fair trial. We have recognized the doctrine of cumulative error in the context of a criminal jury trial, stating that while one or more trial errors might not, standing alone, constitute prejudicial error, "their cumulative effect was to deprive the defendant of his constitutional right to a public trial by an impartial jury." *Wamsley v. State*, 171 Neb. 197, 209, 106 N.W.2d 22, 29 (1960). We have not applied this doctrine in a civil case. Assuming without deciding the general proposition that the doctrine could be applied in a civil case, there is no basis for its application in this case. The first three "cumulative errors" alleged by Laura are simply a restatement of her contention that the jury was improperly utilized in this case. We have found those arguments to be without merit. Other "cumulative errors" alleged by Laura include improper cross-examination of Bernard, improper admission of character evidence with respect to one of the State's witnesses, a ruling made during the cross-examination of an expert witness called by the State, and the sequence in which closing arguments were presented by counsel. Although Laura includes these in what she characterizes as a "laundry list of errors," brief for appellant in case No. S-01-583 at 30, she does not otherwise discuss or argue them. Errors assigned but not argued will not be addressed on appeal. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001).

In her final assignment of error, Laura contends that the district court erred in denying her motion for new trial based upon an alleged inadequacy of her damage award. The district court

awarded \$19,294.71 in economic damages, which represented all medical bills proved to have been necessitated by Laura's injuries, and \$15,705.29 in noneconomic damages. Laura argues that the latter amount was inadequate compensation for her pain and suffering and the permanency of her injuries.

There was conflicting evidence on the issue of noneconomic damages. Laura testified that she continued to experience pain, numbness, and limitation of motion in her left arm and shoulder and in her neck and that she sometimes awoke during the night due to pain. She testified that she is left handed but is learning to use her right hand to brush her teeth and wash and comb her hair because using her left hand causes pain. Laura further testified that she is unable to do laundry or vacuum due to the pain. There was evidence that Laura was energetic and involved in family activities prior to the accident, but is less energetic and more moody since the accident due to her pain.

However, the record also establishes that Laura was disabled prior to the accident due to severe type I lupus. She first sought medical attention for neck and back pain approximately 1 month following the accident. Her physician diagnosed a ruptured cervical disk for which she underwent surgery on June 1, 1998. Laura saw her surgeon for postoperative examinations in July and October. At the time of the last visit, the surgeon noted that she was "'doing just perfect'" and "'really has no symptoms.'" Laura's physician did not place any physical restrictions on her activities.

As noted above, the amount of damages awarded in an action under the State Tort Claims Act is a matter solely for the factfinder, whose action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of damages proved at trial. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). Based upon our review of the record, we conclude that the damage award of \$35,000 meets this test and was therefore not inadequate. Accordingly, the district court did not err in denying Laura's motion for a new trial.

CROSS-APPEAL

Bernard's sole argument on cross-appeal is that the district court erred in submitting the issue of gross negligence to the

jury because, as a matter of law, he was not grossly negligent in the operation of his vehicle. The jury was instructed that Bernard was grossly negligent in (1) leaving a place of safety in Kimball and choosing to drive in blizzard conditions with near zero visibility, (2) driving around the closed and locked gate at the Kimball entrance ramp, (3) continuing to attempt to drive on I-80 when it was not safe to do so and he had opportunities to exit or pull off to the side, and (4) failing to maintain a reasonable lookout for snow removal vehicles or other road maintenance vehicles while traveling on a closed highway. There is evidence in the record to support each of these specifications of negligence, although there is also evidence to the contrary.

[10] Gross negligence is “‘great or excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.’” *Youngs v. Potter*, 237 Neb. 583, 588, 467 N.W.2d 49, 52 (1991), quoting *Carlson v. Waddle*, 223 Neb. 671, 392 N.W.2d 777 (1986). We understand Bernard to argue that even if the jury found he had committed all of the acts of negligence enumerated in the instruction, it could not have found that he was grossly negligent because such acts do not establish the absence of “slight care.” He points to evidence offered at trial that was favorable to him on this issue, including evidence that he slowed his speed due to the weather conditions and that his headlights and taillights were on. However, we agree with the district court that there was sufficient evidence which, if believed by the factfinder, would amount to gross negligence. One who intentionally and deliberately enters a closed roadway and continues to drive on such roadway in near zero visibility can reasonably be found to be exhibiting the absence of even slight care, even if the person drives slowly and with his or her headlights on. We find no error in the submission of this issue to the jury.

CASE NO. S-01-582, BERNARD’S PERSONAL INJURY CLAIM

As noted above, Bernard’s assignments of error in this case are identical to those of Laura in her separate case. The first four assignments of error pertain to the use of a jury to determine issues of fact with respect to the State’s third-party claim against Bernard. That claim was asserted in Laura’s personal injury case, which is before us as case No. S-01-583 and discussed

above. There is no indication in the record that the jury considered or decided any issue with respect to Bernard's personal injury claim against the State, case No. S-01-582. To the extent that Bernard argues that the district court accepted or in some way utilized the jury's verdict in resolving Bernard's separate claim, his argument finds no support in the record. The court's judgment in this case makes no reference to the jury verdict. It includes specific findings of fact which support the court's conclusion that Bernard was negligent to a degree which barred his recovery, including a finding that "the gate was closed as of 8:30 a.m. and that Mr. Hradecky had entered the main lanes of I-80 in spite of the clear notice that I-80 was closed." Bernard's first four assignments of error are without merit.

Bernard raises the same "cumulative errors" issues assigned by Laura and discussed above. They are without merit. Finally, Bernard contends that the district court erred in denying his motion for new trial. His brief identifies no specific reasons or arguments in support of this assignment, other than the arguments on his other assignments of error. We conclude that the district court did not err in denying Bernard's motion for new trial.

CONCLUSION

For the reasons discussed above, we find no reversible error in either of these consolidated appeals, and therefore affirm both judgments.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, NEBRASKA EQUAL OPPORTUNITY
COMMISSION, ON BEHALF OF RAYMOND SERRANO ET AL.,
APPELLANT, V. LANNY BELLAMY, APPELLEE.

652 N.W.2d 86

Filed October 18, 2002. No. S-01-727.

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 duty of an appellate court to determine whether it has jurisdiction over the matter before it.

3. ____: _____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **Jurisdiction: Final Orders: Motions for New Trial: Time: Notice: Appeal and Error.** 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 for new trial.
5. **Motions for New Trial: Pleadings: Judgments: Time: Notice: Appeal and Error.** The running of the time for filing a notice of appeal may be terminated by the filing of certain motions, including a motion for new trial under Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2000), a motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2000), or a motion to set aside a verdict or judgment under Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2000).
6. **Jurisdiction: Pleadings: Time: Notice: Appeal and Error.** When a motion terminating the 30-day appeal period is filed, a notice of appeal filed before the court announces its decision upon the terminating motion has no effect and an appellate court acquires no jurisdiction.
7. **Pleadings: Judgments.** A determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title.
8. **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. 2000), and must seek substantive alteration of the judgment.
9. **Pleadings: Judgments: Time: Notice: Appeal and Error.** A motion which merely seeks to correct clerical errors or one seeking relief that is wholly collateral to the judgment is not a motion to alter or amend a judgment, and the time for filing a notice of appeal runs from the date of the judgment.

Appeal from the District Court for Dawson County: DONALD E. ROWLANDS II, Judge. Appeal dismissed.

Don Stenberg, Attorney General, and Delores N. Coe-Barbee for appellant.

Melodie Turner Bellamy for appellee.

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

McCORMACK, J.

NATURE OF CASE

The Nebraska Equal Opportunity Commission appeals from a decision of the district court for Dawson County awarding attorney fees to Lanny Bellamy. The district court determined that Bellamy was a "prevailing party" under Neb. Rev. Stat. § 20-341

(Reissue 1997) when the commission dismissed, without prejudice, the petition filed against him.

BACKGROUND

On September 12, 2000, the commission instituted a civil action against Bellamy under Neb. Rev. Stat. § 20-340 (Reissue 1997) alleging a violation of the Nebraska Fair Housing Act, Neb. Rev. Stat. § 20-301 et seq. (Reissue 1997 & Cum. Supp. 2000). In his answer, Bellamy requested attorney fees.

On March 19, 2001, the case was dismissed without prejudice on the motion of the commission. Bellamy later filed a motion for attorney fees pursuant to § 20-341 or, in the alternative, under Neb. Rev. Stat. § 25-824 (Reissue 1995) as a defendant to a frivolous suit.

On May 23, 2001, the district court found that Bellamy was a "prevailing party" within the meaning of § 20-341 and awarded Bellamy \$3,525 in attorney fees. The district court declined to award attorney fees under § 25-824 because there was insufficient evidence to show that the lawsuit was frivolous or brought in bad faith by the commission.

On May 31, 2001, the commission filed a motion entitled "Motion for Reconsideration." The motion reads in full as follows:

Comes now the plaintiff, in the above captioned case and requests that the Court reconsider its decision in the above captioned case, due to the attached case, noted as Exhibit A, whose decision was rendered on May 29, 200[1] by the Supreme Court of the United States as to the definition of a prevailing party.

Exhibit A is the U.S. Supreme Court's ruling in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001), which was decided on May 29, 2001.

On June 22, 2001, with its motion for reconsideration still pending, the commission filed its notice of appeal in district court, appealing the May 23, 2001, order awarding attorney fees. In a July 13, 2001, journal entry, the district court found that it had no jurisdiction to decide the commission's motion for reconsideration because of the commission's appeal. We moved

the case to our own docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

ASSIGNMENT OF ERROR

The sole assignment of error raised by the commission is that the district court erred in finding that Bellamy was a prevailing party entitled to attorney fees under § 20-341.

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. *Lopez v. IBP, inc.*, ante p. 273, 646 N.W.2d 628 (2002).

ANALYSIS

[2,3] 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. *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (2002). Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Id.*

[4-6] 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 for new trial. *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2000). The running of the time for filing a notice of appeal may be terminated by the filing of certain motions, including a motion for new trial under Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2000), a motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2000), or a motion to set aside a verdict or judgment under Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2000). See § 25-1912(3). When a motion terminating the 30-day appeal period is filed, a notice of appeal filed before the court announces its decision upon the terminating motion has no effect and an appellate court acquires no jurisdiction. See, *Reutzel v. Reutzel*, 252 Neb. 354, 562 N.W.2d 351 (1997); § 25-1912(3).

In this case, the district court entered an order awarding attorney fees to Bellamy on May 23, 2001. The commission filed its notice of appeal 30 days later, on June 22. However, the effect of the notice of appeal is now in question because of the

commission's "Motion for Reconsideration," filed on May 31 and still pending at the time the commission filed its notice of appeal. Nebraska statutes do not recognize motions for reconsideration, and this court has recognized the confusion created by the labeling of pleadings as motions for reconsideration. *Breeden, supra*. Once again, we are required to decipher a motion for reconsideration and determine its effect on the running of the appeal period. If the commission's motion for reconsideration is of the type which terminates the 30-day appeal period, then the commission's notice of appeal was ineffective and this court has no jurisdiction over the commission's purported appeal. If not, the commission's appeal is properly before us for consideration.

We have previously held that a motion for reconsideration does not act as a motion for new trial so as to terminate the appeal period. See, *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2000); *Breeden, supra*; *Bechtold v. Gomez*, 254 Neb. 282, 576 N.W.2d 185 (1998). However, in 2000, § 25-1912(3) was amended to provide that the running of the time for filing a notice of appeal shall be terminated not only by a timely motion for new trial or by a timely motion to set aside a verdict or judgment, but also by "a timely motion to alter or amend a judgment under section 25-1329." 2000 Neb. Laws, L.B. 921. Thus, we now consider whether to treat the commission's motion for reconsideration as a motion to alter or amend a judgment.

Federal courts have adopted a bright-line rule and hold that a motion for reconsideration, if filed within 10 days of the entry of judgment, is the functional equivalent of a motion to alter or amend a judgment brought pursuant to Fed. R. Civ. P. 59(e). *Cockrel v. Shelby County School Dist.*, 270 F.3d 1036 (6th Cir. 2001); *American Ironworks v. North American Const.*, 248 F.3d 892 (9th Cir. 2001); *COMSAT Corp. v. St. Paul Fire and Marine Ins. Co.*, 246 F.3d 1101 (8th Cir. 2001); *Adams v. Reliance Standard Life Ins. Co.*, 225 F.3d 1179 (10th Cir. 2000); *Amatangelo v. Borough of Donora*, 212 F.3d 776 (3d Cir. 2000); *St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336 (5th Cir. 1997); *Aybar v. Crispin-Reyes*, 118 F.3d 10 (1st Cir. 1997); *Square D Co. v. Fastrak Softworks, Inc.*, 107 F.3d 448 (7th Cir. 1997); *Ass'n for Retarded Citizens v. Thorne*, 68 F.3d

547 (2d Cir. 1995); *In re Burnley*, 988 F.2d 1 (4th Cir. 1992); *Wright v. Preferred Research, Inc.*, 891 F.2d 886 (11th Cir. 1990); *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881 (D.C. Cir. 1987); *Tylo Sauna, S.A. v. Amerrec Corp.*, 826 F.2d 7 (Fed. Cir. 1987). Several state courts likewise construe motions for reconsideration as motions to alter or amend a judgment. *Malone v. Gainey*, 726 So. 2d 725 (Ala. Civ. App. 1999); *Soderlund v. Admin. Director of Courts*, 96 Haw. 114, 26 P.3d 1214 (2001); *In re Adoption of A.P.*, 26 Kan. App. 2d 210, 982 P.2d 985 (1999); *Smith v. Johnson*, 125 N.C. App. 603, 481 S.E.2d 415 (1997); *Woodworth v. Chillemi*, 590 N.W.2d 446 (N.D. 1999); *Wentworth v. Fletcher Allen Health Care*, 171 Vt. 614, 765 A.2d 456 (2000); *Law v. Monongahela Power Co.*, 210 W. Va. 549, 558 S.E.2d 349 (2001).

[7-9] However, courts have not blindly treated all motions entitled "Motion for Reconsideration" as a motion to alter or amend a judgment. A determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title. See *Sherman v. Rose*, 943 P.2d 719 (Wyo. 1997). See, also, *Kerr v. Clary*, 37 P.3d 841 (Okla. 2001); *Tennessee Farmers Mut. Ins. Co. v. Farmer*, 970 S.W.2d 453 (Tenn. 1998). To provide guidance to the lower courts and practicing bar, we hold 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. See *U.S. v. Deutsch*, 981 F.2d 299 (7th Cir. 1992). A motion which merely seeks to correct clerical errors or one seeking relief that is wholly collateral to the judgment is not a motion to alter or amend a judgment, and the time for filing a notice of appeal runs from the date of the judgment. *Id.*

Applying these rules to the present case leads us to construe the commission's motion for reconsideration as a motion to alter or amend a judgment under § 25-1329. The commission's motion asked the district court to reconsider its decision in light of the U.S. Supreme Court's opinion in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855

(2001). The commission claims that under *Buckhannon Board & Care Home, Inc.*, which was decided 6 days after the district court granted Bellamy's motion for attorney fees, Bellamy is not a "prevailing party" entitled to attorney fees, as the Court interpreted that term under various sections of federal law. The commission's motion seeks substantive alteration of the judgment and was filed within 10 days of the entry of the order awarding attorney fees to Bellamy. Thus, the commission's motion for reconsideration is a motion to alter or amend a judgment under § 25-1329, which terminated the appeal period under § 25-1912(3). As a result, the commission's notice of appeal was prematurely filed and this court does not have jurisdiction over the commission's purported appeal.

CONCLUSION

A motion seeking substantive alteration of a judgment and filed within 10 days of the entry of judgment is the functional equivalent of a motion to alter or amend a judgment under § 25-1329. A motion to alter or amend a judgment terminates the appeal period, and a notice of appeal filed before disposition of the terminating motion is ineffective and does not convey jurisdiction upon an appellate court. Thus, this court does not have jurisdiction over the commission's appeal when the commission filed its notice of appeal while its motion for reconsideration was still pending.

APPEAL DISMISSED.

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

652 N.W.2d 91

Filed October 18, 2002. No. S-01-741.

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.

Cite as 264 Neb. 790

2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
4. **Disciplinary Proceedings.** Only those matters which are specifically charged in the complaint in disciplinary proceedings can be considered.

Original action. Judgment of dismissal.

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

Jeffrey A. Silver for respondent.

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

PER CURIAM.

NATURE OF CASE

This is an original action brought by the Counsel for Discipline of the Nebraska Supreme Court seeking the imposition of discipline against Thomas M. Petersen, a member of the Nebraska State Bar Association. Petersen was formally charged with violating disciplinary rules and his oath of office as an attorney in connection with his representation of Jennifer Davis, also known as Jennifer Weeks (Weeks). A hearing was held, and the referee found that Petersen engaged in conduct involving dishonesty, fraud, and deceit. The referee recommended that Petersen be suspended from the practice of law for 1 year. Petersen filed exceptions to the referee's report. We reject the referee's determination and dismiss the action.

BACKGROUND

Petersen was admitted to the practice of law in the State of Nebraska on April 14, 1995. He has been engaged in the private practice of law in Omaha, Nebraska, since that date and at all times relevant to this proceeding. Petersen practices law as the Petersen Law Office and employs attorneys, paralegals, secretaries, and an office manager to assist him in his practice. On February 20, 1998, Weeks retained the Petersen Law Office to represent her in a personal injury claim arising out of an automobile accident. She signed a contingency fee agreement

whereby the Petersen Law Office would receive one-third of all amounts recovered.

Petersen had previously defended Weeks, and she was pleased with his representation. While the personal injury claim was pending, Weeks and her husband, Ray Davis, consulted Petersen about a possible bankruptcy filing. They decided against filing the bankruptcy, and Petersen did not bill them for the consultation.

Weeks' personal injury claim was handled by several different attorneys in the Petersen Law Office. The case was transferred to Tracy Zitnik in early 2000. Zitnik began working for Petersen in December 1999.

On January 28, 2000, the Petersen Law Office received a letter from the insurance company with whom it was negotiating on Weeks' behalf containing a final offer to settle for no more than \$7,600. Weeks gave Zitnik the authority to settle for that amount. On March 8, the insurance company sent a memorandum to Zitnik stating that Weeks was responsible for all medical liens. Zitnik had no further contact with Weeks or her claim until March 30 or 31.

According to Weeks, Petersen called her and asked her to come to his office to go over the settlement statement and to sign the necessary release papers. Weeks went to see Petersen on March 25, 2000.

Weeks testified that Petersen showed her a photocopy of the settlement check and had her sign the copy. Petersen went over the settlement statement with her. She did not receive her money that day, as the banks were closed, but was told to come back the following Monday. Petersen told Weeks that he was writing checks for the medical bills, including a check for a bill to the chiropractor at the Natural Health Center, P.C. He told her that he had obtained a reduction of this bill from \$3,807.09 to \$3,000 and that he was going to try to reduce it even more.

On Monday, March 27, 2000, the settlement check was deposited into the firm's trust account. Also on March 27, the Petersen Law Office issued checks for all disbursements on Weeks' settlement statement except for the disbursement to the Natural Health Center. Five checks were written that day. The checks for attorney fees and costs were deposited into the firm's business account. The checks to the University of Nebraska

Medical Center and to University Medical Associates were retained in Weeks' file.

On Tuesday, March 28, 2000, Petersen further negotiated with the Natural Health Center, which resulted in a reduction of Weeks' bill from \$3,000 to \$2,500. He instructed the office manager, Matthew R. Samp, to write a check to the Natural Health Center in that amount. Samp wrote check No. 12666 to the Natural Health Center on March 29. Samp thought Weeks owed the firm money for past representation on a driving under the influence (DUI) charge. He asked Petersen about it, and Petersen told him to find the documentation. On March 29, Samp drafted check No. 12665, referencing "Weeks, Jennifer - DWI," payable to the firm for \$500. Samp signed the check, copying Petersen's signature, and deposited it into the firm's business account. Samp, however, did not find the necessary documentation to support the issuance of the check.

Lisa M. Samuelson was an employee at the Petersen Law Office during the relevant time period. While she was closing Weeks' file and preparing to send out the medical payments, she noticed that the Natural Health Center bill was \$500 less than the corresponding charge stated on the settlement statement. She also observed check No. 12665, or the stub to that check, in the file. She was not aware of the firm's representing Weeks on a DUI charge and took the file to another employee, who stated that there was no DUI file for Weeks. Samuelson then gave the file to Zitnik and notified Zitnik of her concerns.

Zitnik could find no documentation verifying that the Petersen Law Office represented Weeks on a DUI charge. She called Weeks to ask her if the Petersen Law Office had ever represented her on such a charge, and Weeks said no. Despite her awareness of the discrepancies in the file, Zitnik gave the file back to Samuelson to close. Samuelson mailed checks to medical providers and a letter to Weeks, closing the file.

By the time the discrepancy in Weeks' file was brought to Zitnik's attention, Zitnik had decided to leave the Petersen Law Office. She did not give notice that she was going to leave. On April 4, 2000, after Zitnik cashed her paycheck, she went to the Douglas County courthouse and gave her resignation letter to Petersen while he was engaged in a court proceeding.

Before going to the courthouse, Zitnik made a photocopy of Weeks' settlement statement, the check stubs, and the memorandum from Petersen to Samp directing Samp to pay \$2,500 to the Natural Health Center. She made notations on the settlement statement and circled the concerns she had. She called Weeks and informed her that she was going to send some documents for Weeks to review. She gave Weeks the name and telephone number for the Assistant Counsel for Discipline. Zitnik encouraged Weeks to file a complaint and indicated that she intended to file a complaint as well.

On April 5, 2000, Weeks received the documents Zitnik sent to her. That same day, Petersen went to Zitnik's new office to discuss why she left. Zitnik told Petersen about how the firm took money for a DUI case that it had not handled. Petersen asked where he could find such information, and she told him to look in Weeks' file. Zitnik had copies of the pertinent documents with her when Petersen was in her office, but did not inform Petersen of that fact.

Petersen then called Samp on his cellular telephone and asked what was happening with Weeks' file. Samp told Petersen about the existence of the \$500 check for "Weeks, Jennifer - DWI" in the file. Samp confirmed that he wrote check No. 12665 without documentation. Petersen called Weeks and asked her if the firm had done any other work for her or if she owed the firm any money. She responded no to both questions. He then asked Weeks to come to his office and met with her the same day. After Weeks had arrived at Petersen's office, Petersen again asked her if the firm had performed any other work for her or for Davis. She told him no. Petersen informed Weeks that the Natural Health Center bill had been reduced and that she was owed more money.

Petersen testified that he apologized for the mistake and gave Weeks a check for \$760.81, representing the \$500 owed and extra money to ensure that she personally recovered more than her attorneys. According to Petersen, it was the policy of the firm to never take more than the client was receiving. On July 5, 2000, the Council for Discipline received a complaint from Weeks regarding Petersen.

A hearing was held in front of a referee, and on October 19, 2001, the report of the referee was released. The referee found

that Petersen had violated Canon 1, DR-102(A)(1) and (4), and his oath of office as an attorney. He recommended that Petersen be suspended from the practice of law for 1 year.

ASSIGNMENTS OF ERROR

Petersen claims, rephrased, (1) that there is not clear and convincing evidence that he violated DR 1-102(A)(1) and (4) and his oath of office; (2) that his motion to dismiss, based upon the violation of the sequestration order and the changed testimony of Davis, should have been sustained; (3) that the referee erred in his evidentiary rulings; and (4) that the referee erred in recommending a 1-year suspension.

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. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001).

[2,3] Disciplinary charges against an attorney must be established by clear and convincing evidence. *Id.* Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000).

ANALYSIS

The referee found that Petersen had violated DR 1-102(A)(1) and (4), and his oath of office. DR 1-102(A) states in pertinent part: "DR 1-102 Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Counsel for Discipline did not file exceptions to the referee's report.

We disagree with the findings of the referee and find that the Counsel for Discipline did not prove by clear and convincing evidence that Petersen engaged in dishonest, fraudulent, or deceitful conduct. See *In re Interest of Michael B. et al.*, *supra*.

We find that the relevant time period is March 24 to April 5, 2000. It is within this period of time that the crucial events of the case occurred.

Petersen told Weeks that he reduced the Natural Health Center bill from \$3,807.09 to \$3,000 and that he was going to try to reduce it even further. On March 28, 2000, Petersen was successful in reducing the bill to \$2,500. Petersen did not try to keep the reduction a secret from anyone in his office. In fact, Weeks' case file contained both the settlement statement and the check to the Natural Health Center.

Petersen did not attempt to cover up the issuance of check No. 12665, and its issuance did not amount to dishonest, fraudulent, or deceitful conduct on the part of Petersen. The corresponding check stub which listed "Weeks, Jennifer - DWT" was placed in Weeks' case file for anyone who had access to see it. Additionally, the evidence is not sufficient to find that Petersen was aware Samp had even written check No. 12665. Petersen's instruction was clear that Samp was to find the supporting documents and confirm the outstanding balance before issuing a check for payment owed on a possible past representation. At no time did Petersen authorize Samp to issue a \$500 check without first locating the documentation to support the claim.

Samp admits that he did not review any of the records before issuing check No. 12665 to the Petersen Law Office, despite the clear directive of Petersen. Petersen did not learn that Samp had issued the check until his conversation with Zitnik on April 5, 2000.

Once Petersen was made aware of what had happened, he took immediate steps to correct the situation. He paid Weeks the money that was owed to her, he relieved Samp of his primary duties as office manager, and he revoked Samp's authority to sign Petersen's name to trust account checks. These actions occurred several months before Weeks filed a complaint with the Counsel for Discipline.

[4] We recognize the record suggests that Petersen failed to properly supervise and control his employees and that his office management was sloppy. But, Petersen was not charged for this conduct. Only those matters which are specifically charged in the complaint in disciplinary proceedings can be considered.

See *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989).

We find that the relator has failed to prove by clear and convincing evidence that Petersen violated DR 1-102(A)(1) and (4), and his oath of office.

CONCLUSION

Because the relator failed to prove by clear and convincing evidence that Petersen engaged in conduct involving dishonesty, fraud, or deceit, we reject the contentions of the Counsel for Discipline and findings of the referee and find that the charges against Petersen should be dismissed.

JUDGMENT OF DISMISSAL.

GERRARD, J., concurring in the result.

I have a markedly different view of what the record establishes about the respondent's conduct, but given the discrepancy between what was charged and what was proved, I reluctantly concur. The operative formal charges in the instant case charged Petersen with violations of Canon 1, DR 1-102(A)(1) (violation of disciplinary rule); DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation); and Canon 7, DR 7-102(A)(5) (knowingly making false statement of law or fact). Petersen's failure to supervise and control the activities of his employees, amply established by the evidence, was negligent and bordered on incompetent, but does not fall within the scope of the allegations or disciplinary rules set forth in the formal charges.

Only those matters which are specifically charged in the complaint in a disciplinary proceeding can be considered. See *State ex rel. Nebraska State Bar Assn. v. Leonard*, 212 Neb. 379, 322 N.W.2d 794 (1982). See, also, *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989) (referee's finding that respondent should be disciplined for failing to supervise employees was error where attorney was not charged with such failure). Had the formal charges specifically accused Petersen, by virtue of his failure to supervise his employees, of engaging in conduct adversely reflecting on his fitness to practice law, see DR 1-102(A)(6), then the result of this proceeding might have been different.

Petersen's poor management of his office and inadequate supervision of Samp, his office manager, could, potentially, subject him to discipline. That Petersen should escape discipline in this proceeding is due solely to the fact that the operative formal charges against him did not raise the issue of Petersen's failure to supervise the conduct of his employees, or charge Petersen with violation of a disciplinary rule pursuant to which such conduct could be punishable.

In his analysis, the referee found that "[Petersen]'s violations arose from disregard for the sanctity of client funds and unprofessional and sloppy office procedures. [Petersen] encouraged office practices which showed no respect for the meaning of a signature, whether it was his or [others]." I agree with the referee's view of the evidence.

The record establishes, beyond reasonable dispute, that Petersen's office management practices were inappropriate for a member of the bar. The record shows that Petersen's signature was routinely "'replicated'" by his employees on letters and court filings and that Petersen was aware of this practice. Samp also routinely signed Petersen's name to checks drawn on the firm's trust account without Petersen's specific authorization for each transaction. The referee specifically noted that Petersen's office procedures included the "forgery" of Petersen's signature on letters and legal documents, "[w]itnessing" and notarization of clients' signatures by individuals who were not actually present to observe the clients' signatures, and "[f]orgery" of Petersen's signature on checks drawn on the trust account. It was precisely these practices which permitted the issuance of the \$500 check to the Petersen Law Office in this case, without verification that the firm was actually entitled to the money.

We have stated that a lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds. *Kirshen, supra*. An attorney has a duty to supervise the conduct of his or her office and may not escape responsibility to clients by blithely contending that any shortcomings are solely the fault of an employee. See *id.* We have held that a lawyer is ultimately responsible for the conduct of his or her employees and associates in the course of the professional representation of the client. *Id.*

While Petersen in the instant case may have directed Samp to "find the paperwork" relating to the check at issue, Samp's issuance of that check without finding the paperwork was a direct result of established office procedures of which Petersen was aware and which Petersen permitted and even encouraged.

I am convinced, based on the record presented, that Petersen's behavior was inexcusable and may have been unethical. I concede, however, that Petersen's failure to supervise the unacceptable behavior of his employees does not prove, by clear and convincing evidence, any of the disciplinary rule violations that were alleged in the formal charges against him. Thus, I reluctantly concur in the result.

MILLER-LERMAN, J., joins in this concurrence.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR, v.
BRIEN P. O'BRIEN, RESPONDENT.

652 N.W.2d 97

Filed October 18, 2002. No. S-02-1094.

Original action. Judgment of disbarment.

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

PER CURIAM.

Brien P. O'Brien, respondent, was admitted to the practice of law in the State of Nebraska on March 4, 1991. On April 25, 2002, a grievance was filed with the Office of the Counsel for Discipline against respondent. Respondent's alleged misconduct involved mishandling of client funds.

On September 25, 2002, respondent filed with this court a voluntary surrender of his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent admitted the essential facts of the grievance and that he had violated Canon 1, DR 1-102(A)(1) and (4), and Canon 9, DR 9-102(A) and (B)(4), of the Code of Professional Responsibility and his oath of office. Respondent "freely, voluntarily and knowingly"

waived his right to notice, appearance, or hearing prior to the entry of an order.

Neb. Ct. R. of Discipline 15 (rev. 2001) provides:

(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.

(2) A voluntary surrender of license shall not terminate such Grievance, Complaint, or Formal Charge unless an appropriate order shall be entered by the Court.

Pursuant to rule 15, this court finds that respondent has voluntarily surrendered his license to practice law, admitted in writing that he has engaged in the conduct that violated his oath of office as well as DR 1-102(A)(1) and (4) and DR 9-102(A) and (B)(4) of the Code of Professional Responsibility, consented to the entry of an order of disbarment, and waived all proceedings against him.

Upon due consideration of the pleadings in this matter, the court finds that respondent's admission and waiver are knowingly made. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith 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. Costs to be taxed against respondent.

JUDGMENT OF DISBARMENT.

IVORIE PEARL NEWMAN, PERSONAL REPRESENTATIVE OF THE
ESTATE OF JOHN HENRY M. CHAMBERLIN, DECEASED,
APPELLEE, v. ALFRED THOMAS, APPELLANT.

652 N.W.2d 565

Filed October 25, 2002. No. S-01-939.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **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.
3. ____: _____. 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. **Decedents' Estates: Statutes: States.** The provisions of article 27 of the Nebraska Probate Code should be construed so as to effectuate their general purpose to make uniform the law of those states which enact them. Neb. Rev. Stat. § 30-2746 (Reissue 1995).
5. **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.
6. **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.
7. **Statutes: Appeal and Error.** As an aid to statutory interpretation, appellate courts must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
8. **Decedents' Estates: Statutes.** Article 27 of the Nebraska Probate Code is designed to provide simple nonprobate alternatives for the disposition of assets upon death of a party to a multiparty or pay-on-death account.
9. **Decedents' Estates: Banks and Banking: Statutes: Words and Phrases.** The use of the word "may" in Neb. Stat. Rev. § 30-2724(a) (Reissue 1995) grants a party the right to alter the type of account the party owns. To exercise that right, however, a party must give his or her financial institution signed written notice.
10. **Decedents' Estates: Banks and Banking: Statutes.** Neb. Rev. Stat. § 30-2724 (Reissue 1995) applies to a financial institution account if Neb. Rev. Stat. § 30-2723 (Reissue 1995) sets out what rights at death accompany that type of account.
11. ____: ____: _____. Neb. Rev. Stat. §§ 30-2716 through 30-2726 (Reissue 1995) are meant to comprehensively cover the problems of financial institution accounts in which one or more persons have an interest.

12. ____: ____: _____. Under the current version of article 27 of the Nebraska Probate Code, signed written notice is required for transforming a non-pay-on-death, single-party account into a multiparty or pay-on-death account. Neb. Rev. Stat. § 30-2724 (Reissue 1995).
13. **Summary Judgment: Evidence: Proof.** The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists. That party must therefore produce enough evidence to demonstrate his or her entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
14. **Summary Judgment: Motions for Continuance: Appeal and Error.** A continuance authorized by Neb. Rev. Stat. § 25-1335 (Reissue 1995) is within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Robert C. McGowan, Jr., of McGowan & McGowan, for appellant.

Michael D. McClellan, of Nelson McClellan, for appellee.

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

CONNOLLY, J.

In this case, we must decide whether the Nebraska Probate Code requires the owner of a non-pay-on-death, single-party account to give his or her financial institution signed written notice to add a pay-on-death (POD) beneficiary to the account. Before his death, John Henry M. Chamberlin opened a single-party certificate of deposit account (CD) with no POD beneficiary at American National Bank (American National). Although there is some evidence that Chamberlin attempted to add the appellant, Alfred Thomas, as a POD beneficiary, it is undisputed that Chamberlin did not give American National signed written notice. The district court ruled that Chamberlin's signed written notice was required and entered summary judgment for Ivorie Pearl Newman, the personal representative of Chamberlin's estate. We affirm.

I. BACKGROUND

In May 1997, Chamberlin opened a non-POD, single-party CD with American National. A standard form was used to open

the CD. Consistent with its normal practice, American National gave Chamberlin the original form and retained two copies for its records.

Chamberlin died on April 16, 1999. His will named his sister, Newman, as the personal representative. On August 31, Newman requested American National to deposit the proceeds of the CD into an estate checking account at American National. American National then deposited about \$50,000, the proceeds of the CD, into the estate checking account. At the time the funds were deposited, Newman was not aware of any other claims on the CD.

Thomas had been Chamberlin's friend and had helped Chamberlin with errands and household chores. After Chamberlin's death, Thomas arrived at an American National branch and claimed that before Chamberlin's death, he had made Thomas a POD beneficiary to the CD. When Thomas arrived at American National, he presented the original form issued to Chamberlin when he opened the CD. On the area of the form designated for the names of POD beneficiaries, someone had typed "POD ALFORD THOMAS [sic]." Someone had also placed a handwritten "x" in the box labeled "Single Party Account with Pay on Death." Notably, next to this box is a space for the owner's initials. This space is blank.

As noted above, American National retained two copies of the form used when Chamberlin opened the CD. "POD ALFORD THOMAS" and the handwritten "x" do not appear on either of these copies. No one at American National knows who made the changes. In addition, American National has no other document or record indicating that Chamberlin requested that Thomas be made a POD beneficiary to the CD.

Thomas claims that an American National employee, Patrice Smith, was responsible for making the handwritten "x" and typing "POD ALFORD THOMAS." According to Thomas' deposition testimony, in January or February 1998, he drove Chamberlin to an American National branch so that Chamberlin could withdraw interest from the CD. While there, Chamberlin met with Smith. Thomas claims he was present throughout this meeting and that during the meeting, Chamberlin orally requested that Thomas be added as the POD beneficiary to the CD. Thomas stated that Chamberlin then handed Smith the original form used

to open the CD and that she "typed something" on it. Thomas also claimed that Chamberlin signed at least one and perhaps two documents during the meeting. Thomas admitted, however, that he did not notice what Chamberlin was signing.

Chamberlin's signature appears three times on the original form used to open the CD. Two of these signatures were clearly made when the account was opened. The third signature is under a notation made on the second page. The notation refers to a withdrawal of interest made on January 7, 1998. The notation contains no reference to the addition of Thomas as a POD beneficiary.

In her deposition, Smith said that she does not remember the January 1998 meeting with Chamberlin. She also testified that she does not know if she made the handwritten "x" or typed "POD ALFORD THOMAS."

After Thomas attempted to claim the CD, American National froze the estate checking account into which it had previously deposited the proceeds from the CD. Newman then filed this declaratory judgment action against American National and Thomas. American National filed a motion seeking leave to deposit the disputed funds into court. The court granted the motion and dismissed American National.

Newman moved for summary judgment. At the summary judgment hearing, Thomas filed an affidavit under Neb. Rev. Stat. § 25-1335 (Reissue 1995) seeking a continuance so that Thomas could have an expert analyze whether Smith's typewriter had been used to type "POD ALFORD THOMAS." The court treated the affidavit as a motion to resist summary judgment.

The court entered summary judgment for Newman. It held that to change Chamberlin's CD to a POD account, the Nebraska Probate Code required him to give signed written notice to American National requesting that the bank add Thomas as a POD beneficiary. Because there was no evidence that Chamberlin had given signed written notice to American National, the court granted Newman summary judgment. Thomas appealed.

II. ASSIGNMENTS OF ERROR

Thomas assigns, rephrased and reordered, that the district court erred in (1) interpreting and applying the applicable provisions of the Nebraska Probate Code, (2) granting Newman's

motion for summary judgment, and (3) failing to order a continuance of the summary judgment hearing.

III. STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *American Fam. Mut. Ins. Co. v. Hadley*, ante p. 435, 648 N.W.2d 769 (2002).

[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. *American Bus. Info. v. Egr*, ante p. 574, 650 N.W.2d 251 (2002); *A-1 Metro Movers v. Egr*, ante p. 291, 647 N.W.2d 593 (2002).

IV. ANALYSIS

1. INTERPRETATION OF APPLICABLE PROVISIONS OF NEBRASKA PROBATE CODE

Article 27 of the Nebraska Probate Code governs nonprobate transfers, including POD accounts. See Neb. Rev. Stat. §§ 30-2715 through 30-2746 (Reissue 1995). In 1993, the Legislature repealed the previous version of article 27 and replaced it with a version based on the revised article VI of the Uniform Probate Code. The revised version of article 27 governs this case.

Under the revised article 27, when the owner of a POD, single-party account dies, the sums on deposit belong to the surviving beneficiary or beneficiaries. § 30-2723(b)(2). A non-POD, single-party account, however, is not affected by the death of the owner. Instead, the amount the owner was beneficially entitled to immediately before death is transferred to the estate. § 30-2723(c). If Chamberlin's CD was a POD, single-party account with Thomas as the beneficiary, Thomas is entitled to the proceeds from the CD. But, if Chamberlin never successfully added Thomas as the CD's POD beneficiary, then Chamberlin's estate is entitled to the proceeds.

The district court determined that § 30-2724 governs changing a non-POD, single-party account into a POD account. Section 30-2724 provides:

(a) Rights at death under section 30-2723 are determined by the type of account at the death of a party. *The type of account may be altered by written notice given by a party to the financial institution to change the type of account or to stop or vary payment under the terms of the account. The notice must be signed by a party and received by the financial institution during the party's lifetime.*

(Emphasis supplied.) The court interpreted the emphasized language as making the signed written notice of a party to the account a mandatory requirement for changing the type of account.

Thomas claims that the court made two errors in interpreting § 30-2724. First, he claims that the language sets out a permissive rather than a mandatory method for changing the type of account. Second, he argues that even if the language of § 30-2724 is mandatory, the section applies only to the modification of an existing multiparty or POD account and not to the creation of a multiparty or POD account. We disagree with both of these arguments.

(a) Is Language of § 30-2724 Mandatory?

Thomas argues that the use of the word “may” in § 30-2724 sets out a permissive rather than a mandatory method for altering the type of account. See Neb. Rev. Stat. § 49-802(1) (Reissue 1998) (“[w]hen the word may appears, permissive or discretionary action is presumed”). Newman counters that “may” in § 30-2724 refers only to the ability of a party to alter the form of his or her account. She argues that § 30-2724 is permissive in the sense that a party may choose to change his or her account from one form to another. But, to put the change into effect, the party must give his or her financial institution signed written notice.

[3] 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. *Capital City Telephone v. Nebraska Dept. of Rev.*, ante p. 515, 650 N.W.2d 467 (2002). Neither Thomas’ nor Newman’s

construction of § 30-2724 is facially unreasonable. We note that other courts are split on whether similar statutory language is permissive or mandatory. Compare *Linehan v. First Nat. Bank of Gordon*, 7 Neb. App. 54, 579 N.W.2d 157 (1998) (construing predecessor to § 30-2724 as mandatory), *Conservatorship of Milbrath*, 508 N.W.2d 360 (N.D. 1993), and *Estate of Wolfinger v. Wolfinger*, 793 P.2d 393 (Utah App. 1990), with *Jampol v. Farmer*, 259 Va. 53, 524 S.E.2d 436 (2000). We thus resort to statutory interpretation.

[4] Initially, we note that the Legislature has instructed us to construe the provisions of article 27 so as “to effectuate their general purpose to make uniform the law of those states which enact them.” § 30-2746. Section 30-2724 corresponds to § 6-213 of the revised article VI of the Uniform Probate Code. (We note that there has been a technical amendment to § 6-213, which Nebraska has not adopted.) Nine other jurisdictions have adopted § 6-213. Unif. Multiple-Person Accounts Act, Table of Jurisdictions Wherein Act Has Been Adopted, 8B U.L.A. 1 (Supp. 2002) (listing jurisdictions which have enacted Multiple-Person Accounts Act portion of revised article VI). None of these jurisdictions appear to have addressed whether the method set out for altering the type of account in § 6-213 is mandatory.

However, § 6-105 of the prerevision version of article VI, the predecessor of § 6-213, contained the same “may be altered” language that appears in §§ 6-213 and 30-2724:

[The form of the account] *may be altered* by written order given by a party to the financial institution to change the form of the account The order or request must be signed by a party, received by the financial institution during the party’s lifetime, and not countermanded by other written order of the same party during his lifetime.

(Emphasis supplied.) Unif. Probate Code § 6-105, 8 U.L.A. 474 (1998). Because of the similarity between §§ 6-105 and 6-213, the manner in which courts have interpreted § 6-105 is persuasive in predicting how courts will interpret § 6-213. The majority of courts interpreting provisions based on § 6-105, including the Nebraska Court of Appeals, have determined that the language in § 6-105 sets out a mandatory method for altering the form of an account. *Linehan v. First Nat. Bank of Gordon*,

supra; *Conservatorship of Milbrath, supra*; *Estate of Wolfinger v. Wolfinger, supra*. But see *Jampol v. Farmer, supra* (language is permissive).

[5-7] Moreover, construing § 30-2724 as setting out a mandatory notice requirement is more consistent with our standards of statutory construction and with the policies underlying article 27. 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. *Capitol City Telephone v. Nebraska Dept. of Rev., supra*. 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. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002). As an aid to statutory interpretation, appellate courts must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Id.*; *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001).

To construe § 30-2724 as permissive would be to render the statute meaningless. It would neither create new rights nor limit existing ones. Any other method for modifying a contract would remain available to alter the form of an account. Signed written notice would simply be a nonbinding legislative suggestion.

[8] By contrast, to read § 30-2724 as setting out a mandatory method for altering the type of an account gives the statute a purpose consistent with the rest of article 27. Article 27 is designed to provide simple nonprobate alternatives for the disposition of assets upon death of a party to a multiparty or POD account. Accord *Conservatorship of Milbrath*, 508 N.W.2d 360 (N.D. 1993). Requiring signed written notice to alter the type of account furthers this purpose by ensuring clear evidence of the account owner's intent, thus preventing fraud and adding certainty to nonprobate transfers.

[9] We conclude that the use of the word "may" in § 30-2724(a) grants a party the right to alter the type of account the party owns. To exercise that right, however, a party must give his or her financial institution signed written notice.

(b) Does § 30-2724 Apply to Transforming Non-POD,
Single-Party Account Into POD Account?

Thomas argues that even if § 30-2724 sets out a mandatory method for altering the type of account, it applies only to altering an existing multiparty or POD account, not to transforming a non-POD, single-party account into a POD account.

[10] The scope of § 30-2724 is set out in the statute's first sentence: "*Rights at death under section 30-2723 are determined by the type of account at the death of a party.*" (Emphasis supplied.) This language means that § 30-2724 applies to an account if § 30-2723 sets out what rights at death accompany that type of account. Section 30-2723(c) sets out what rights at death a non-POD, single-party account carries: "Sums on deposit in a single-party account without a POD designation . . . are not affected by death of a party, but the amount to which the decedent, immediately before death, was beneficially entitled under section 30-2722 is transferred as part of the decedent's estate." Thus, § 30-2724 includes within its scope non-POD, single-party accounts.

[11] Thomas' interpretation of § 30-2724 is inconsistent with the purpose underlying the revised article 27. As noted, article 27 was substantially based on the revised article VI of the Uniform Probate Code. The revised article VI has three separate parts, each of which is designed to be a free-standing uniform act. The Uniform Multiple-Person Accounts Act is the second part of the Uniform Nonprobate Transfers on Death Act, which in turn corresponds to §§ 30-2716 through 30-2726 of article 27. The prefatory note to the Uniform Multiple-Person Accounts Act does not draw a distinction between single and multiparty accounts. Instead, it states that the purpose of the act is to "*comprehensively [cover] the problems of financial institution accounts in which one or more persons have an interest.*" (Emphasis supplied.) Unif. Multiple-Person Accounts Act, Prefatory Note, 8B U.L.A. 4 (2001). Under Thomas' interpretation of § 30-2724, however, article 27 is not comprehensive. Rather, it leaves a potentially problematic issue—the proper method for adding a POD beneficiary to a non-POD, single-party account—completely outside the scope of article 27.

Thomas relies on *Linehan v. First Nat. Bank of Gordon*, 7 Neb. App. 54, 579 N.W.2d 157 (1998). In *Linehan*, a husband and wife opened a joint bank account. Later, the wife orally requested that the bank add her daughter to the account. The bank permitted the daughter to sign the original signature card. After the wife died, the husband attempted to withdraw the funds from the account and the daughter objected. The Court of Appeals ruled that to change the form of an *existing joint* account, the owner must give the bank a signed written order. The *Linehan* court went on to state that “[t]here is no statutory restriction in the Nebraska Probate Code which prohibits a party from orally instructing his or her bank to change the party’s *individual* account into a joint account.” (Emphasis in original.) 7 Neb. App. at 59, 579 N.W.2d at 160. See, also, *Estate of Wolfinger v. Wolfinger*, 793 P.2d 393 (Utah App. 1990).

[12] *Linehan*, however, was governed by the pre-1993 version of article 27. See Neb. Rev. Stat. §§ 30-2701 through 30-2714 (Reissue 1989). The section of the previous article 27 that corresponds to § 30-2724 is § 30-2705. It provided in part: “*The provisions of section 30-2704 as to rights of survivorship are determined by the form of the account at the death of a party.*” (Emphasis supplied.) § 30-2705. So, just as § 30-2724 refers to § 30-2723 to define its scope, the scope of § 30-2705 was set by reference to another section, § 30-2704. Unlike § 30-2723, § 30-2704 did not speak to what rights at death a non-POD, single-party account carried. Instead, it only addressed what survivorship rights accompany POD and multi-party accounts. Given this, the *Linehan* court logically concluded that the scope of § 30-2705 did not include changing a non-POD, single-party account into a multiparty or POD account. However, the inclusion of non-POD, single-party accounts in § 30-2723 expands the scope of § 30-2724 beyond that of its § 30-2705 predecessor and means that signed written notice is now required for transforming a non-POD, single party account into a multiparty or POD account.

2. SUMMARY JUDGMENT

[13] The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists.

That party must therefore produce enough evidence to demonstrate his or her entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Richmond v. Case*, ante p. 319, 647 N.W.2d 90 (2002).

In this case, it is undisputed that Chamberlin opened the CD as a single-party account with no POD beneficiary. As we have set out above, to add Thomas as a POD beneficiary, § 30-2724 required Chamberlin to give American National signed written notice of the desired change. To meet her burden on summary judgment, Newman, as the moving party, was required to present evidence that no such notice was given. She met this burden in the form of deposition and affidavit testimony from American National officers stating they had no record of signed written notice from Chamberlin requesting American National to add Thomas as the CD's POD beneficiary. The burden then switched to Thomas to present evidence that signed written notice was given. But, the record contains no evidence—and Thomas does not even attempt to argue—that Chamberlin gave the notice required by § 30-2724. Thus, Thomas failed to meet his burden and the district court properly entered summary judgment for Newman.

3. CONTINUANCE OF SUMMARY JUDGMENT HEARING

[14] Finally, Thomas assigns as error the district court's failure to continue the summary judgment hearing. A continuance authorized by § 25-1335 is within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Eastroads, Inc. v. City of Omaha*, 237 Neb. 837, 467 N.W.2d 888 (1991). Thomas sought the continuance so that he could have an expert inspect Smith's typewriter to see if it had been used in typing "POD ALFORD THOMAS" on the original form used to open the CD. But, whether Smith typed "POD ALFORD THOMAS" is irrelevant. Even if she did type it, it would not change the answer to the determinative issue whether Chamberlin gave American National the signed written notice required by § 30-2724. As a result, this assignment of error is without merit.

V. CONCLUSION

We determine that to add a POD beneficiary to a non-POD, single-party account, the owner of the account must give signed written notice to his or her financial institution. Because Thomas has failed to present any evidence showing that Chamberlin gave signed written notice to American National requesting the bank to add Thomas as a POD beneficiary to Chamberlin's CD, Newman was entitled to summary judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.

CLIFFORD L. JONES, APPELLEE.

652 N.W.2d 288

Filed October 25, 2002. No. S-01-990.

1. **Judgments: Jurisdiction: Appeal and Error.** 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. **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.
3. ____: _____. An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law.
4. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
5. ____: ____: ____: _____. To the extent the State is authorized to appeal an adverse ruling in a criminal case, the appeal is to be taken in accordance with, and is constrained by, the terms of the statute authorizing the appeal.
6. **Statutes: Ordinances: Prosecuting Attorneys: Appeal and Error.** The authority to take error proceedings pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995) is limited to county attorneys, and such authority does not extend to city attorneys or to prosecutions involving the violation of city ordinances.
7. **Statutes.** It is not for the courts to supply missing words or sentences to a statute to supply that which is not there.
8. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** There is no statutory authorization for a city attorney representing the State to appeal a decision of a district court which reverses the decision of a county court upon appeal by a criminal defendant.

Appeal from the District Court for Lancaster County,
BERNARD J. MCGINN, Judge, on appeal thereto from the County

Court for Lancaster County, LAURIE J. YARDLEY, Judge. Appeal dismissed.

John C. McQuinn, Chief Lincoln City Prosecutor, for appellant.

Robert Wm. Chapin, Jr., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this criminal case, the Lincoln City Attorney's office, on behalf of the State, challenges the Lancaster County district court's decision of July 26, 2001, which reversed the county court's order convicting Clifford L. Jones of violating Lincoln Mun. Code § 9.16.240(e) (2000). The jurisdictional issue presented in this case is whether the city attorney representing the State is authorized to appeal an order of the district court where the order of the district court, in an appeal brought by the criminal defendant, reverses the county court's conviction. Because there is no statutory provision which authorizes the city attorney to appeal a reversal entered by the district court in a criminal case, we dismiss the appeal for lack of jurisdiction.

STATEMENT OF FACTS

On August 11, 2000, an undercover Lincoln police officer conducted a surveillance operation at Mataya's Babydolls juice bar. Jones, the manager and co-owner of Mataya's Babydolls, was functioning as a D.J. and providing security at the establishment on August 11. The officer observed activities in the juice bar which he believed amounted to sexual contact by the dancers and patrons.

On August 30, 2000, the Lincoln City Attorney's office, representing the State, filed a complaint in county court alleging that Jones "[d]id knowingly allow any person on the premises to engage in sexual contact in violation of LMC §9.16.240(e) on August 11, 2000." A bench trial was held on October 13. On November 20, the county court found Jones guilty beyond a

reasonable doubt. On December 15, the county court sentenced Jones to pay a fine of \$200 and costs.

Jones appealed to the district court, assigning as error, *inter alia*, that there was not sufficient evidence to support the conviction. A hearing on Jones' appeal was held on May 16, 2001. On July 26, the district court entered an order in which it determined that there was not sufficient evidence to support Jones' conviction. The district court reversed the conviction and sentence and remanded the case to the county court with directions to dismiss the complaint against Jones.

On August 23, 2001, the Lincoln City Attorney's office, representing the State, filed a "Notice of Intention to Prosecute Appeal Pursuant to Neb.Rev.Stat. § 25-1912," stating its intention to appeal the July 26 order of the district court reversing the judgment of the county court. Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000) is the general appeal statute which contains, *inter alia*, provisions relating generally to matters such as docket fees and timing for filing appeals. The matter was docketed in the Nebraska Court of Appeals. On January 24, 2002, the Court of Appeals ordered the parties "to address in their briefs the jurisdictional question of appellant's (State of Nebraska) right to appeal under Neb. Rev. Stat. Sec. 25-1912." The appeal was subsequently moved to this court's docket.

ASSIGNMENT OF ERROR

The Lincoln City Attorney, on behalf of the State, asserts that this court has jurisdiction to hear the appeal and that the district court erred in various particulars. Because we dismiss the appeal, we do not reach the merits of the assignments of error.

STANDARD OF REVIEW

[1] 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. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

ANALYSIS

[2,3] 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. *Harms, supra*. An appellate

court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000).

[4,5] In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *Id.* To the extent the State is authorized to appeal an adverse ruling in a criminal case, the appeal is to be taken in accordance with, and is constrained by, the terms of the statute authorizing the appeal. See *State v. Baird*, 238 Neb. 724, 472 N.W.2d 203 (1991). In this criminal case, we must determine whether the State, represented by the city attorney, is authorized to appeal from the district court's order which reversed the county court's conviction where the appeal to district court was taken by Jones, the criminal defendant. We conclude that the State, represented by the city attorney, cannot appeal the district court's order.

In *Baird*, *supra*, the State was represented by the Lancaster County Attorney's office, and we noted that the specific statutory authorization for the State to appeal the adverse ruling of the district court in that case was pursuant to the error proceeding statute, Neb. Rev. Stat. § 29-2315.01 (Reissue 1989). Because the county attorney on behalf of the State in *Baird* had ignored the provisions of § 29-2315.01 and had instead filed the appeal under the provisions of the general appeal statute, § 25-1912, we determined that this court lacked jurisdiction over the case. In a manner consistent with the reasoning in *Baird*, we examine the statutory framework which authorizes a city attorney to take an appeal in a criminal case to determine, based on a plain statutory reading, whether an appeal is authorized in the present case.

[6] In its argument in support of its assertion that this court has jurisdiction over the instant case, the State refers us to *State v. Linn*, 192 Neb. 798, 224 N.W.2d 539 (1974), and Neb. Rev. Stat. §§ 29-2317 to 29-2319 (Reissue 1995). In *Linn*, this court held that the authority to take error proceedings pursuant to § 29-2315.01 (Reissue 1964) is limited to county attorneys and that such authority does not extend to city attorneys or to prosecutions involving the violation of city ordinances. Subsequent to *Linn*, in 1975, the Legislature enacted §§ 29-2317 to 29-2319 which primarily pertain to appeals by prosecutors from county

court to district court. Sections 29-2317 to 29-2319(1) provide procedures by which a county attorney, city attorney, or designated assistant may appeal a ruling or decision of a county court to a district court, the appointment of counsel, and the impact of such appeals relative to double jeopardy. Section 29-2319(2) relates to the trial court's authority to rearrest a defendant.

Section 29-2317(1) provides:

A prosecuting attorney, including any county attorney, *city attorney*, or designated assistant, may take exception to *any ruling or decision* of the county court made during the prosecution of a cause by presenting to the court a notice of intent to take an appeal to the district court with reference to the rulings or decisions of which complaint is made.

(Emphasis supplied.)

Section 29-2319(3) provides, "When the district court *affirms* the final order of the trial court, the prosecuting attorney may take exception to the decision of the district court in the manner provided by sections 29-2315.01 to 29-2316." (Emphasis supplied.) By its terms, § 29-2319 refers to district court orders which were entered in an appeal to the district court brought by a prosecutor rather than by a criminal defendant, such as in the instant case.

The State argues that the enactment of §§ 29-2317 to 29-2319 was a response to this court's decision in *Linn, supra*. The State further claims that §§ 29-2317 to 29-2319 were intended to give city attorneys the same authority as that provided to county attorneys in Neb. Rev. Stat. §§ 29-2315.01 to 29-2316 (Reissue 1995) to appeal adverse rulings of district courts. In the alternative, the State claims that if the appeal in this case was not authorized under §§ 29-2317 to 29-2319, the city attorney could, nevertheless, proceed under the general appeal statute, § 25-1912. We reject these arguments.

[7] Section 29-2317(1) explicitly gives a city attorney the authority in a criminal case to appeal "*any ruling or decision*" of a county court to the district court. In contrast to the language of § 29-2317(1), § 29-2319(3) gives a city attorney the authority to appeal the decision of the district court only "[w]hen the district court *affirms* the final order of the trial court" Even if we were to ignore the context in which § 29-2319(3) appears and to

conclude that § 29-2319(3) applied to a district court order which was occasioned by the appeal of a criminal defendant from county court to district court, there is nothing in the plain language of § 29-2319(3) or elsewhere which authorizes a city attorney in a criminal case to appeal the decision of the district court where the district court reverses the trial court. With respect to the statutory silence regarding the city attorney's potential authority to appeal a reversal by a district court in a criminal case, we note that it is not for the courts to supply missing words or sentences to a statute to supply that which is not there. See *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001).

[8] The language of §§ 29-2317 to 29-2319 contains no provision giving city attorneys the same scope of authority given to county attorneys pursuant to § 29-2315.01, nor has the Legislature amended §§ 29-2315.01 to 29-2316 to provide that city attorneys are authorized to undertake error proceedings under these statutes. We conclude that there is no statutory authorization for the city attorney representing the State to appeal a decision of a district court which reverses the decision of a county court upon appeal by a criminal defendant. In the absence of specific statutory authorization, the State has no right to appeal the adverse ruling in this criminal case. See *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000). Because there is no such statutory authority, this court lacks jurisdiction over this case, and the general appeal statute, § 25-1912, "does not come into play," see *State v. Baird*, 238 Neb. 724, 726, 472 N.W.2d 203, 205 (1991), and does not by itself authorize this court to exercise jurisdiction. We must therefore dismiss this appeal.

CONCLUSION

In this criminal case, we conclude that the city attorney, prosecuting on behalf of the State, had no statutory right to appeal the order of the district court which reversed the decision of the county court in an appeal brought to the district court by a criminal defendant and that this court lacks jurisdiction. We therefore dismiss this appeal.

APPEAL DISMISSED.

R.W. ET AL., APPELLANTS, V. DANIEL B. SCHREIN, M.D.,
APPELLEE, AND THE MEDICAL PROTECTIVE COMPANY
OF FORT WAYNE, INDIANA, GARNISHEE-APPELLEE.
652 N.W.2d 574

Filed November 1, 2002. Nos. S-00-808 through S-00-812.

SUPPLEMENTAL OPINION

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **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. **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.
4. **Trial: Waiver.** A party who fails to insist upon a ruling to a proffered objection waives that objection.
5. **Trial: Evidence: Waiver.** If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection the party may have had thereto, and the evidence is in the record for consideration the same as other evidence.
6. **Insurance: Contracts.** An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
7. **Contracts: Intent.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
8. **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.
9. **Words and Phrases.** In determining whether a particular act is of a professional nature or a professional service, a court must look not to the title or character of the party performing the act, but to the act itself.
10. **Malpractice: Physician and Patient: Liability.** When there is a claim of medical malpractice based on unwanted sexual contact, the determination of liability should focus not solely on the locale of the alleged harm or the professional status of the actor, but, rather, on the context of the alleged medical service involved in the action. In other words, it is the physician's deviation from the recognized medical standard of care during the course of treatment that is the essence of a claim

for medical malpractice, and there must exist a causal relationship between the alleged harm and the complained-of deviation from that standard of care in order for liability to attach.

Appeals from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Supplemental opinion: Motions for rehearing sustained. Former opinion modified.

James E. Harris and Britany S. Shotkoski, of Harris, Feldman Law Offices, for appellants.

Mark A. Christensen and Pamela K. Epp, of Cline, Williams, Wright, Johnson & Oldfather, P.C., for garnishee-appellee.

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

PER CURIAM.

NATURE OF CASE

Appellants in this case were, as children, patients of Daniel B. Schrein, M.D., an Omaha pediatrician. As adults, appellants brought actions against Schrein to recover damages for sexual abuse alleged to have been perpetrated by Schrein during the course of medical treatment. Appellants obtained default judgments against Schrein and commenced garnishment proceedings against Schrein's professional liability insurer, The Medical Protective Company of Fort Wayne, Indiana (Medical Protective). The district court concluded that appellants' claims were not covered by Schrein's insurance policy and entered summary judgment for Medical Protective. In *R.W. v. Schrein*, 263 Neb. 708, 642 N.W.2d 505 (2002) (*R.W. I*), we affirmed the district court's judgment. Appellants filed a motion for rehearing, which we granted. We again affirm the judgment of the district court.

ISSUES ON REHEARING

In our first opinion, we affirmed the judgment of the district court, relying in part on the affidavit of Harlan C. Schriener, Jr., M.D., a pediatrician who opined that Schrein's actions did not constitute or arise out of professional services and that Schrein's actions thus did not breach any applicable standard of care. Appellants filed timely motions for rehearing, arguing in part that this court erred in relying on Schriener's affidavit because

the affidavit, although present in the record on appeal, had not been received into evidence by the district court. We granted appellants' motions for rehearing. We ordered that the issues on rehearing include all the issues originally briefed and offered the parties leave to file supplemental briefs addressing the following additional issues:

(1) Did the district court rule on appellants' objections to the affidavits of Schriener offered in each of these cases at the time the objections were made?

(2) If there were no rulings at the time of the objections, did appellants insist upon rulings prior to submission of the motions for summary judgment? If not, were the objections waived?

(3) Were the objections and/or the grounds upon which they were based addressed and resolved by the district court in its order of July 28, 2000, and if so, how were the issues resolved?

(4) Did the district court rule on appellants' alternative requests for a continuance pursuant to Neb. Rev. Stat. § 25-1335 (Reissue 1995) at the time the requests were made?

(5) If not, did appellants insist upon such rulings prior to submission of the motions for summary judgment? If not, were the requests for continuance waived?

STANDARD OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Pinkard v. Confederation Life Ins. Co.*, ante p. 312, 647 N.W.2d 85 (2002). 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.*

[3] 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. See *American Fam. Mut. Ins. Co. v. Hadley*, ante p. 435, 648 N.W.2d 769 (2002).

ANALYSIS

SCHRINER AFFIDAVIT

We turn first to the issues presented by the motion for rehearing. As set forth above, we granted rehearing on the issue whether Schrinier's affidavit, on which our opinion relied, was properly received into evidence by the district court. We conclude that we are unable to resolve this issue on the record presented. The record does not show that the district court either explicitly ruled on appellants' objections to the affidavit or received the affidavit into evidence. This ambiguity in the record precludes us from relying on the affidavit or resolving any issues to which the affidavit might be relevant on appeal.

[4,5] We note that the presentation of an adequate record for appellate review is primarily the responsibility of the parties. It is well established that a party who fails to insist upon a ruling to a proffered objection waives that objection. See, e.g., *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002); *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000). We have also stated:

“‘If when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object, *or to insist upon a ruling on an objection to the introduction of the evidence*, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, *and the evidence is in the record for consideration the same as other evidence.*’”

(Emphasis in original.) *State v. Nowicki*, 239 Neb. 130, 134, 474 N.W.2d 478, 483 (1991) (quoting *In re Estate of Kaiser*, 150 Neb. 295, 34 N.W.2d 366 (1948)). See, also, *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991). That we have chosen, in this case, not to consider the disputed affidavit should not be taken to mean that we will not, in other cases, consider disputed evidence where an objection thereto has not been properly preserved by insistence upon a ruling on that objection. It is the responsibility of trial courts to rule on the objections presented to them. However, parties and counsel are cautioned that they

must insist on such rulings in order to preserve those objections; they fail to do so at their own peril.

The fact that Schriners' affidavit is not available for our review, however, does not change our ultimate conclusion from *R.W. I*. There is no factual controversy regarding Schrein's underlying conduct, which for purposes of this proceeding is assumed to have been as alleged in appellants' petitions. Similarly, the interpretation of a contract is a question of law. See *Hadley, supra*. Thus, we are presented with an integrated question of law—whether the allegations in the petitions set forth a claim for damages based on “professional services” within the meaning of the insurance policy. See, *Cluett v. Medical Protective Co.*, 829 S.W.2d 822 (Tex. App. 1992); *Hirst v. St. Paul Fire & Marine Ins. Co.*, 106 Idaho 792, 683 P.2d 440 (Idaho App. 1984).

A medical professional such as Schriners can opine regarding a breach of the applicable standard of medical care, but cannot advise this court on a question of law, i.e., the meaning of a term in a contract. Our previous opinion erred in relying on Schriners' affidavit because the evidence was not relevant to the question presented to this court. After further consideration, we conclude that the dispositive question in this appeal is a question of law, on which expert testimony has no bearing. Therefore, we withdraw the section of *R.W. I* under the subheading “2. RENDERING OF ‘PROFESSIONAL SERVICES,’” *id.* at 716, 642 N.W.2d at 512, and ends prior to the subheading “3. PUBLIC POLICY,” *id.* at 721, 642 N.W.2d at 515. In its place, we substitute the following discussion of the issue:

RENDERING OF PROFESSIONAL SERVICES

[6-8] The applicable language of the insurance policy issued to Schrein provides that Medical Protective will pay damages “based on professional services rendered or which should have been rendered . . . by the insured or any other person for whose acts or omissions the insured is legally responsible, in the practice of the insured's profession.” An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *American Fam. Mut. Ins. Co. v. Hadley, ante* p. 435, 648 N.W.2d 769 (2002). When the terms of a contract are clear, a court may not resort to rules of

construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Id.* 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. *Id.* We conclude that the language of the insuring agreement is unambiguous. The determinative question, then, is whether Schrein's actionable conduct constituted "professional services" within the meaning of the policy.

[9] This court has previously defined the term "professional services" in the context of a liability policy for professional negligence. In *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968), a physician's employee mistakenly poured benzine instead of water into a sterilization container, resulting in an explosion and a fire. The physician was insured by a policy covering damages arising out of "'malpractice, error or mistake of the insured, or of a person for whose acts or omissions the insured is legally responsible . . . in rendering or failing to render professional services.'" (Emphasis omitted.) *Id.* at 13, 157 N.W.2d at 871. Noting that the precise question presented was whether the damages arose out of the rendering or failure to render professional services, we stated:

The insurer's liability is thus limited to the performing or rendering of "professional" acts or services. Something more than an act flowing from mere employment or vocation is essential. The act or service must be such as exacts the use or application of special learning or attainments of some kind. The term "professional" in the context used in the policy provision means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. . . . In determining whether a particular act is of a professional nature or a "professional service" we must look

not to the title or character of the party performing the act, but to the act itself.

(Citations omitted.) *Id.* at 13-14, 157 N.W.2d at 871-72. Finding that the boiling of water for sterilization was "not a part of any patient's treatment per se any more than any other routine cleaning or arranging procedure incidental to the proper general operations of the plaintiffs' offices," we concluded that the act was not a professional service covered by the language of the insurance policy. *Id.* at 14, 157 N.W.2d at 872.

In *Marx, supra*, the determinative question was whether the act performed was "professional" as distinguished from the act of a layperson. In this case, however, the critical issue is whether the act performed is "professional" as opposed to unprofessional. In other words, the fact that the actions occurred between a doctor and patient is pertinent only if the act itself is of a professional nature. See *St. Paul Ins. Co. of Illinois v. Cromeans*, 771 F. Supp. 349 (N.D. Ala. 1991).

[10] We recently revisited the *Marx* holding in *Iwanski v. Gomes*, 259 Neb. 632, 640, 611 N.W.2d 607, 613 (2000), which presented the question whether "a doctor commits malpractice by engaging in sexual relations or having consensual sex with an individual with whom the doctor concurrently maintains a physician-patient relationship." After recognizing our holding in *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968), we concluded that in order to establish that conduct by a physician constitutes malpractice, the acts of the physician upon which the claim is based must "be such as exacts the use or application of special learning or attainments of some kind" that would constitute the "'performing or rendering of 'professional' acts or services.'" *Iwanski*, 259 Neb. at 641, 611 N.W.2d at 614 (quoting *Marx, supra*). In addressing whether the acts of the physician fell within this definition, we referred to case law from other jurisdictions interpreting "professional services" coverage in insurance contracts. We then stated:

We agree that the fact that sexual misconduct occurs in a medical professional's office "does not automatically transmute the act into a professional service [because the] location of an act's occurrence is not determinative of liability." *Lindheimer v. St. Paul Fire & Marine Ins.*, 643 So.

2d 636, 638 (Fla. App. 1994). When the only connection between the sexual misconduct and treatment is that the activity occurred in the medical professional's office, such a connection is too remote from the actual rendering of proper services to impose liability upon the medical professional for malpractice. See *Roe v. Federal Ins. Co.*, 412 Mass. 43, 587 N.E.2d 214 (1992).

We conclude, based on the foregoing rationale, that there must be a causal relationship between the alleged harm and the complained-of professional act or service. When there is a claim of medical malpractice based on unwanted sexual contact, the determination of liability should focus not solely on the locale of the alleged harm or the professional status of the actor, but, rather, on the context of the alleged medical service involved in the action. In other words, it is the physician's deviation from the recognized medical standard of care *during the course of treatment* that is the essence of a claim for medical malpractice, and *there must exist a causal relationship between the alleged harm and the complained-of deviation from that standard of care in order for liability to attach.*

(Emphasis in original.) (Emphasis supplied.) *Iwanski*, 259 Neb. at 642, 611 N.W.2d at 614. In applying this standard to the facts, we held that the relationship between the adult parties was consensual and that as to the only incident related to the direct provision of medical services, the evidence established that the sexual act between the patient and the physician took place well after the physician had completed a gynecological examination. We thus held that there was no actionable claim for "professional negligence." *Id.* at 643, 611 N.W.2d at 615.

Relying on our decision in *Marx, supra*, and consistent with our decision in *Iwanski, supra*, the clear majority rule among other jurisdictions is that outside the unique circumstance of mishandling the transference phenomenon in psychiatric counseling, sexual conduct is not a professional act or service for which medical malpractice insurance coverage is provided. See, e.g., *Snyder v. Major*, 789 F. Supp. 646 (S.D.N.Y. 1992), *modified* 818 F. Supp. 68 (S.D.N.Y. 1993); *St. Paul Ins. Co. of Illinois v. Cromeans*, 771 F. Supp. 349 (N.D. Ala. 1991); *Physicians Ins.*

Co. v. Pistone, 555 Pa. 616, 726 A.2d 339 (1999); *D.D. v. Insurance Co. of North America*, 905 P.2d 1365 (Alaska 1995); *N.M. Physicians Mut. Liability v. LaMure*, 116 N.M. 92, 860 P.2d 734 (1993); *Roe v. Federal Ins. Co.*, 412 Mass. 43, 587 N.E.2d 214 (1992); *Niedzielski v. St. Paul Fire & Marine Ins. Co.*, 134 N.H. 141, 589 A.2d 130 (1991); *S. C. Med. Malpractice Liab. Ins. v. Ferry*, 291 S.C. 460, 354 S.E.2d 378 (1987); *Smith v. St. Paul Fire & Marine Ins. Co.*, 353 N.W.2d 130 (Minn. 1984); *American Casualty Co. v. Corum*, 131 Or. App. 445, 885 P.2d 726 (1994), *vacated on other grounds* 321 Or. 135, 894 P.2d 461 (1995); *Lindheimer v. St. Paul Fire & Marine Ins.*, 643 So. 2d 636 (Fla. App. 1994); *Steven G. v. Herget*, 178 Wis. 2d 674, 505 N.W.2d 422 (Wis. App. 1993); *Cluett v. Medical Protective Co.*, 829 S.W.2d 822 (Tex. App. 1992); *Standard Fire Ins. v. Blakeslee*, 54 Wash. App. 1, 771 P.2d 1172 (1989); *St Paul Fire Ins v Quintana*, 165 Mich. App. 719, 419 N.W.2d 60 (1988); *Hirst v. St. Paul Fire & Marine Ins. Co.*, 106 Idaho 792, 683 P.2d 440 (Idaho App. 1984). See, generally, Annot., 60 A.L.R.5th 239 et seq. (1998 & Supp. 2002).

There is no dispute among appellate courts, even in those cases that find insurers to be liable for sexual contact, about the applicability of the holding in *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968). Generally, cases that find sexual contact to be "professional services" do so by either (1) expanding the scope of the "act" to include the sexual contact or (2) lowering the requirement for causation between the act and the damages. There is no dispute that when a court is determining the coverage of a professional liability insurance policy, it must examine the nature of the act performed, rather than the title or professional character of the actor. *Niedzielski, supra*.

Based on these standards, courts have generally refused to require insurers to provide coverage for sexual acts, based on professional liability insurance policies with medical care providers, because sexual activity with a patient is not a part of the delivery of professional services or part of medical treatment. See *Snyder, supra*. When the physician's sexual contact with his or her patient is not necessitated by the particular course of medical treatment, then the malpractice insurance policy does not provide coverage for the damages sustained by the victim. *Blakeslee, supra*.

The most well-known statement of the minority rule is *St. Paul Fire & Marine Ins. Co. v. Asbury*, 149 Ariz. 565, 720 P.2d 540 (Ariz. App. 1986). In that case, the Court of Appeals of Arizona articulated the following rationale for concluding that sexual assault was a "professional service":

The claims of Dr. Asbury's patients that he manipulated their clitorises while performing routine gynecological examinations, if true, was tortious conduct committed while providing professional services and covered by his insurance policy. Most of the cases cited to us by St. Paul are distinguishable because the tortious sexual abuse of the patient was not intertwined with and inseparable from the services provided.

Id. at 567, 720 P.2d at 542. Accord, *St. Paul Fire & Marine Ins. v. Torpoco*, 879 S.W.2d 831 (Tenn. 1994); *St. Paul Fire and Marine Ins. Co. v. Shernow*, 222 Conn. 823, 610 A.2d 1281 (1992). The *Asbury* court adopted the rationale of the trial court in that case, quoting the trial court's opinion:

"The question of insurance coverage does not turn on whether the conduct was negligent or intentional, or whether or not there was an assault and battery. Regardless of the category in which the underlying complaints are placed, they clearly allege tortious conduct while treating the patients, and seek damages resulting from the providing of professional services. Furthermore, the tortious conduct, if it occurred, took place in the course of and as an inseparable part of the providing of professional services. Consequently, any damages would be those resulting from the providing of professional services by the insured."

Asbury, 149 Ariz. at 566, 720 P.2d at 541. Accord, *Torpoco*, *supra*; *Shernow*, *supra*. See, also, *Princeton Ins. Co. v. Chunmuang*, 151 N.J. 80, 698 A.2d 9 (1997). But see, e.g., *St. Paul Ins. Co. of Illinois v. Cromeans*, 771 F. Supp. 349, 353 (N.D. Ala. 1991) (rejecting *Asbury* as "illogical"); *Physicians Ins. Co. v. Pistone*, 555 Pa. 616, 623, 726 A.2d 339, 343 (1999) (stating *Asbury* "has no basis in logic"); *N.M. Physicians Mut. Liability v. LaMure*, 116 N.M. 92, 97, 860 P.2d 734, 739 (1993) (uncertain of *Asbury* test's "workability or its support in public policy").

However, the *Asbury* rule has received significant criticism. First, it has been noted that in determining the scope of a liability insurance policy, the issue "is not whether the conduct in question is negligence, but whether a particular contract was intended to cover this conduct." *Snyder v. Major*, 789 F. Supp. 646, 650 (S.D.N.Y. 1992), *modified* 818 F. Supp. 68 (S.D.N.Y. 1993). See *Volquardson v. Hartford Ins. Co.*, *ante* p. 337, 647 N.W.2d 599 (2002). The minority rule would be more logical if presented in the context of a tort action, i.e., expanding the set of wrongs from which tort victims should be protected. See *Snyder, supra*. However, where the issue is the scope of coverage under an insurance policy, expanding the meaning of "professional services" is inconsistent with our responsibility to give effect to the intent of the parties at the time the contract was written. See *Volquardson, supra*. In light of the case law set out above supporting the majority rule, along with our own decisions in *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968), and *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000), it is unlikely that parties entering into medical malpractice insurance contracts are operating under the assumption that the sexual misconduct of physicians may be covered by the malpractice insurance. It would decrease the likelihood of capturing the parties' intent to hold otherwise. See *Snyder, supra*.

Furthermore, the minority rule erodes the concept of legal causation until the requirement of proximate cause is essentially meaningless. As stated by one commentator:

The decisions that find coverage for allegations of sexual abuse or molestation against physicians and dentists do so only through flawed reasoning. They appear to apply what amounts to a simple "but for" test: Because the assault occurred during an otherwise proper and necessary medical procedure, the injury arose out of the performance of that professional service. Of course, the "but for" test is virtually boundless, as almost no subsequent event would take place were it not for some antecedent event, and as all events are, at some level, interrelated. It is simply unreasonable to conclude that conduct such as sexual molestation of a patient, which must be known to be only harmful and not beneficial, and which also must be known by the

doctor to further no preventive or corrective interest of the patient, is part of a professional medical procedure. It cannot, therefore, be part of the professional service that the doctor contracts with the patient to provide.

David S. Florig, *Insurance Coverage for Sexual Abuse or Molestation*, 30 Tort & Ins. L.J. 699, 727 (1995). This analysis, with which we agree, echoes some of the most basic and familiar concepts of tort causation.

"Proximate cause" . . . is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation." As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.

This limitation is to some extent associated with the nature and degree of the connection in fact between the defendant's acts and the events of which the plaintiff complains.

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41 at 264 (5th ed. 1984 & Supp. 1988).

The majority rule, then, expresses a difficult truth: that appellants' injuries, in the instant case and most others, are not caused by any act of medical treatment that would normally be associated with the provision of a "professional service." The common thread running throughout the majority rule cases is the necessity for, and lack of, a direct causal link between appellants' damages and any legitimate medical treatment. "[T]here must be a causal relationship between the alleged harm and the complained-of professional act or service, that is, it must be a medical . . . act or service that causes the harm, not an act or service that requires no professional skill." *Roe v. Federal Ins. Co.*, 412 Mass. 43, 49,

587 N.E.2d 214, 217 (1992). Accord, *Lindheimer v. St. Paul Fire & Marine Ins.*, 643 So. 2d 636 (Fla. App. 1994); *Steven G. v. Herget*, 178 Wis. 2d 674, 505 N.W.2d 422 (Wis. App. 1993). “[T]here must be a causal relationship between the treatment (i.e., professional services) and the harm alleged by the victim.” *Standard Fire Ins. v. Blakeslee*, 54 Wash. App. 1, 10, 771 P.2d 1172, 1177 (1989) (citing *Hirst v. St. Paul Fire & Marine Ins. Co.*, 106 Idaho 792, 683 P.2d 440 (Idaho App. 1984)).

As most clearly stated by the Supreme Court of New Hampshire, “[t]he specified source out of which damages must arise, according to the terms of the insurance policy, is professional services rendered, or which should have been rendered.” *Niedzielski v. St. Paul Fire & Marine Ins. Co.*, 134 N.H. 141, 146-47, 589 A.2d 130, 133 (1991). The minority rule abrogates this principle.

The court in *St. Paul Fire & Marine Ins. Co. v. Asbury*, 149 Ariz. 565, 720 P.2d 540 (Ariz. App. 1986), attempts to connect the plaintiffs’ damages to professional services by asserting that the professional service “is intertwined with and inseparable from” the tortious conduct which was the actual direct cause of the plaintiffs’ damages. However, the *Asbury* approach rests on the assertion that it is impossible to separate legitimate medical treatment from sexual assault. There may, in some cases, be a fact question presented as to whether the medical professional’s conduct was, in fact, legitimate medical treatment. This does not mean, however, that we can conclude it is not possible for the trier of fact to separate legitimate medicine from a sexual assault, to determine which acts of the care provider were professional treatment and which were not, and then assess by which acts the plaintiffs’ damages were caused. In any event, there is no fact question presented in the instant case as to which acts of Schrein caused appellants’ damages, and none of those acts are within the scope of coverage of Schrein’s liability insurance policy.

For the foregoing reasons, we reject appellants’ contention that this court should follow the minority rule. Instead, we continue to adhere to the majority rule as indicated by our decisions in *Marx v. Hartford Acc. Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968), and *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000). In

the instant case, the substance of appellants' allegations is that Schrein's behavior went beyond the scope of legitimate medical treatment and that their damages result entirely from actions that were not legitimated by any appropriate medical purpose. Appellants did not establish any harm attributable to any failure to properly diagnose or treat a medical condition. Rather, their injuries and damages resulted solely from the affirmative acts of abuse and molestation committed by Schrein under the guise of medical examination and treatment. Consequently, the "act" that caused each of appellants' damages was not medical treatment and not a "professional service" within the meaning of the policy.

CONCLUSION

As previously indicated, the foregoing discussion is substituted for that section of our opinion in *R. W. I* in which we erred and which has been withdrawn. In all other respects, we continue to adhere to the reasoning and conclusions of *R. W. I*, as they pertain to appellants' remaining assignments of error on appeal and rehearing. For the reasons stated in *R. W. I* and this supplemental opinion, we affirm the judgment of the district court.

MOTIONS FOR REHEARING SUSTAINED.

FORMER OPINION MODIFIED.

WRIGHT and McCORMACK, JJ., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR, v.
GARY G. THOMPSON, RESPONDENT.

652 N.W.2d 593

Filed November 1, 2002. No. S-01-489.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____: _____. In a proceeding to discipline an attorney, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception.
3. **Disciplinary Proceedings.** Under Neb. Ct. R. of Discipline 10(L) (rev. 2001), the Nebraska Supreme Court may, in its discretion, consider the referee's findings as final and conclusive.

4. _____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors.
5. **Disciplinary Proceedings: Proof.** To establish depression as a mitigating factor in a proceeding to discipline an attorney, 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.
6. **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 and 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.
7. _____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
8. _____. For the 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.
9. _____. The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.

Original action. Judgment of suspension and probation.

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

Carole McMahan-Boies, of Pepperl & McMahan-Boies Law Offices, for respondent.

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

PER CURIAM.

The Counsel for Discipline of the Nebraska Supreme Court filed formal charges against Gary G. Thompson, respondent, alleging various ethical violations. Later, amended formal charges were filed. In a stipulation filed with the referee, Thompson admitted the allegations in the amended formal charges; admitted he violated his oath of office, Neb. Rev. Stat. § 7-104 (Reissue 1997); and admitted he violated various provisions of the Code of Professional Responsibility. The referee recommended a sanction of a 120-day mandatory suspension, followed by at least 2 years' probation. The only issue presented in this proceeding is the appropriate sanction for Thompson's unethical conduct.

FACTS

Thompson was admitted to the practice of law on June 23, 1967, and, since 1971, has been engaged in the practice of law in Beatrice, Gage County, Nebraska. In April 1997, Thompson formed a partnership with Paul W. Korslund.

The Korslund and Thompson partnership apparently flourished, and in May 1997, they hired another attorney as an associate. In October 1998, Korslund was appointed as a district court judge and left the partnership. Thompson then formed a new partnership with the associate, and they hired another attorney.

When Korslund left the partnership, his caseload was transferred to Thompson. Thompson attributes much of his problems to his increased caseload. But, as noted by the referee, a careful examination of the timeline indicates that Thompson's neglect and misrepresentations began before Korslund left the partnership. It does appear, however, that Thompson's unethical behavior became more severe following Korslund's departure, and the three counts of misconduct largely stem from this time period.

COUNT I

In October 1997, Thompson agreed to represent William J. Decker on a claim against Decker's disability insurance carrier, The Equitable Life Assurance Society (Equitable). On April 14, 1998, Thompson filed a petition in Gage County District Court. Equitable then removed the case to federal court on June 3. Thompson admitted that he lacked federal civil court experience and that when the case was removed, he did nothing to refresh or educate himself on federal civil procedure.

On August 29, 1998, the magistrate entered a case progression order setting a deadline for the completion of mandatory disclosures. Thompson and Equitable's counsel then agreed to extend the deadline. On November 18, Equitable served its initial disclosures and also filed a request for production of documents.

Thompson failed to comply with the deadline for mandatory disclosures and did not respond to the request for production of documents. On March 23, 1999, Equitable moved the court to compel Decker to provide initial disclosures and to respond to Equitable's request for production of documents. Thompson did not reply, and on April 16, the magistrate granted Equitable's

motion, ordered Decker to provide initial disclosures and respond to discovery by May 10, extended the progression schedule, and approved sanctions.

Thompson, however, again failed to respond, and Equitable moved for dismissal on May 24, 1999. Although Thompson served initial disclosures on June 17, he did not respond to Equitable's request for production of documents. Because of Thompson's failure to comply with discovery requirements and the order of the court, Decker's case was dismissed on July 19 and another sanction was imposed. Thompson personally paid all sanctions.

Thompson actively misrepresented the status of the case to Decker. He never voluntarily told Decker about his failure to provide discovery, about the sanctions, or about the dismissal of the case. Instead, he continued to assure Decker that the case was progressing normally.

In April 2000, Decker became suspicious about the status of the case and contacted another attorney. That attorney quickly determined that the case had been dismissed. On April 11, Decker and his wife went to see Thompson, ostensibly to find out the status of the case. Thompson initially told the Deckers that things were fine. When the Deckers confronted Thompson with the information they had obtained, Thompson admitted that the case had been dismissed, but represented that he had refiled the case in October 1999. In fact, Thompson did not attempt to reinstate the case until April 11, 2000. The district court denied that motion on April 26. It should be noted, however, that after Thompson withdrew, Decker was allowed to refile.

The referee determined that on Thompson's representation of Decker, the Counsel for Discipline had established by clear and convincing evidence that Thompson had violated his oath of office and the following provisions of Canons 1, 6, and 7 of the Code of Professional Responsibility:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

....

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

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

....

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him or her.

....

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

....

(2) Fail to carry out a contract of employment entered into with a client for professional services

....

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his or her representation of a client, a lawyer shall not:

....

(5) Knowingly make a false statement of law or fact.

COUNT II

Thompson became the attorney in fact for Gary Dickey on October 24, 1997. There was conflicting evidence about the nature of the representation. Dickey was incarcerated in an out-of-state correctional institution, and according to Dickey, he retained Thompson to recover some personal property in the possession of Spencer Fentress. Thompson claimed that he told Dickey that the property or proceeds from the sale of property could not be recovered until after Dickey was released from confinement. Thompson admitted, however, that he told Dickey that he had commenced a civil action against Fentress for the recovery of Dickey's personal property, when, in fact, he had filed no such action. The referee also concluded that Thompson had been

neglectful in failing to answer several letters and telephone calls from Dickey.

Thompson continued to represent Dickey after Dickey filed his complaint with the Counsel for Discipline. After Dickey's release, Thompson successfully prosecuted a replevin action against Fentress.

The referee determined that the Counsel for Discipline had established by clear and convincing evidence that Thompson had violated his oath of office and the following provisions of Canons 1, 6, and 7 of the Code of Professional Responsibility:

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 6-101 Failing to Act Competently.

(A) A lawyer shall not:

....

(3) Neglect a legal matter entrusted to him or her.

....

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his or her representation of a client, a lawyer shall not:

....

(5) Knowingly make a false statement of law or fact.

COUNT III

In 1996, Deward Cummings filed a pro se discrimination suit against his former employer, the U.S. Postal Service, in federal court. In March 1997, Thompson entered his appearance on behalf of Cummings. Thompson filed an amended complaint, but missed the deadline for making initial mandatory disclosures. He then moved the court for leave to file a brief in opposition to the defendant's motion to dismiss. The court granted leave, but Thompson failed to file a brief. Instead, Cummings, through another attorney, filed bankruptcy. Thompson testified

that he did some research on the brief, but, because Cummings anticipated bankruptcy would stay the proceedings, he did not file the brief.

In August 1998, Cummings' case was returned to the active trial docket. The magistrate set January 19, 1999, as the date for the pretrial conference. Thompson failed to inform Cummings of the date and did not appear at the conference. Thompson testified that although he received notice of the conference, he failed to note the date on his calendar. Thompson also failed to properly follow the federal rules of civil procedure for two motions to produce. Both motions were considered abandoned by the magistrate because of Thompson's errors and omissions.

Finally, Thompson failed to file a brief in opposition to the defendant's motion for summary judgment. Although the court entered summary judgment for the defendant, the referee concluded that the failure to file the brief did not prejudice Cummings. The referee reasoned that the court's ruling was based on lack of jurisdiction and that the order showed that no evidence or point of law would have changed the court's ruling.

The referee determined that the Counsel for Discipline had established by clear and convincing evidence that Thompson had violated his oath of office and the following provisions of Canons 1 and 6 of the Code of Professional Responsibility:

DR 1-102 Misconduct:

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

....

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it.

....

(3) Neglect a legal matter entrusted to him or her.

THOMPSON'S DEPRESSION

For each count, Thompson affirmatively alleged depression as a mitigating factor. Thompson had long suspected that depression played a role in his life, and even engaged in self-treatment with

St. John's Wort, but he failed to associate his unethical behavior with depression. In November 2001, Thompson sought a psychiatric evaluation from Walter J. Duffy, M.D. Duffy referred Thompson to his partner, Robert G. Arias, Ph.D., a psychotherapist and neuropsychologist. Arias diagnosed Thompson as suffering from "major depressive disorder, recurrent, moderate." Arias testified that Thompson's symptoms included decreased motivation, increased procrastination, sleep disturbance, concentration problems, and a high level of guilt. Thompson testified that these symptoms became predominate when Korslund left the partnership and transferred his caseload to Thompson.

Arias testified that the primary emotion underlying Thompson's depression was a feeling of being ashamed of himself, which resulted in an inclination on Thompson's part to construct an external view of himself that belies how he actually feels. This leads to difficulty in setting limits. For Thompson, this was reflected in the large number of community projects in which he took part and in his willingness to accept all clients regardless of their ability to pay. According to Arias, the result is a cycle of "'learned helplessness.'" In other words, people like Thompson take on more than they can do to combat feelings of inadequacy, but, because they can never complete all the tasks assumed, their sense of inadequacy gets worse.

Arias also testified that depression would not cloud a person's ability to distinguish right from wrong, but that a major depressive disorder can compromise a person's motivation to such an extent that the person cannot do what he or she knows should be done.

When asked about the possibility of Thompson's experiencing a reoccurrence of depression, Arias testified that the greater the number of past episodes, the more likely one will be to suffer an episode in the future. Arias also testified that treatment significantly diminished the prospects of relapse and that one goal of Thompson's treatment would be to improve his ability to recognize that something was wrong before things got out of hand.

At the time of the hearing, Thompson was receiving treatment for his depression from both Arias and Duffy, including medication and psychotherapy. Arias testified that Thompson

was making significant progress and that he was “fairly optimistic” about Thompson’s prognosis.

REFEREE’S RECOMMENDED SANCTION

The referee concluded that Thompson’s conduct, particularly in his representation of Decker, would ordinarily result in a severe sanction. But the referee found the evidence of Thompson’s depression and its effect on his professional behavior to be “very persuasive” and used it as a mitigating factor. The referee recommended that Thompson be suspended from the practice of law for at least 120 days and that upon reinstatement, he be subject to probation for not less than 2 years. As a condition for reinstatement, the referee recommended that Thompson be required to continue his therapy. For the terms of probation, the referee recommended (1) continuing treatment, to be monitored by the Counsel for Discipline or the Nebraska Lawyers Assistance Program; (2) limiting Thompson’s practice to those matters where he was experienced and felt comfortable and not allowing Thompson to go outside those areas unless he associates with a lawyer experienced in the relevant area of law; and (3) requiring a calendar control system to be monitored by the Counsel for Discipline.

ASSIGNMENTS OF ERROR

Neither Thompson nor the Counsel for Discipline takes exception to the factual findings of the referee. The Counsel for Discipline takes exception to (1) the length of the recommended period of suspension and (2) the terms of probation.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002); *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001).

ANALYSIS

[2,3] Under existing case law, we are limited in our review to examining only those items to which the parties have taken exception. *State ex rel. Counsel for Dis. v. Apker, supra*. Under Neb. Ct. R. of Discipline 10(L) (rev. 2001), we may, in our discretion, consider the referee’s findings as final and conclusive. Accordingly,

we find, on our de novo examination of the record, clear and convincing evidence that Thompson's conduct, set forth above, violated his oath of office and the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1), (4), and (5); Canon 6, DR 6-101(A)(1) through (3); and Canon 7, DR 7-101(A)(2).

The facts we have set out above establish that Thompson committed serious ethical breaches that would ordinarily result in a severe sanction. Over a period of almost 3 years, Thompson engaged in a pattern of neglect which severely frustrated his clients' attempts to seek redress through the judicial process. Particularly distressing is Thompson's handling of the Decker case. Not only did his neglect result in the dismissal of the case and the imposition of sanctions, but he repeatedly misrepresented to Decker and his wife the status of the case.

A lawyer's integrity and the client's right to rely upon the lawyer's word form the bedrock of an attorney-client relationship. A knowingly false statement made by a lawyer to a client not only constitutes a breach of trust but also taints the reputation of the bar as a whole and requires firm disciplinary action in order to protect the public, as well as deter others from engaging in such conduct.

State ex rel. NSBA v. Aupperle, 256 Neb. 953, 962, 594 N.W.2d 602, 608 (1999).

[4] However, "[t]he determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors." *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. at 749, 642 N.W.2d at 169. In this case, Thompson asserts his depression as a mitigating factor. Depression is a serious mental illness, and lawyers are not immune to its debilitating effects. In fact, a growing body of literature suggests lawyers are especially susceptible to experiencing depression. Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & Health 1 (1995-96); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871 (1999). In a recent disciplinary case that, much like this one, involved attorney neglect and misrepresentations, the Iowa Supreme Court described

the interaction of depression and attorney misconduct and how depression affects the disciplinary process:

Clearly, misrepresentation is the most serious violation in this case. The concept of such conduct is repulsive to our system of justice and its very presence within our profession supports serious discipline, justified by the need to deter the offender and others, protect the public, and maintain the reputation of the profession. . . . Yet, against the backdrop of depression, misrepresentation can take on added meanings, as can neglect. This backdrop complicates the imposition of discipline and requires us to fully examine the impact of depression.

The evidence in this case reveals that serious depression often results from chemical imbalances in the brain that cause those afflicted to be plagued by growing and overwhelming feelings of hopelessness and despair. It also reveals that depression can take hold of a person without his or her knowledge or understanding of the need for treatment. . . . With the state of mind brought on by depression, it is understandable how neglect, and even excuses for non-performance, can become part of the disease. . . . Thus, unethical professional conduct can double as a symptom of depression. . . . Moreover, these symptoms too often appear before the disease is diagnosed and treatment is sought.

(Citations omitted.) *Sup. Ct. Bd. of Prof. Ethics v. Grotewold*, 642 N.W.2d 288, 294-95 (Iowa 2002).

[5] We have recognized that “[t]he nature of depression and the psychiatrist-assisted potential for cure are mitigating factors” in determining an appropriate sanction. *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 1008, 540 N.W.2d 359, 363 (1995). 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. Accord ABA Standards for Imposing Lawyer Sanctions § 9.32(i) (Supp. 1992). These are factual questions.

Here, the referee concluded that “[t]he testimony and evidence established that [Thompson] indeed suffered from a major

depressive episode during much of the period at issue, and that [Thompson's] depression symptoms played a major role in his conduct." The referee also determined that treatment would reduce the risk of further misconduct. The Counsel for Discipline did not take exceptions to the referee's factual findings, and under rule 10(L), we find the referee's conclusions concerning Thompson's depression to be final and conclusive. See *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001). As a result, we must decide how Thompson's depression should impact his sanction.

[6-8] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and 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. Spindler*, ante p. 501, 648 N.W.2d 319 (2002); *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Each case must be evaluated individually in light of its particular facts and circumstances. *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000). For the 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. Spindler*, supra; *State ex rel. NSBA v. Frank*, 262 Neb. 299, 631 N.W.2d 485 (2001).

The nature of depression, however, clouds several of the factors we normally consider in determining the appropriate sanction. Using a sanction as a deterrent for others loses some of its value. See *Sup. Ct. Bd. of Prof. Ethics v. Grotewold*, supra. The evidence in this case was that a major depression inhibits a person's ability to make rational choices by compromising his or her motivation to such an extent that the person cannot do what he or she knows should be done. As a result, threatening those like Thompson who suffer from an untreated mental illness with a severe sanction will have a limited effect, at best.

Our consideration of the maintenance and reputation of the bar as a whole is also affected by the nature of depression. See

State ex rel. NSBA v. Gleason, 248 Neb. 1003, 1007, 540 N.W.2d 359, 362 (1995) ("maintenance of the reputation of the bar is important to the court. The question is how to maintain the reputation"). The bar is not served by imposing punitive sanctions against those suffering from treatable mental illness. Instead, "the reputation of the profession can be vindicated by the diagnosis and successful treatment of the disease." *Sup. Ct. Bd. of Prof. Ethics v. Grotewold*, 642 N.W.2d 288, 295 (Iowa 2002).

The attitude of the offender is also of less importance because depression can negatively affect the attorney's attitude without his or her knowledge. In this case, Thompson repeatedly failed to cooperate with the Counsel for Discipline. Normally, such conduct would be treated as an aggravating factor, see *State ex rel. NSBA v. Simmons*, 259 Neb. 120, 608 N.W.2d 174 (2000), but here, the parties agree that Thompson's failure to cooperate with the Counsel for Discipline was a manifestation of Thompson's depression. Although Thompson initially failed to cooperate with the Counsel for Discipline, once treatment began, he became cooperative and expressed regret for the harm he had caused.

[9] Our main concern in determining what effect Thompson's depression should have on his sanction is the protection of the public. As we have repeatedly said, "the purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice." *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 568, 635 N.W.2d 427, 432-33 (2001). Accord *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000). For many lawyers suffering from depression, the proper treatment can return them to being productive members of the bar with little risk that they will engage in future misconduct. There is always the danger, however, that their treatment may be ineffective or that, even if effective, they will stray from it. Accordingly, it is necessary to construct a sanction which adequately protects the public by ensuring both that the treatment has been successful and that the lawyer will continue with the treatment.

In cases involving depression as a mitigating factor, a period of mandatory suspension coupled with terms of reinstatement will often be appropriate. The suspension is not designed as

punishment. Instead, it is meant as a time period in which the respondent can seek treatment without posing a danger to his or her clients. Once the respondent can demonstrate that treatment has resulted in a meaningful and sustained recovery, he or she should then be placed on a period of probation with treatment and practice monitoring components.

At the hearing there was evidence that the treatment of Thompson's depression was having a positive effect, but Thompson also candidly admitted that he was currently unable to engage in a full general practice of law. After reviewing the evidence, we agree with the referee that a suspension of 120 days adequately ensures there will be evidence of a meaningful and sustained recovery before Thompson is allowed to return to practice. At the end of that period, Thompson may apply for reinstatement subject to the terms of probation. Upon his application for reinstatement, Thompson will have the burden of proving that he is fit to practice law under the terms of his probation, including that treatment for his depression has resulted in a meaningful and sustained recovery. Such proof shall include a showing that he has continued therapy with a qualified psychiatrist and psychotherapist, unless such psychiatrist releases Thompson from treatment.

Following readmission, Thompson shall be subject to probation for a period of not less than 2 years. The Counsel for Discipline filed exceptions to the referee's recommended terms of probation. The referee recommended a treatment monitoring program and a practice monitoring program, both of which were to be monitored by the Counsel for Discipline. Apparently, the Counsel for Discipline complains that its office is not capable of acting as a monitor. Counsel for Discipline suggests that the Nebraska Lawyers Assistance Program (NLAP) be the monitor for the treatment monitoring program and that a practicing attorney be arranged as the monitor for the practice monitoring program.

As for the treatment component of Thompson's probation, he will be required to comply with treatment recommendations of his treating psychotherapist and psychiatrist as monitored by NLAP. If at any time NLAP believes that Thompson has failed to comply with his treatment requirements, it shall report the same to the Counsel for Discipline.

As for the practice monitoring component of Thompson's probation, the Counsel for Discipline shall serve as the monitor. However, a practicing attorney may be substituted as the monitor if Thompson and the Counsel for Discipline can agree upon a practicing attorney who is willing to serve as Thompson's monitor. If a practicing attorney does serve as the monitor, he or she shall not be compensated for his or her duties, but he or she shall be reimbursed by Thompson for actual expenses incurred. We note that the record shows that a local attorney volunteered to act in a supervisory capacity.

During the probationary period, Thompson will be limited to those matters where he has experience and is comfortable. The Counsel for Discipline and Thompson should agree on these areas. Thompson may not accept a case outside the agreed-upon areas without notifying his practice monitor and associating with a lawyer experienced in the relevant area of law.

As part of the practice monitoring program, Thompson will also be required to maintain a calendar control system in which Thompson shall, at least monthly, provide a list of all cases for which he is then responsible to his practice monitor. The names of Thompson's clients shall be kept confidential by way of a number assigned to each case. It will be the duty of Thompson to inform his clients that he is required to provide this list to his practice monitor.

The lists shall include the following:

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. Type and date of work completed on file (i.e., pleading, correspondence, document preparation, discovery, court hearing).
5. Type and date of work that should be completed on the case.
6. Any applicable statute of limitations and its date.

The practice monitor shall have the right to contact Thompson with any questions the monitor may have regarding the list. If the monitor is not the Counsel for Discipline, then if at any time the monitor believes Thompson has violated a disciplinary rule or has failed to comply with the terms of this probation, he or she shall report the same to the Counsel for Discipline.

At the end of the 2-year probationary period, it will be Thompson's burden to show cause why the period of probation should not be extended for another year. If probation is extended, it will be Thompson's burden to show cause why the period of probation should not be extended for an additional year, until Thompson is released from probation.

CONCLUSION

It is the judgment of this court that Thompson be suspended from the practice of law for a period of 120 days, effective immediately, after which time Thompson may apply for readmission consistent with the terms of reinstatement as outlined above. Following reinstatement, Thompson shall be subject to a term of probation for not less than 2 years with the terms as outlined above. Thompson shall comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, Thompson shall be subject to punishment for contempt of this court. Accordingly, Thompson 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.

NEFF TOWING SERVICE, INC., APPELLEE, v. UNITED STATES
FIRE INSURANCE CO., DOING BUSINESS THROUGH
CRUM & FORSTER INSURANCE, APPELLANT.

652 N.W.2d 604

Filed November 1, 2002. No. S-01-960.

1. **Summary Judgment: Jurisdiction: Appeal and Error.** Generally, the denial of a motion for summary judgment is not a final, appealable order. However, 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.
2. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.

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.
4. **Insurance: Contracts: Intent.** An insurance policy is a contract. An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
5. **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.
6. **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.
7. **Insurance: Contracts: Liability.** Generally, where the event for which an insured seeks coverage is plainly outside the scope of the coverage encompassed in the policy according to a plain reading of its terms, an insurer may not be obligated to provide coverage to the insured.
8. **Insurance: Liability.** In determining its duty to defend, an insurer must not only look to the petition, but must also investigate and ascertain the relevant facts from all available sources.
9. ____: _____. Where the insured has undertaken the responsibility for maintaining personal property and is in fact attempting to exercise control thereof at the time of an occurrence which damages the property, the insured has that degree of care, custody, or control of the property contemplated by a liability coverage exclusion.
10. **Insurance: Contracts: Claims.** Although an insurer is obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded with directions.

Thomas M. Locher, Thomas M. Braddy, and Ralph A. Froehlich, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellant.

Eugene L. Hillman and Patricia McCormack, of Hillman, Forman, Nelsen, Childers & McCormack, for appellee.

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

STEPHAN, J.

In this declaratory judgment action, United States Fire Insurance Co. (USFIC) appeals from an order of the district court for

Douglas County determining that an insurance policy issued to Neff Towing Service, Inc. (Neff Towing), provided liability coverage for a property damage claim asserted against Neff Towing. We reverse, based upon our conclusion that the claim falls within an exclusion to the liability coverage provided by the policy.

BACKGROUND

The relevant facts are either stipulated or uncontroverted. Neff Towing is a Nebraska corporation with its principal place of business in Omaha, Nebraska. It is engaged in the business of providing towing and trucking services. USFIC is a New York corporation with its home office located in the State of New York. USFIC issued insurance policy No. 136 145274 3 to Neff Towing, effective December 10, 1993, to December 10, 1994. The policy, referred to as a "Garage Policy," defines "[g]arage operations" as follows:

"Garage operations" means [sic] the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations. "Garage operations" includes [sic] the ownership, maintenance or use of the "autos" indicated in SECTION I of this Coverage Form as covered "autos." "Garage operations" also include all operations necessary or incidental to a garage business.

The term "[a]uto" is defined by the policy to mean "a land motor vehicle, trailer or semi-trailer." A schedule in the policy lists "autos" owned by Neff Towing, including a 1985 GMC wrecker and a 1984 Freightliner tractor. The policy includes both "Liability Coverage" and "Garagekeepers Coverage," which are described in separate sections of the policy.

Under the Liability Coverage, the term covered "autos" includes the scheduled vehicles owned by the insured, as well as certain hired and nonowned vehicles used in connection with the insured's garage business. The Liability Coverage provides, under the heading "'Garage Operations' — Covered 'Autos'":

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident"

and resulting from "garage operations" involving the ownership, maintenance or use of covered "autos."

....
We have the right and duty to defend any "suit" asking for such damages However, we have no duty to defend "suits" for . . . "property damage" . . . not covered by this Coverage Form.

The "Exclusions" section of the Liability Coverage provides that coverage does not apply to property damaged while in the insured's "care, custody or control."

Under the separate "Garage Coverage Form" provided by the policy, a covered "auto" is defined as "[a]ny customer's 'auto' while left with your 'garage operations' for service, repair, storage or safekeeping." The Garagekeepers Coverage obligates USFIC to

pay all sums the "insured" legally must pay as damages for "loss" to a covered "auto" or "auto" equipment left in the "insured's" care while the "insured" is attending, servicing, repairing, parking or storing it in your "garage operations" . . . [c]aused by . . . (1) [t]he covered "auto's" collision with another object; or (2) [t]he covered "auto's" overturn.

The Garagekeepers Coverage further provided that USFIC had the "right and duty to defend any 'suit' asking for these damages," but no duty to defend suits for losses which were not covered.

On November 12, 1994, Neff Towing was called to tow a disabled tractor-trailer unit owned by CRST, Inc., from a location near mile marker 17 on Interstate 80 east of Council Bluffs, Iowa. Neff Towing dispatched two towing vehicles to the scene of the disabled CRST tractor-trailer unit. One towing unit was a 1985 GMC wrecker, and the other was a 1984 Freightliner tractor. Neff Towing's GMC wrecker removed the disabled tractor from the scene, leaving the trailer unattached. While Neff Towing was attempting to attach its Freightliner tractor to the trailer, the trailer tipped onto its side and was damaged. Neff Towing's employee left the scene without attaching the trailer to the towing unit. On the following day, the president of Neff Towing returned to the scene where he observed CRST loading cargo from the damaged trailer onto another tractor-trailer, which was then driven away. Neff Towing then righted the damaged

empty trailer and towed it away for repairs. Pursuant to the Garagekeepers Coverage under the aforementioned policy, USFIC paid CRST \$9,187.99 in full settlement of the damage to its trailer. The Garagekeepers Coverage did not extend to the cargo which had been contained in the trailer at the time of damage. Unlike the Liability Coverage which covers "'property damage,'" defined as "damage to or loss of use of tangible property," the Garagekeepers Coverage is limited to paying for damages to a covered "'auto'" or "'auto' equipment."

Thereafter, CRST filed suit against Neff Towing, alleging that CRST delivered and transferred possession of the trailer to Neff Towing for the purpose of towing the trailer from the roadside on November 12, 1994, and that when CRST reclaimed possession of the trailer on the following day, its contents were damaged in the amount of \$53,438, which CRST sought to recover with interest. Neff Towing filed an answer specifically alleging that "on or about November 12, 1994, defendant Neff Towing did come into possession of a trailer owned and operated by the plaintiff for purposes of towing said trailer." Neff Towing specifically denied that "the contents of the trailer, while in the possession of [Neff Towing] were damaged in the nature and to the extent as alleged in plaintiff's petition."

When Neff Towing's tender of the defense of this action to USFIC was declined, Neff Towing filed this declaratory judgment action in which it sought a determination that coverage for the cargo loss claim was afforded under the Liability Coverage of the USFIC Garage Policy described above. Both parties filed motions for summary judgment. At the hearing on the motions, arguments centered upon whether the claim of CRST was excluded by the "care, custody or control" exclusion in the policy's Liability Coverage. Counsel for USFIC argued that the exclusion applied because Neff Towing judicially admitted, in its answer to the petition filed by CRST, that it had taken possession of the trailer. Based upon the stipulated facts, the pleadings in the underlying action, and an uncontroverted affidavit, counsel for Neff Towing argued that the CRST trailer was "knocked over and damaged" before it ever came under the "care, custody, and control" of Neff Towing, and therefore the exclusion did not apply.

The district court sustained Neff Towing's motion for summary judgment and overruled that of USFIC. The district court reasoned that while it was obligated to consider the pleadings in the underlying suit by CRST against Neff Towing, it could also consider other pertinent facts as stipulated by the parties in determining whether the exclusion was applicable. The court determined that the exclusion was unambiguous but held that it was inapplicable because the stipulated facts revealed that Neff Towing was attempting to attach its tractor to the CRST trailer when the accident occurred, but never succeeded in doing so. For this reason, the district court concluded that "Neff Towing never had . . . care, custody, and control" of the trailer and its contents. It held that USFIC had a duty to defend Neff Towing in the action brought against it by CRST and to indemnify it for any damages adjudged against it pursuant to the Liability Coverage of the aforementioned policy.

USFIC perfected this timely appeal, which we moved 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

USFIC assigns that the district court erred in granting Neff Towing's motion for summary judgment and denying its own motion for summary judgment.

STANDARD OF REVIEW

[1] Generally, the denial of a motion for summary judgment is not a final, appealable order. However, 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. *Knudsen v. Mutual of Omaha Ins. Co.*, 257 Neb. 912, 601 N.W.2d 725 (1999).

[2] When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with

regard to that question. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001).

[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. *American Fam. Mut. Ins. Co. v. Hadley*, ante p. 435, 648 N.W.2d 769 (2002); *Reisig v. Allstate Ins. Co.*, ante p. 74, 645 N.W.2d 544 (2002).

ANALYSIS

As noted, the insurance policy in question provides separate Liability Coverage and Garagekeepers Coverage. In its operative second amended petition, Neff Towing alleges that any liability it may have to CRST for damage to the contents of its trailer is covered under the policy's Liability Coverage; it makes no claim under the Garagekeepers Coverage. The district court specifically determined that the latter coverage was inapplicable, and neither party has taken exception to this ruling. Accordingly, we focus our attention on the Liability Coverage to determine whether USFIC had a duty to defend or indemnify Neff Towing with respect to the CRST property damage claim.

In construing liability insurance policies, we have held that an insurer's duty to defend is broader than its duty to indemnify. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, supra; *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996); *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). However, in a case such as this, where the facts are undisputed, a determination that a duty to defend exists will likewise be determinative of the existence of a duty to indemnify. The specific issue to be resolved is whether CRST's property was in the "care, custody, or control" of Neff Towing at the time the damage occurred. If this question is resolved in the negative, the policy exclusion claimed by USFIC is inapplicable and both a duty to defend and a duty to indemnify exist. If, however, the property was in the "care, custody, or control" of Neff Towing when damaged, the exclusion applies and USFIC has neither a duty to defend nor a duty to indemnify.

[4-7] Familiar general principles guide our determination of whether, as a matter of law, the claimed coverage exclusion

applies to the undisputed facts of this case. An insurance policy is a contract. An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *American Fam. Mut. Ins. Co. v. Hadley*, *supra*. 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. *American Fam. Mut. Ins. Co. v. Hadley*, *supra*; *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). 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. *American Fam. Mut. Ins. Co. v. Hadley*, *supra*; *Volquardson v. Hartford Ins. Co.*, *ante* p. 337, 647 N.W.2d 599 (2002). Generally, where the event for which an insured seeks coverage is plainly outside the scope of the coverage encompassed in the policy according to a plain reading of its terms, an insurer may not be obligated to provide coverage to the insured. *Farm Bureau Ins. Co. v. Witte*, *supra*.

The first step in our analysis requires that we determine whether the coverage exclusion is ambiguous. The district court cited *Clausen v. Columbia Nat. Ins. Co.*, 1 Neb. App. 808, 510 N.W.2d 399 (1993), for the proposition that the phrase "care, custody, or control" used in an insurance policy with reference to personal property is not ambiguous. In *Clausen*, the Nebraska Court of Appeals considered this phrase in the context of a provision in a commercial lines insurance policy which extended coverage to personal property of others in the "'care, custody or control'" of the insured. 1 Neb. App. at 810, 510 N.W.2d at 401. The court cited a line of cases from other jurisdictions that held the phrase to be unambiguous and noted that while most of those cases considered the phrase in the context of a coverage exclusion, rather than an extension of coverage, that distinction was not determinative. The Court of Appeals held that the phrase "'care, custody, or control'" was "unambiguous and should be given [a] common and ordinary meaning." *Id.* at 814, 510 N.W.2d at 403. The court noted that the term "'care,'" when used in reference to personal property, would include such concepts as charge, supervision,

management, responsibility for or attention to safety and well-being, and temporary keeping for the benefit of the owner; “‘custody’” would encompass a temporary charge or keeping; and “‘control’” would include the exercise of regulation, influence, domination, or command with respect to property. *Id.* at 814-15, 510 N.W.2d at 403-04, quoting *Grana v. Security Insurance Group*, 72 Misc. 2d 265, 339 N.Y.S.2d 34 (1972), and Webster’s Encyclopedic Unabridged Dictionary of the English Language (1989). We agree with this analysis and conclude that the phrase “care, custody, or control” as used in the USFIC Garage Policy is unambiguous.

[8] In determining whether the CRST claim against Neff Towing falls within the exclusion, USFIC argues that we should consider only the pleadings in the underlying case in which Neff Towing admitted that it “did come into possession of a trailer owned and operated by the plaintiff for purposes of towing said trailer.” USFIC argues that this constitutes a judicial admission which conclusively establishes the applicability of the exclusion and forecloses examination of other facts pertinent to the claim. However, our law is well settled that in determining its duty to defend, an insurer must not only look to the petition, but must also investigate and ascertain the relevant facts from all available sources. *Mapes Indus. v. United States F. & G. Co.*, 252 Neb. 154, 560 N.W.2d 814 (1997); *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). If an insurer must look beyond the pleadings to ascertain relevant and available facts in deciding whether it is obligated to accept a tender of defense by an insured, it logically follows that a court which is asked to determine whether a duty to defend exists in a declaratory judgment action should likewise expand its focus beyond the pleadings, particularly in a case such as this where all relevant facts are known and not disputed. Accordingly, in our independent determination of the question of law presented in this appeal, we consider all of the evidence received and considered by the district court.

[9] In its ruling from the bench, the district court repeatedly used the phrase “care, custody, *and* control” in referring to the exclusion. (Emphasis supplied.) We deem it significant that the language of the policy is plainly stated in the disjunctive, i.e., “care, custody *or* control.” (Emphasis supplied.) Thus, if the facts

establish any one of the three relationships between Neff Towing and the property of CRST, the exclusion applies. See *Clausen v. Columbia Nat. Ins. Co.*, 1 Neb. App. 808, 510 N.W.2d 399 (1993). Neff Towing argues, and the district court held, that because it was unsuccessful in actually attaching the CRST trailer to its towing unit, it never exercised care, custody, or control of the property. This argument is unrealistically narrow because it focuses exclusively on the factor of "custody," while ignoring "care" and "control." We determine that the better rule is "[w]here . . . the insured has undertaken the responsibility for maintaining personal property and is in fact attempting to exercise control thereof at the time of an occurrence which damages the property . . . the insured has that degree of 'care, custody or control of the property contemplated by the [liability coverage] exclusion.'" *Howard Assoc. v. Home Indem. Co.*, 34 Colo. App. 390, 392-93, 528 P.2d 980, 981 (1974).

[10] When CRST requested that Neff Towing tow CRST's disabled tractor-trailer unit laden with cargo, CRST authorized Neff Towing to exercise that degree of control over the property necessary to physically remove it from the roadside to a place of safety. This was of mutual benefit to CRST, which had an interest in protecting its stranded property, and Neff Towing, which was in the business of providing towing services. Neff Towing was the only entity authorized by the owner of the property to remove it from the roadside. This necessarily involved the exercise of "care, custody, or control" over the property. Neff Towing first acted pursuant to this authority when it detached the disabled tractor from its trailer and towed the tractor away. Neff Towing continued to exercise its right of control by backing its towing unit under the now-separated trailer in an unsuccessful attempt to couple the trailer to the towing unit so that the trailer also could be removed from the roadside. It was this very act of exercising control over the trailer which allegedly caused the cargo damage claimed by CRST. Although an insurer is obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy. *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993); *Iowa Mut. Ins. Co. v. Meckna*, 180 Neb. 516, 144 N.W.2d 73 (1966). We conclude that

the undisputed facts fall within the Liability Coverage exclusion of the USFIC Garage Policy, and thus there was no duty to defend or indemnify.

CONCLUSION

Based upon our independent review of the question of law presented in this appeal, we conclude that the CRST trailer and its cargo were in the "care, custody, or control" of Neff Towing at the time of the alleged loss, thereby falling within the unambiguous Liability Coverage exclusion stated in the policy. We, therefore, reverse the judgment of the district court granting Neff Towing's motion for summary judgment and overruling that of USFIC, and remand the cause to the district court with directions to vacate the judgment entered in favor of Neff Towing and to enter judgment in favor of USFIC in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MCCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.

KEVIN B. HARRIS, APPELLANT.

652 N.W.2d 585

Filed November 1, 2002. No. S-01-1123.

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 discretion.
2. **Juror Qualifications.** When a defendant, through diligence, is able to discover a reason to challenge a juror, the objection to the juror must be made at the time of voir dire.
3. **Juror Qualifications: Juror Misconduct: Waiver.** A defendant does not waive an objection to a juror when the juror has concealed the information that is the subject of the objection.
4. **Criminal Law: Jury Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that the misconduct was prejudicial to the extent that the defendant was denied a fair trial.
5. **Verdicts: Juror Misconduct: Proof.** Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that his conduct was of such character that prejudice may be presumed.

6. **Juror Qualifications: Juror Misconduct: Presumptions.** A juror is presumed to be biased when he or she conceals information for the purpose of being placed on the jury.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for a new trial.

Thomas C. Riley, Douglas County Public Defender, and Mikki E. Campbell for appellant.

Don Stenberg, Attorney General, and Susan J. Gustafson for appellee.

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

CONNOLLY, J.

A jury convicted the appellant, Kevin B. Harris, of shoplifting. Harris contends that he was denied a fair trial because one of the jurors failed to disclose on a jury form that she was a convicted felon. We determine that the juror was biased, and we reverse, and remand for a new trial.

BACKGROUND

On August 30, 2000, Patrick Maly, a grocery store manager, while watching through a surveillance camera, saw a man pick up two bottles of vodka in the liquor department. He then observed the man walk to the back of the store and give the bottles to another person, whom Maly later identified as Harris. According to Maly, Harris put the bottles into a green bag and went to the exit of the store without going through the checkout stands.

Maly stopped Harris at the exit door and asked about the bottles. Harris denied that he had any bottles and continued toward the door. A struggle ensued between Maly, Harris, and another store manager, Robert Flood. Maly and Flood handcuffed Harris, and the bag fell to the floor. According to Maly, the man who initially took the vodka bottles appeared, took the bag, ran from the store, and drove away. The man was never identified or apprehended.

Flood testified that like Maly, he saw a man carrying two bottles of vodka toward the back of the store. He described the

struggle with Harris and stated that when Harris dropped the bag, there was a sound like bottles clinking together.

The record reflects inconsistent testimony whether the incident was videotaped. Maly stated that a videotape recording of the incident had been taped over, and Flood stated that the tape never recorded any video. The record also reflects inconsistent testimony about information that was provided to the investigating officers.

Harris did not present any evidence. At the end of the State's case, he moved for a dismissal of the case because the State had failed to make a prima facie case. The motion was overruled. The jury found Harris guilty. Harris moved for a new trial, alleging, among other things, that the trial court erred in overruling his motion for a directed verdict and that juror misconduct occurred.

JUROR QUALIFICATION FORM

At the hearing on the motion for a new trial, Harris entered into evidence a juror qualification form that Pamela Dortch, one of the jurors, filled out as part of the jury duty process. The form states:

YOU ARE HEREBY REQUIRED, UNDER PENALTY OF LAW, to answer all the questions listed below and return this notice properly signed to the Jury Commissioner within TEN DAYS from the date of receipt. ANY PERSON WHO KNOWINGLY FAILS TO COMPLETE AND RETURN OR WHO WILLFULLY MISREPRESENTS A MATERIAL FACT ON THIS FORM FOR THE PURPOSE OF AVOIDING OR SECURING SERVICE AS A JUROR SHALL BE GUILTY OF CONTEMPT OF COURT.

Question No. 7 on the form asks, "Have you ever been convicted of a criminal offense punishable by imprisonment in the Nebraska Penal and Correctional Complex?" Dortch answered no to this question. Dortch left blank the questions asking for her county of residence and date of birth. On a question stating that people over age 65 may be exempt from jury duty, Dortch checked a box stating that her preference was to serve as a juror. Also entered into evidence was a district court journal entry showing that in 1990, Dortch was convicted of possession with intent to deliver a controlled substance and was sentenced to 1 to 3 years in prison.

DORTCH'S TESTIMONY AT MOTION FOR NEW TRIAL

Dortch testified that she had been convicted in a criminal action and that she had not been pardoned. When asked whether she knew she had a felony conviction when she filled out the juror qualification form, Dortch stated that the conviction was years ago, that she thought she had put it behind her, and that she thought it was all erased. Dortch later admitted that she was also convicted of shoplifting in 1996 and spent some time in jail as a result.

When asked whether she remembered voir dire in Harris' case, Dortch stated that she felt kind of ill that day and was trying to stay awake. She did not remember the potential jurors' being asked questions about convictions or police contacts, but admitted that she might not have been paying full attention that day. She also did not remember the jurors' being asked whether anyone had been convicted of shoplifting. She further did not remember being asked whether she had any medical conditions that would keep her from sitting on a jury. She stated that she was very ill, that she was kind of sleepy, and that she dozed off a couple of times that day.

Dortch also testified that she felt ill and sleepy through the entire trial. She admitted that she did not focus during the trial and dozed off a few times. She said that she did miss things during the trial because she was ill and sleepy.

Dortch stated that she had previously met Alicia Gully, Harris' ex-wife, at a barbecue. Dortch stated that she was unaware that Gully had been married to Harris. She did not remember any questions at voir dire about whether anyone knew people who were connected to Harris. The voir dire of the jury is not in the record.

After the hearing, the trial court stated that it did not find Dortch's statements about her condition and illness during trial to be credible. The court stated, "I think [the statements] are made to justify the fact that she didn't know what she was doing and to avoid responsibility for what is under way at this time, so I don't find that particularly credible evidence in this matter." The court later found that Dortch intentionally falsified her statements and misled the court by failing to disclose that she had been convicted of a crime punishable by imprisonment. The court stated:

There's no question that she knew about it and she intended to say that she hadn't been convicted of it. She notes that she wishes to serve as a juror in this case, and so it was an intentional—it was intentionally done to mislead those involved in the process.

The court also found, however, that there was no evidence that the jury panel was actually asked about prior convictions at voir dire or that Harris relied on the statements in the juror qualification form. The court concluded that a party who fails to inquire into an issue on voir dire waives any objections about a juror that are made after trial. Because of the lack of evidence about voir dire, the court determined that Harris waived any objection he had to Dortch and overruled Harris' motion for a new trial.

ASSIGNMENTS OF ERROR

Harris assigns, rephrased, that the district court erred in failing to sustain his motion for a new trial on the grounds that (1) Dortch failed to disclose that she was a convicted felon, (2) Dortch stated that she was not paying attention at voir dire and trial, and (3) there was insufficient evidence to support a guilty verdict.

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 discretion. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

ANALYSIS

Harris contends that he was denied a fair trial because Dortch was ineligible to serve as a juror. The State, however, contends that Harris waived any objection he had to Dortch by failing to object during voir dire.

STATUTES INVOLVED

Because we apply statutory law when discussing the issues of both waiver and fair trial, we first provide the relevant statutory sections. Neb. Rev. Stat. § 25-1601(1) (Reissue 1995) provides in part, "Persons disqualified to serve as either grand or petit jurors are: . . . persons who have been convicted of a criminal offense punishable by imprisonment in a Department of Correctional

Services adult correctional facility, when such conviction has not been set aside or a pardon issued.” Neb. Rev. Stat. § 29-112 (Reissue 1995) also provides that any person sentenced to be punished for any felony, when the sentence has not been reversed or annulled, is deemed incompetent to be a juror. Neb. Rev. Stat. § 25-1609 (Reissue 1995) provides that it shall be a sufficient cause of challenge of a juror if he or she is disqualified under § 25-1601. Neb. Rev. Stat. § 25-1629 (Reissue 1995) requires that a juror qualification form be sent to potential jurors and requires that a juror who is disqualified under § 25-1601 be stricken from the proposed juror list.

WAIVER

Relying on *Turley v. State*, 74 Neb. 471, 104 N.W. 934 (1905), the State argues that Harris waived any objection that he had about Dortch because he failed to raise the issue during voir dire. We disagree.

In *Turley*, it was discovered after trial that a juror had formerly been convicted of a felony. We held that the issue was waived and stated:

Great latitude is allowed the defendant upon the *voir dire* examination to enable him to ascertain whether there is any ground for objecting to the juror. He cannot waive an objection of this nature, and, after taking his chances of an acquittal before the jury selected, insist upon an objection which he should have raised upon the impaneling of the jury, and, if he makes no effort to ascertain whether a juror offered is qualified to sit, he must be held to have waived the objection.

Id. at 476, 104 N.W. at 936.

[2,3] *Turley* holds that when a defendant, through diligence, is able to discover a reason to challenge a juror, the objection to the juror must be made at the time of voir dire. *Turley* does not stand for the proposition that an objection to a juror is waived when the juror has concealed information and the defendant through diligence cannot discover the information before trial. A defendant cannot waive something that has been concealed. *People v. Green*, 31 Cal. App. 4th 1001, 38 Cal. Rptr. 2d 401 (1995), *reversed on other grounds*, *Green v. White*, 232 F.3d 671 (9th Cir. 2000).

Under § 25-1629, a juror qualification form must be sent to potential jurors and any juror who is disqualified under § 25-1601 must be stricken from the proposed juror list. Attorneys must be able to rely on a statutory scheme intended to prevent disqualified jurors from ever being placed in the jury pool. Attorneys should not be required to ask again at voir dire about past convictions that would disqualify a juror when jurors have already filled out forms addressing the issue.

Here, Dortch gave false information on her juror qualification form. The record shows that she concealed information during voir dire. A defendant does not waive an objection to a juror when the juror has concealed the information that is the subject of the objection. Nothing in the record suggests that Harris could have discovered the information before trial. We conclude that the issue has not been waived.

CONVICTION OF CRIME AND JUROR BIAS

[4,5] Harris contends that he was denied a fair trial because Dortch should have been disqualified as a juror. A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that the misconduct was prejudicial to the extent that the defendant was denied a fair trial. See *State v. Anderson*, 252 Neb. 675, 564 N.W.2d 581 (1997). Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that his conduct was of such character that prejudice may be presumed. *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983). When a juror deliberately conceals information, courts address the issue in terms of juror bias. See, e.g., *U.S. v. Bishop*, 264 F.3d 535 (5th Cir. 2001); *Green v. White*, *supra*; *McCoy v. Goldston*, 652 F.2d 654 (6th Cir. 1981). See, also, *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc) (juror concealed fact that family member was crime victim).

Some courts hold that when a juror deliberately concealed information or purposely gave an incorrect answer during voir dire, bias is presumed, prejudice is presumed, and a new trial must be granted. See, e.g., *McCoy v. Goldston*, *supra*; *Fleming v. State*, 687 So. 2d 146 (Miss. 1997). The Fifth and Ninth Circuit Courts

of Appeals have specifically addressed the issue whether bias is presumed when a juror conceals that he or she has been convicted of a crime. *U.S. v. Bishop, supra*; *Green v. White, supra*; *Dyer v. Calderon, supra*.

In *Dyer*, the Ninth Circuit Court of Appeals noted that the Sixth Amendment to the U.S. Constitution guarantees criminal defendants a verdict by impartial and indifferent jurors. The bias or prejudice of a juror violates a defendant's right to a fair trial. The court further noted that the presence of a biased juror cannot be harmless and that the error requires a new trial without a showing of actual prejudice. *Id.*, citing *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927). The Ninth Circuit applied these concepts to a juror's concealment of his commission of a crime. *Green v. White*, 232 F.3d 671 (9th Cir. 2000).

In *Green*, a juror failed to disclose on a jury form that he had been convicted of a felony for passing bad checks, which would statutorily disqualify him from serving on a jury. The juror also failed to disclose during voir dire other encounters with the law, including a conviction for assault and an arrest for robbery. During deliberations, a question arose about the juror's impartiality because he stated that he knew the defendant was guilty the minute he saw him and made a reference to a desire to shoot the defendant. The Ninth Circuit determined that the juror deliberately lied and inferred that the juror had a desire to serve on the jury. The court then noted that while a court might be unable to say exactly what motive a juror would have to stay on a jury, it believed that "[t]he individual who lies in order to improve his chances of serving has too much stake in the matter to be considered indifferent." *Id.* at 677, quoting *Dyer v. Calderon, supra*. The court then stated:

"A juror . . . who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process. . . . [A] perjured juror is unfit to serve even in the absence of . . . vindictive bias. If a juror treats with contempt the court's admonition to answer voir dire questions truthfully, she can be expected to treat her responsibilities as a juror—to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions—with equal scorn. Moreover, a juror

who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony."

Green v. White, 232 F.3d at 677, quoting *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc). Finding that the juror's pattern of lies and misbehavior created "destructive uncertainties," the Ninth Circuit determined that the juror was biased and instructed the trial court to grant the defendant's request for a writ of habeas corpus. *Green v. White*, 232 F.3d at 678. See, also, *State v. Cho*, 108 Wash. App. 315, 30 P.3d 496 (2001) (bias presumed when juror withholds information to increase likelihood of being seated on jury); *State v. Akins*, 867 S.W.2d 350 (Tenn. Crim. App. 1993) (when juror willfully conceals or fails to disclose information during voir dire which reflects on that juror's impartiality, presumption of prejudice arises).

The Fifth Circuit in *U.S. v. Bishop*, 264 F.3d 535 (5th Cir. 2001), declined to adopt a per se presumption of bias except in extreme circumstances. In *Bishop*, a juror had pled guilty to a charge of embezzlement and the adjudication of the matter was deferred for 10 years under a state statute that allows courts to defer adjudication and place a defendant under community supervision. The juror answered no to questions on a juror questionnaire about whether she had ever been convicted of, or charged with, a crime. She also did not respond to voir dire questions about whether any potential jurors had been involved in criminal matters. She explained that she did not reveal the charge of embezzlement because her lawyer told her that because the adjudication of the charge had been deferred, she did not have to tell anyone about it.

The Fifth Circuit noted that motivations of jurors for concealing information can vary and that only those that truly affect a juror's impartiality can affect the fairness of a trial. Thus, the court determined that a felon's serving as a juror is not an automatic basis for a new trial. Instead, the defendant must demonstrate that the juror was actually biased or fundamentally

incompetent. *Id.* The court recognized that in the majority of situations, the party seeking a new trial must demonstrate bias through admission or factual proof. The court stated, however, that bias will be implied or presumed in extreme circumstances. The court also stated that “[i]ndicia of partiality are particularly problematic when coupled with the juror’s lies or other efforts to hide a potential disqualification.” *Id.* at 554.

The court discussed *Green v. White*, 232 F.3d 671 (9th Cir. 2000), and distinguished it, stating:

[I]naccurate responses to voir dire questions are excused when caused by inattention or when a query does not elicit the specific information relevant to the juror’s disqualification. . . . Failure to disclose a conviction due to a mistaken, but honest belief the record was expunged, or due to embarrassment, also does not suggest bias. . . . Even when a juror’s non-disclosure is dishonest as opposed to mistaken, his behavior is not a basis for reversal unless the dishonesty appears to be rooted in bias or prejudice.

U.S. v. Bishop, 264 F.3d at 555. The court then determined that the juror would not be presumed to be biased. Unlike in *Green*, there was no suggestion in *Bishop* that the juror especially desired to serve on the jury, the juror’s motivations appeared to be purely personal, and there were no other troubling circumstances involved. The *Bishop* court affirmed the defendant’s convictions.

Here, we need not decide whether to adopt an automatic presumed-bias rule when a juror is statutorily disqualified, because under either an automatic or a conditional rule, Harris is entitled to a new trial.

[6] Dortch did not merely lie on her juror qualification form. Although her age is not apparent from the record, Dortch also marked a box on the juror qualification form for people over age 65, indicating that she would like to serve on a jury. The trial judge made specific findings of fact that Dortch wished to serve as a juror in the case and that she intentionally lied to mislead those involved in the process. Further, the record shows that Dortch also failed to disclose that she had been convicted of shoplifting, the same crime that Harris was charged with. Dortch stated that she did not remember questions asked at voir dire about whether anyone had been convicted of shoplifting, because

she was ill and sleepy. Although the voir dire is not in the record, the trial judge specifically found that Dortch's testimony about her illness and sleepiness was not credible. Finally, there was an allegation that Dortch had met Harris' ex-wife, Gully, although Dortch stated that she did not know Gully was Harris' ex-wife. Under these circumstances, there is more than mere juror dishonesty because of mistake or embarrassment. Instead, the inference is that Dortch deliberately lied with the motivation of being placed on the jury. Under either an automatic or a conditional rule of presumption, a juror is presumed to be biased when he or she conceals information for the purpose of being placed on the jury. Once bias is presumed, prejudice is presumed as well and the error cannot be harmless. We conclude that Harris is entitled to a new trial.

SUFFICIENCY OF EVIDENCE

Harris contends that there was insufficient evidence to convict him. He contends that there was no videotape of the crime, that there was inconsistent evidence, and that the State's witnesses lacked credibility. Witnesses testified that they saw Harris take the bottles of vodka and attempt to leave the store. The credibility of the witnesses is a question for the jury. This assignment of error is without merit.

CONCLUSION

We conclude that there was sufficient evidence to convict Harris. But, because there is an inference that Dortch concealed information specifically to secure a place on the jury and because of other irregularities in her behavior, we conclude that she is presumed to have been biased. As a result, prejudice is presumed and Harris is entitled to a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V.
JASON S. BAKER, APPELLANT.
652 N.W.2d 612

Filed November 1, 2002. No. S-02-115.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial.** If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to an absolute discharge from the offense charged.
4. _____. The primary burden of bringing an accused person to trial within the time provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge.
5. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Jurisdiction: Speedy Trial: Time: Appeal and Error.** Where further proceedings are to be had following an interlocutory appeal, for speedy trial purposes, the period of time excludable due to the appeal concludes when the district court first reacquires jurisdiction over the case by taking action on the mandate of the appellate court.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded with directions to dismiss.

Robert P. Lindemeier, Lincoln County Public Defender, for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Jason S. Baker filed a motion to discharge alleging violation of his statutory right to a speedy trial. The Lincoln County District Court denied Baker's motion, and he appeals.

SCOPE OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Recek*, 263 Neb. 644, 641 N.W.2d 391 (2002).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Id.*

FACTS

On March 23, 1999, a juvenile court petition was filed alleging that Baker had subjected another person to sexual penetration without consent. This petition was dismissed on April 2, and a complaint was filed in Lincoln County Court charging Baker with first degree sexual assault, a Class II felony. On April 30, before the clerk of the district court, the Lincoln County Attorney subscribed and swore to an information charging Baker. However, the information was not file stamped until October 5. According to an order file stamped on October 19, Baker pled not guilty on October 4, and the Lincoln County District Court set a jury trial date for January 25, 2000.

On January 20, 2000, Baker filed a motion to discharge on speedy trial grounds, which the district court denied on February 2. The court explained that the speedy trial statute, Neb. Rev. Stat. § 29-1207 (Reissue 1995), "specifically states that the six month period to be counted toward speedy trial begins to run when the information is filed." The court found that the information was not filed in this case until October 5, 1999, the date the information was file stamped. The court separately considered whether Baker's Sixth Amendment right to a speedy trial or his due process rights had been violated and concluded that they had not. On February 11, 2000, Baker filed an appeal of the court's denial of his motion to discharge.

On February 6, 2001, the Nebraska Court of Appeals affirmed the district court's denial of Baker's motion to discharge. See *State v. Baker*, No. A-00-177, 2001 WL 221557 (Neb. App. Feb. 6, 2001) (not designated for permanent publication). The Court of Appeals also concluded that the 6-month period contained in

§ 29-1207 did not begin to run until October 5, 1999, the date the information was filed. It held that neither Baker's statutory right to a speedy trial nor his constitutional right to a speedy trial had been violated.

Baker's petition for further review was granted and subsequently dismissed as having been improvidently granted. The clerk of the district court received our mandate on September 14, 2001, and an order spreading the mandate was signed and filed on September 28. By order file stamped October 17, the district court set a trial date for December 18. On December 3, the court rescheduled the trial for January 29, 2002. We point out that following Baker's interlocutory appeal, the State did not advise the district court of any potential speedy trial problems. The State did not object to the trial dates set by the court, nor did the State attempt to show good cause why the court should extend the time for bringing Baker to trial as provided in § 29-1207(4)(f). On December 18, 2001, Baker filed a supplemental motion to discharge. The court denied Baker's motion on January 22, 2002, and he filed a notice of appeal from that decision on January 28.

ASSIGNMENTS OF ERROR

Baker assigns as error that the district court erred by failing to grant his motion to discharge, because the State did not bring him to trial within 6 months as required by Neb. Rev. Stat. §§ 29-1205 through 29-1209 (Reissue 1995). He does not claim that the court erred in failing to find a violation of his constitutional right to a speedy trial.

ANALYSIS

The speedy trial statute, § 29-1207, provides:

(1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.

.....
(3) If such defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, or the mandate on remand.

[3,4] If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to an absolute discharge from the offense charged. *State v. Knudtson*, 262 Neb. 917, 636 N.W.2d 379 (2001). The primary burden of bringing an accused person to trial within the time provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge. *Id.*

Baker argues that the district court erred by holding that the State was entitled to a new 6-month period for speedy trial purposes after his interlocutory appeal was decided. He asserts that the 6-month period commenced to run when the juvenile court petition was filed on March 23, 1999, or, in the alternative, that the 6-month period commenced when the information was file stamped on October 5, 1999. Baker argues that in either case, the 6-month period expired before trial and that, therefore, he was entitled to an absolute discharge.

The State argues that a new 6-month period for speedy trial calculations commenced to run on September 28, 2001, when the mandate was spread on the record following Baker's interlocutory appeal. The State asserts that it does not matter that the trial was not set until December 18 and later rescheduled for January 29, 2002, because in either case, the 6-month period did not elapse.

In *State v. Baker*, No. A-00-177, 2001 WL 221557 (Neb. App. Feb. 6, 2001) (not designated for permanent publication), the Court of Appeals determined that the information charging Baker with first degree sexual assault was filed on October 5, 1999. This determination became the law of the case, and therefore, pursuant to § 29-1207(2), the 6-month period commenced on October 5, 1999.

The issue presented is whether the State is entitled to an additional 6-month speedy trial period after the mandate was entered in the district court following appellate review of Baker's interlocutory appeal or whether such appeal merely tolled the original 6-month period until the district court reacquired jurisdiction. The State argues that our opinion in *State v. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999), is controlling.

Kinser involved a jury trial conviction in district court. There, the judgment of conviction was reversed on appeal, and the cause

was remanded for a new trial. In *Kinser*, we construed § 29-1207(3) to mean that when a new trial is ordered after an appeal, the district court has 6 months to retry the defendant after the mandate is spread upon the record. We stated that § 29-1207 specifies two categories of events from which the 6-month period may be computed: The date the indictment is returned or the information filed, see § 29-1207(2), or “[i]f such defendant is to be tried again following a mistrial, an order for a new trial, or *an appeal* or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, *or the mandate on remand.*”

(Emphasis in original.) *Kinser*, 256 Neb. at 58, 588 N.W.2d at 796-97.

[5] Unlike *Kinser*, the case at bar does not involve a defendant who is to be tried again. The district court concluded that § 29-1207 required that the 6-month period begin again after the mandate was spread on the record following Baker’s interlocutory appeal. We disagree. To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Recek*, 263 Neb. 644, 641 N.W.2d 391 (2002). In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Portsche*, 261 Neb. 160, 622 N.W.2d 582 (2001). A fundamental principle of statutory construction requires that penal statutes be strictly construed. See *State v. Utter*, 263 Neb. 632, 641 N.W.2d 624 (2002).

Here, the key words in § 29-1207(3) are “tried again.” Given their ordinary meaning, they can only refer to a defendant who has previously been put on trial. “[T]ried again,” as used in § 29-1207(3), does not refer to a defendant who has yet to be brought to trial a first time and whose trial has been delayed because of the defendant’s interlocutory appeal. To conclude otherwise would require us to ignore the plain language of § 29-1207(3). We therefore conclude that § 29-1207(3) does not apply to the case at bar because Baker has not yet been brought to trial.

[6] We next address the impact of Baker's interlocutory appeal upon the 6-month period for speedy trial purposes. The State urges this court to modify our decision in *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999), and hold that when a defendant files a motion to discharge and an appellate court finds no merit to the motion, the 6-month period should begin again after the cause is remanded to the trial court. In *Ward*, we explained that "where further proceedings are to be had following an interlocutory appeal, for speedy trial purposes, the period of time excludable due to the appeal concludes when the district court first reacquires jurisdiction over the case by taking action on the mandate of the appellate court." 257 Neb. at 386, 597 N.W.2d at 621.

The State claims that our decision in *Ward* could result in practical difficulties which violate the intent of § 29-1207. The State claims that a hypothetical defendant whose trial date was set for the last possible day in the 6-month period could file a motion to discharge on that day and appeal the trial court's denial of the motion. The trial court would subsequently be left with insufficient time to reset the trial date after the mandate was spread on the record following the appellate court's decision to affirm the denial of the motion to discharge. Although such a factual scenario is not before us, we point out that § 29-1207(4)(f) provides that other periods of delay may be excluded if the court finds they are for good cause. We decline the State's invitation to modify our decision in *Ward*.

We next consider whether Baker was timely brought to trial. Between October 5, 1999, and December 18, 2001, when Baker filed his second motion to discharge, there were two periods excludable under § 29-1207(4).

On January 20, 2000, Baker filed his first motion to discharge. The district court overruled this pretrial motion on February 2. This period is excludable under § 29-1207(4)(a) as "the time from filing until final disposition of pretrial motions of the defendant." Then the question becomes whether the excludable period commences January 20 or 21.

In *State v. Oldfield*, 236 Neb. 433, 442-43, 461 N.W.2d 554, 561 (1990), we explained:

Although in some of our decisions it appears that the day on which a defendant filed a pretrial motion is counted

within the exclusionary period under § 29-1207(4)(a) . . . nevertheless, as we have reaffirmed and expressed today, an excludable period under § 29-1207(4)(a) commences on the day immediately after the filing of a defendant's pretrial motion.

Therefore, in this case, we start counting the excludable period resulting from Baker's pretrial motion on January 21, 2000. Beginning with January 21, there are 13 days until February 2. This is the first excludable period.

Second, on February 11, 2000, Baker filed a notice of appeal of the district court's denial of his first motion to discharge. As we stated in *State v. Ward*, 257 Neb. 377, 386, 597 N.W.2d 614, 620 (1999), for speedy trial purposes, an interlocutory appeal "certainly constitutes a 'period of delay resulting from other proceedings concerning the defendant,' within the meaning of § 29-1207(4)(a)." Whereas the excludable time resulting from Baker's first motion to discharge, for speedy trial purposes, falls under the "pretrial motions" category of § 29-1207(4)(a), see *State v. Oldfield, supra*, his appeal of the district court's ruling on the motion to discharge falls under the "other proceedings concerning the defendant" category of § 29-1207(4)(a).

In *Ward*, we explained that in calculating the number of excludable days resulting from an interlocutory appeal, for speedy trial purposes, "the period to be excluded due to [the] appeal commence[s] on and includes . . . the date on which he filed his notice of appeal." 257 Neb. at 386, 597 N.W.2d at 620. Therefore, it is clear that in calculating the excludable time resulting from Baker's interlocutory appeal, for speedy trial purposes, we begin counting on February 11, 2000, the day the notice of appeal was filed.

In *State v. Kinser*, 256 Neb. 56, 60, 588 N.W.2d 794, 797-98 (1999), we stated that "[t]he district court first took action on the mandate by spreading it on the record . . . thus reacquiring jurisdiction from the appellate courts . . ." In the case at bar, the district court first took action on the mandate by spreading it on the record on September 28, 2001. Beginning with February 11, 2000, there are 596 days until September 28, 2001. Adding the 13 excludable days resulting from Baker's pretrial motion to discharge to the 596 excludable days resulting from his interlocutory

appeal of the district court's ruling on that motion, we arrive at a total excludable period of 609 days.

We next proceed to calculate whether the 6-month period elapsed before Baker was brought to trial. The rule in Nebraska is clear that to calculate the time for speedy trial purposes, we must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add in any time excluded under § 29-1207(4) to determine the last day the defendant can be tried. See *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999). The information was filed against Baker on October 5, 1999. If there were no time periods excluded under § 29-1207(4), the last day on which the State could have brought Baker to trial would have been April 5, 2000. Since there are 609 days excluded under § 29-1207(4), the last day the State could have brought Baker to trial was December 5, 2001. Baker's trial date was initially set for December 18, and then it was delayed to January 29, 2002. Thus, the 6-month speedy trial period elapsed before Baker was brought to trial. The State failed to meet its burden of bringing Baker to trial within the time provided by law.

As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Recek*, 263 Neb. 644, 641 N.W.2d 391 (2002). The district court's denial of Baker's motion to discharge was clearly erroneous.

CONCLUSION

Baker is entitled to an absolute discharge of the offense charged, because the State did not bring him to trial within the time required by § 29-1207. The judgment of the district court is reversed, and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH
DIRECTIONS TO DISMISS.

WILLIAM "DOUG" JAY, APPELLANT AND CROSS-APPELLEE, V.
MOOG AUTOMOTIVE, INC., A MISSOURI CORPORATION,
AND CNA INSURANCE CO., APPELLEES
AND CROSS-APPELLANTS.
652 N.W.2d 872

Filed November 8, 2002. No. S-01-477.

1. **Directed Verdict: Evidence: Appeal and Error.** When a motion for a 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.** In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error.
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 question independently of the conclusion reached by the trial court.
4. **Products Liability: Words and Phrases.** In products liability litigation, the notion of a defective product embraces two separate concepts. The first, commonly labeled as a "manufacturing defect," is one in which the product differs from the specifications and plan of the manufacturer. The second concept of a defective product is one in which the product meets the specifications of the manufacturer but the product nonetheless poses an unreasonable risk of danger. This condition is generally characterized as a "design defect."
5. **Products Liability: Negligence: Damages: Proof.** To establish a prima facie case in negligence in a products liability case based upon negligent design, a plaintiff needs to establish some evidence of duty, breach, causation, and damages.
6. **Products Liability: Actions: Negligence.** In a products liability cause of action based on negligence, the manufacturer's conduct is at issue, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury.
7. **Products Liability: Proof.** In a products liability action on a claim of strict liability based on defect, a plaintiff must prove by a preponderance of the evidence that (1) the defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of the plaintiff's injury sustained while the product was being used in a way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) the plaintiff's damages were a direct and proximate result of the alleged defect.

8. **Products Liability: Actions.** In a products liability cause of action based on strict liability in tort, the quality of the product is at issue, that is, whether the product was unreasonably dangerous.
9. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
10. **Negligence.** Assumption of risk differs from contributory negligence in that a subjective standard is applied to the former and an objective standard is applied to the latter.
11. **Negligence: Pleadings: Proof: Trial.** When a defendant pleads the affirmative defense of assumption of risk, the defendant has the burden to establish the elements of assumption of the risk before that defense, as a question of fact, may be submitted to the jury.
12. **Negligence: Evidence: Trial.** Before the defense of assumption of risk ismissible to a jury, the evidence must show that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage.
13. **Negligence.** The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts. The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event.
14. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
15. **Jury Instructions: Evidence: New Trial.** Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial.
16. **Products Liability.** A misuse defense is available in a products liability case based on a claim of strict liability.
17. **Products Liability: Negligence.** Failure to follow plain and unambiguous instructions is a misuse of the product.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded for a new trial.

Christopher D. Jerram, of Kelley & Lehan, P.C., for appellant.

Joseph F. Gross, Jr., of Timmermier, Gross & Prentiss, for appellee Moog Automotive, Inc.

Don Stenberg, Attorney General, and Charles E. Lowe for amicus curiae State of Nebraska.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

William "Doug" Jay brought an action against Moog Automotive, Inc. (Moog), and others in the district court for Douglas County in connection with injuries Jay received after having been struck by a strut coil spring assembly which escaped a strut spring compressor. The jury returned a verdict in favor of Moog, the manufacturer of the compressor, and the district court entered judgment in Moog's favor. Jay appeals the judgment of the district court, and Moog cross-appeals. We determine that there is merit to Jay's appeal and no merit to Moog's cross-appeal. We reverse, and remand for a new trial.

II. STATEMENT OF FACTS

On November 15, 1993, Jay sustained permanent eye and neurological injuries as a result of being struck in the face by a strut coil spring assembly which escaped during compression from a model T40187C strut spring compressor machine manufactured by Moog. Jay was working as an automotive mechanic for Jensen Goodyear automotive repair shop in Omaha and, at the time of the accident, had over 11 years of automotive mechanic experience. He had previously used other strut spring compressors but had never used a Moog compressor prior to November 15.

Jay filed an action against Moog in the district court for Douglas County. Jay's second amended petition is the operative petition. In addition to Moog, Jay named Specialty Sales, Co., as a defendant. Specialty Sales is the company that sold the compressor to Jensen Goodyear and installed the compressor. Specialty Sales was dismissed as a party prior to trial. CNA Insurance Company, Jensen Goodyear's workers' compensation insurance carrier, was also made a party to the action pursuant to Neb. Rev. Stat. § 48-118 (Reissue 1993) for purposes of determining the nature and extent of any subrogation rights.

In his second amended petition, Jay asserted three "causes of action" against Moog: "negligence," "strict liability," and "breach of warranty." The substance of Jay's allegation, denominated "strict liability," was that the compressor was defectively designed.

In its answer, Moog alleged as affirmative defenses that Jay was "contributorily negligent," that Jay assumed the risk, and that

the compressor was altered, which alteration was a superseding cause of Jay's injury. The substance of Moog's defense, denominated "contributory negligence," was that Jay misused the compressor. At trial, Moog was given leave to amend its answer to specify that Jay misused the product as follows: (1) that Jay used the compressor without a retaining pin; (2) that Jay used the compressor on the upper strut mount, misplacing the upper arms; (3) that Jay applied a prying force on the strut assembly while the spring was compressed and the upper arms not fixed with a retaining pin; and (4) that Jay failed to follow directions and warnings not to use the compressor without a retaining pin.

Trial was held beginning April 2, 2001. At the close of Jay's evidence, Moog moved for a directed verdict on all three theories of recovery. Jay withdrew the breach of warranty claim, and the district court overruled Moog's motion for directed verdict on the remaining theories of recovery.

In its defense, Moog presented the expert testimony of Ted Sokol, Ph.D., a civil engineer. The district court overruled Jay's motion in limine to exclude Sokol's testimony, Jay's objections to Sokol's testimony, and his motion to strike filed after Sokol's testimony. Sokol testified regarding his reconstruction of the accident and concluded that the compressor was used improperly in the following respects: improper placement of the upper arms caused a misalignment of the holes for the strut; the retaining pin was removed or never inserted through the holes; and a prying force was used, possibly to realign the holes for the strut, which caused the upper arms to separate. Sokol further stated that the directions and warnings provided with the compressor were sufficient. At the close of all the evidence, Jay moved for directed verdict and Moog renewed its motion for directed verdict. The district court overruled both motions.

On April 9, 2001, the district court submitted Jay's theories of recovery of strict liability and negligence to the jury. The district court instructed the jury on Moog's affirmative defenses of assumption of risk and contributory negligence based on misuse as to each theory of recovery.

On April 10, 2001, the jury returned a unanimous general verdict in favor of Moog. The district court accepted the verdict and

entered judgment in favor of Moog. Jay appeals from the judgment, and Moog cross-appeals.

III. ASSIGNMENTS OF ERROR

Jay claims, renumbered and restated, that the district court erred in (1) failing to find that Neb. Rev. Stat. § 25-21,185.12 (Reissue 1995), authorizing the affirmative defense of assumption of risk, violates the Equal Protection Clause; (2) instructing the jury on assumption of risk and overruling Jay's motion to dismiss the affirmative defense when Moog's evidence was insufficient to support the instruction; (3) instructing the jury on "contributory negligence" as an affirmative defense because (a) contributory negligence is not a defense to a strict liability theory of recovery and (b) the evidence was not sufficient to support the instruction as to either the strict liability or the negligence theory of recovery; (4) allowing Sokol's testimony because it lacked foundation and was not relevant; (5) failing to sustain Jay's motion for directed verdict; and (6) refusing to allow Jay to question Moog's employees regarding prior injuries involving the compressor.

In its cross-appeal, Moog claims the district court erred in overruling its motion for directed verdict when Jay failed to prove any proximate causation between an alleged defect and the accident.

IV. STANDARDS OF REVIEW

[1] When a motion for a 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. *Malone v. American Bus. Info.*, ante p. 127, 647 N.W.2d 569 (2002).

[2] In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (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 question independently of the conclusion reached by the trial court. *Id.*

V. ANALYSIS

1. CROSS-APPEAL

Moog claims on cross-appeal that the district court erred when it denied Moog's motion for a directed verdict. We first consider Moog's cross-appeal, because if Moog's cross-appeal were meritorious, we would not reach the issues raised in Jay's appeal. We conclude, however, that the district court did not err in overruling Moog's motion for directed verdict and that Moog's cross-appeal is without merit.

[4] In products liability litigation, the notion of a defective product embraces two separate concepts. The first, commonly labeled as a "manufacturing defect," is one in which the product differs from the specifications and plan of the manufacturer. The second concept of a defective product is one in which the product meets the specifications of the manufacturer but the product nonetheless poses an unreasonable risk of danger. This condition is generally characterized as a "design defect." *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000). In this products liability case, Jay pursued two theories of recovery against Moog, negligence and strict liability, both of which were based on what Jay asserted to be failures in the design of the compressor.

[5,6] To establish a prima facie case in negligence in a products liability case based upon negligent design, a plaintiff needs to establish some evidence of duty, breach, causation, and damages. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). In a products liability cause of action based on negligence, the manufacturer's conduct is at issue, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury. *Freeman v. Hoffman-La Roche, Inc.*, *supra*.

[7,8] In a products liability action on a claim of strict liability based on defect, a plaintiff must prove by a preponderance of the evidence that (1) the defendant placed the product on the market for use and knew, or in the exercise of reasonable care

should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of the plaintiff's injury sustained while the product was being used in a way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) the plaintiff's damages were a direct and proximate result of the alleged defect. *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999). In a products liability cause of action based on strict liability in tort, the quality of the product is at issue, that is, whether the product was unreasonably dangerous. *Freeman v. Hoffman-La Roche, Inc.*, *supra*.

[9] A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Green Tree Fin. Servicing v. Sutton*, *ante* p. 533, 650 N.W.2d 228 (2002). In the present case, Jay presented expert testimony to the effect that the Moog compressor was defectively designed because it required use of a pin and that there were alternative practical designs for the product that did not entail the risks associated with the pin design used by Moog. The expert also testified that Moog's testing of the product was inadequate. The expert further testified that the accident in the present case could not have occurred if the pin were secure. Because Jay testified that he used the pin, the implication most favorable to Jay is that the pin was not secured due to a design defect.

Based on the evidence presented by Jay, the jury could reasonably have found that the compressor was negligently or defectively designed. Under the negligence cause of action, the jury could have concluded that Moog's conduct in designing the compressor was not reasonable. Under the strict liability cause of action, the jury could have concluded that the design of the compressor was defective and made the compressor unreasonably dangerous. The jury could have found that the design of the compressor, which required the use of a pin, proximately caused the accident. Because reasonable minds could have found in Jay's favor, we conclude that the district court did not err in overruling

Moog's motion for directed verdict. We, therefore, find no merit to Moog's cross-appeal.

2. APPEAL

[10] Jay claims on appeal that the district court erred by instructing the jury on the defenses of assumption of risk and contributory negligence as to both theories of recovery.

We have explained:

"Assumption of risk rests in contract or in the principle expressed by the ancient maxim, '*volenti non fit injuria*,' whereas contributory negligence rests in tort. The former involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas the defense of contributory negligence implies the failure of the plaintiff to exercise due care. As stated in some decisions, assumption of risk is a mental state of willingness, whereas contributory negligence is a matter of conduct."

Cassio v. Creighton University, 233 Neb. 160, 173, 446 N.W.2d 704, 713 (1989). Assumption of risk differs from contributory negligence in that a subjective standard is applied to the former and an objective standard is applied to the latter. *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000); *Talle v. Nebraska Dept. of Soc. Servs.*, 249 Neb. 20, 541 N.W.2d 30 (1995).

(a) Assumption of Risk Defense as to Both Theories of Recovery: Sufficiency of Evidence

Jay asserts that the district court erred in instructing the jury on the affirmative defense of assumption of risk as to both his negligence and his strict liability theories of recovery. Jay argues that it was error to give the instruction for two reasons: (1) because the statute allowing the defense violates the constitutional guarantee of equal protection and (2) because the evidence was insufficient to support the instruction. We conclude that the evidence in this case was not sufficient to support the instruction on the affirmative defense of assumption of risk as to either theory of recovery. Because this error requires reversal and remand for a new trial, we need not consider Jay's constitutional claim.

[11,12] When a defendant pleads the affirmative defense of assumption of risk, the defendant has the burden to establish the elements of assumption of the risk before that defense, as a question of fact, may be submitted to the jury. *Everts v. Hardcopf-Bickley*, 257 Neb. 151, 595 N.W.2d 911 (1999). Before the defense of assumption of risk is submissible to a jury, the evidence must show that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage. *Pleiss v. Barnes*, *supra*.

[13] The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts. *Pleiss v. Barnes*, *supra*. The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event. *Talle v. Nebraska Dept. of Soc. Servs.*, *supra*.

In the present case, although there was evidence that Jay knew of and understood the specific risk of using the compressor without a pin, there was no evidence to support a subjective finding that Jay voluntarily exposed himself to such risk. Jay consistently testified that he had in fact used the pin. Although Moog presented expert testimony that the accident could not have occurred if the pin were in place, the expert could only speculate that the pin was not in place because Jay chose not to use it. Moog presented no evidence of a subjective, conscious choice on Jay's part to voluntarily expose himself to the risk presented by using the compressor without a pin. It was therefore error for the district court to instruct the jury on the affirmative defense of assumption of risk as to both theories of recovery.

[14,15] Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001). Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial. *Springer v. Bohling*, 259 Neb. 71, 607 N.W.2d 836 (2000). We have generally held that

giving a jury instruction on assumption of risk is prejudicial error when the evidence is not sufficient to support the defense. See, *Everts v. Hardcopf-Bickley*, *supra*; *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991); *Trackwell v. Burlington Northern RR. Co.*, 235 Neb. 224, 454 N.W.2d 497 (1990); *Vanek v. Prohaska*, 233 Neb. 848, 448 N.W.2d 573 (1989). We conclude in this case that instructing the jury on assumption of risk as to both theories of recovery was prejudicial error and that we must reverse, and remand for a new trial.

(b) "Contributory Negligence" as
Defense to Strict Liability

Because the jury instruction on assumption of risk was prejudicial error requiring reversal and remand, it is not necessary that we consider Jay's remaining assignments of error in order to dispose of this appeal. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002); *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000).

The majority of Jay's assignments of error relate generally to issues involving the sufficiency of the specific evidence presented in this case or to the specific expert testimony admitted. We will not consider such other issues in the present appeal because such issues may or may not recur on remand. However, the legal issue Jay raises regarding contributory negligence as a defense to Jay's strict liability theory of recovery is worthy of comment to avoid error on remand of this cause, and we therefore address that issue. We conclude that the affirmative defense which was characterized by Jay, Moog, and the district court as "contributory negligence" was in substance an affirmative defense of "misuse" and that misuse is a proper defense in a products liability case based on a theory of recovery of strict liability.

In its amended answer, Moog asserted as an affirmative defense to both Jay's negligence and strict liability theories of recovery that Jay was "contributorily negligent" in four respects. In two separate instructions, addressing both negligence and strict liability theories of recovery, the district court referred to

Moog's assertion that Jay was "contributorily negligent" and instructed the jury in part as follows:

[T]he Defendant claims the Plaintiff himself was negligent in one or more of the following ways:

1. The Plaintiff used the 40187C tool without a retaining pin;

2. The Plaintiff used the 40187C tool on the upper strut mount misplacing the upper arms;

3. The Plaintiff applied a prying force on the strut assembly while the spring was compressed and the upper arms not fixed with a retaining pin; and

4. The Plaintiff failed to follow directions and warnings not to use the tool without a retaining pin.

[16] Jay argues generally on appeal that as a matter of law, it is error for a district court to give a contributory negligence instruction as a defense to a strict liability theory of recovery. Jay specifically contends that because of statutory amendments in 1992, including the enactment of new comparative negligence statutes, contributory negligence is not a defense to a strict liability theory of recovery in Nebraska. The contention raised by Jay is not at issue in this case because the affirmative defense pled by Moog constitutes the affirmative defense of "misuse," and the issue on appeal is therefore the propriety of a misuse affirmative defense where the plaintiff alleges a strict liability theory of recovery. We conclude that a misuse defense is available in a products liability case based on a theory of recovery of strict liability.

[17] In its answer, Moog pled as a defense that Jay used the compressor without a retaining pin, used the compressor on the upper strut mount misplacing the upper arms, and applied a prying force on the strut assembly while the spring was compressed and the upper arms not fixed with a retaining pin. These assertions describe specific misuses of the compressor. Moog also asserts that Jay failed to follow directions and warnings not to use the compressor without a retaining pin. Failure to follow plain and unambiguous instructions is a misuse of the product. *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984).

We have stated both prior and subsequent to the 1992 statutory amendments noted by Jay that misuse of the product is a defense

to a strict liability theory of recovery. See, *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000); *Erickson v. Monarch Indus.*, *supra*. We have also distinguished between contributory negligence and misuse, stating that while "traditional 'contributory negligence' in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort," misuse of the product is a defense. *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 567, 209 N.W.2d 643, 655 (1973), *disapproved on other grounds*, *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983). We find nothing in the statutory amendments noted by Jay or elsewhere that would change our prior holdings that misuse of the product is a proper affirmative defense to a strict liability theory of recovery. We therefore conclude that on remand, if Moog's evidence supports the instruction, rather than the instruction given at trial, the district court may instruct the jury on misuse of the product as an affirmative defense to Jay's strict liability theory of recovery using an appropriately tailored instruction. See NJ12d Civ. 11.25.

VI. CONCLUSION

We conclude that the district court did not err in overruling Moog's motion for directed verdict, and we therefore reject Moog's cross-appeal. We conclude, however, that the district court committed prejudicial error by instructing the jury on the affirmative defense of assumption of risk as to both theories of recovery because there was not sufficient evidence to support the instruction. We therefore reverse the judgment, and remand the cause to the district court for a new trial. We further conclude that misuse of the product is an allowable defense to Jay's strict liability theory of recovery, and if warranted by the evidence on remand, the jury may be instructed on the affirmative defense as to this theory of recovery.

REVERSED AND REMANDED FOR A NEW TRIAL.

ANGELA KOSMICKI, APPELLEE AND CROSS-APPELLANT, V.
STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND
HUMAN SERVICES, AND RON ROSS, DIRECTOR,
APPELLANTS AND CROSS-APPELLEES.

652 N.W.2d 883

Filed November 8, 2002. No. S-01-508.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.
4. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Administrative Law: Appeal and Error.** An appellate court accords deference to an administrative agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent.
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: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
8. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter which are in *pari materia* may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible.
9. **Contracts: Words and Phrases.** A contract, in its broad sense, is an agreement, obligation, or legal tie whereby a party binds itself, or becomes bound, expressly or impliedly, to pay a sum of money or to perform or omit to do some certain act or thing.
10. **Duress: Proof.** The burden of proving duress is placed upon the party alleging it.
11. **Duress.** What constitutes duress is a question of law, but existence of duress is a question of fact.
12. **Contracts: Duress.** To be voidable because of duress, an agreement must not only be obtained by means of the pressure brought to bear, but the agreement itself must be unjust, unconscionable, or illegal.

13. **Duress.** The essence of duress is the surrender to unlawful or unconscionable demands. It cannot be predicated upon demands which are lawful or the threat to do that which the demanding party has a legal right to do.
14. **Contracts.** Adhesion contracts are not automatically unconscionable or void.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Don Stenberg, Attorney General, Michael J. Rumbaugh, Special Assistant Attorney General, Royce N. Harper, and Michele M. Lewon, Senior Certified Law Student, for appellants.

Rebecca L. Gould, D. Milo Mumgaard, and Sue Ellen Wall, of Nebraska Appleseed Center for Law in the Public Interest, Inc., for appellee.

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

GERRARD, J.

The Welfare Reform Act (Act), Neb. Rev. Stat. § 68-1708 et seq. (Reissue 1996 & Cum. Supp. 2000), limits recipients of public assistance to no more than 2 years of cash assistance and generally requires that while receiving cash assistance benefits, recipients engage in certain approved work-related activities. Full-time postsecondary education is among the work-related activities acceptable under the Act. The question presented in this appeal is whether Angela Kosmicki's pursuit of a bachelor's degree meets the work activity requirement of the Act when the evidence does not show that Kosmicki will be self-sufficient prior to the expiration of the 2-year cash assistance benefit limitation.

FACTUAL AND PROCEDURAL BACKGROUND

On September 16, 1998, while Kosmicki was living in Scottsbluff, Nebraska, she applied for public assistance benefits from the Nebraska Department of Health and Human Services (Department) for herself and her son. On November 9, Kosmicki signed a self-sufficiency contract, as required by the Act. Kosmicki's service plan required her to complete an associate degree at Western Nebraska Community College.

In August 1999, Kosmicki moved to Lincoln, Nebraska, to join her newborn daughter's father. In February 2000, Kosmicki left Lincoln to escape an abusive relationship, returned to Scottsbluff, and reapplied for benefits. In April, Kosmicki moved to a domestic violence shelter in Lincoln, and Kosmicki's public assistance case was transferred to the Lincoln office of the Department. On May 12, a new service plan was concluded with the Department in which Kosmicki would do an independent job search, but if her job search was unsuccessful, Kosmicki would attend workshops at Curtis & Associates, Inc.

Kosmicki did not attend required workshops at Curtis & Associates and telephoned her caseworker on June 20, 2000, to inform him that she wished to complete her education and was trying to enroll at the University of Nebraska-Lincoln (UNL). By this time, a total of 8 months had elapsed of the 24 months of cash assistance benefits to which Kosmicki was limited under the Act. Kosmicki's caseworker informed her that if she could not complete a degree program at UNL before reaching her 2-year time limit for cash assistance benefits, then Kosmicki would have to engage in at least 30 hours per week of other approved work activity in order to remain eligible for cash assistance. If, on the other hand, Kosmicki could receive a degree from UNL within the 2-year cash assistance limitation period, Kosmicki's status as a full-time student would satisfy her work activity requirement under the Act.

Kosmicki, at the time, had four to five semesters to complete at UNL before receiving a bachelor's degree. Because Kosmicki could not complete a degree before the end of the 2-year cash assistance limitation period, Kosmicki's caseworker informed her that she could not attend UNL. Kosmicki was told, however, that she would be allowed to complete her associate degree at Southeast Community College. Kosmicki refused to sign a new self-sufficiency contract under the terms offered by the Department.

In July 2000, Kosmicki was informed that as of August 1, 2000, her aid to dependent children payments and medical assistance would stop, although her food stamps would increase to \$302 per month, as the result of an initial sanction imposed under

the Act. Kosmicki appealed, and the director of the Department affirmed the sanction.

Kosmicki appealed to the district court under the Administrative Procedure Act, generally raising two arguments. Kosmicki argued that her self-sufficiency contract with the Department was void because the contract was involuntary on her part and that the Department erred in concluding that Kosmicki could not attend UNL. The district court found that the contract was valid, but concluded that the Department had erred in concluding that attending UNL would not be an acceptable work activity pursuant to the Act and the Department's regulations. The district court remanded the case to the Department for the negotiation of a new self-sufficiency contract consistent with the district court's order. The State appeals.

ASSIGNMENTS OF ERROR

The State's sole assignment of error is that the district court erred in concluding that Kosmicki was entitled to renegotiate a new self-sufficiency contract that included Kosmicki's attending UNL, because Kosmicki cannot complete a degree within the 2-year time limit on her cash assistance benefits. On cross-appeal, Kosmicki assigns that the district court erred in concluding that there was no duress, coercion, and intimidation on the part of the Department

when the contract formation process outlined by statute and [Department] regulations, and designed to equalize the extreme disparity in bargaining power between low-income families and the State . . . are not followed, and the applicant family is finally forced to accept a contract containing standard clauses that do not reflect the interests and barriers of the applicant family.

STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Hauser v. Nebraska Police Stds. Adv. Council*, ante p. 605, 650 N.W.2d 760 (2002). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the

decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings. *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002).

[4,5] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.* However, an appellate court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent. See *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995). See, also, *Capitol City Telephone v. Nebraska Dept. of Rev.*, ante p. 515, 650 N.W.2d 467 (2002).

ANALYSIS

POSTSECONDARY EDUCATION

The intent of the Act was, in part, to reform the welfare system to remove disincentives to work, promote economic self-sufficiency, and provide individuals and families the support needed to move from public assistance to economic self-sufficiency. See § 68-1709. The Act was intended to change public assistance from entitlements to temporary, "contract-based" support, accomplished through individualized assessments of the personal and economic resources of the applicant and the use of individualized self-sufficiency "contracts." See § 68-1709. To that end, the Act limits recipients of public assistance to no more than 2 years of cash assistance and generally requires that while receiving cash assistance benefits, recipients engage in certain approved work-related activities, which can include full-time postsecondary education.

When an individual or family applies for public assistance benefits, a comprehensive assessment of the applicant's personal and financial assets is conducted by the Department. Based on the results of the assessment, the applicant and Department case manager are to develop a self-sufficiency contract, built upon the

premise of urgent action, and detailing the responsibilities, roles, and expectations of the applicant family, the case manager, and other service providers. See §§ 68-1719 and 68-1720. Cash assistance may be provided for a period of time not to exceed a total of 2 years for recipient families, absent certain exceptions which are not pertinent to this appeal. See § 68-1724. Cash assistance is also provided only while recipients are actively engaged in the specific work-related activities outlined in the self-sufficiency contract. § 68-1723.

Under the self-sufficiency contract, the principal wage earner and other nonexempt members of the applicant family are "required to participate in one or more of the following: Education, job skills training, work experience, job search, or employment." § 68-1721(1). Education consists of "the general education development program, high school, Adult Basic Education, English as a Second Language, *postsecondary education*, or other education programs approved in the contract." (Emphasis supplied.) § 68-1721(2). A regulation of the Department, 468 Neb. Admin. Code, ch. 2, § 020.06B1 (1997), provides, in relevant part:

Post-secondary education is limited to that which is directly related to the fulfillment of an individual's vocational goal. The participant can participate in postsecondary education for up to 24 months. . . . A postsecondary education program that can be included in the Self-Sufficiency Contract should be for occupations that facilitate economic self-sufficiency. In order for postsecondary education to be included in the Contract, the client should demonstrate that the education program will lead to economic self-sufficiency.

The principal goal of the Act is the achievement of self-sufficiency as expediently as possible. The self-sufficiency contract is "built upon the premise of urgent action." § 68-1719. The Legislature has determined that "the primary purpose of the welfare programs in this state is to provide temporary, transitional support for Nebraska families so that economic self-sufficiency is attained in as an expeditious manner as possible, with the goal of attaining such *self-sufficiency within two years of the initial receipt of public assistance*." (Emphasis supplied.) § 68-1709. See, also, 42 U.S.C. § 608(b)(2)(A)(iii) (2000);

45 C.F.R. § 261.12(c) (2001) (stating that for state-administered welfare programs, individual responsibility plans should “be designed to move the individual into whatever private-sector employment he or she is capable of handling as quickly as possible”).

To that end, the Act and its associated regulations emphasize that a self-sufficiency contract must include specific goals for both the State and the recipient of benefits. To ensure that a recipient makes progress toward self-sufficiency, “goals shall be set with timelines and benchmarks that facilitate forward momentum.” § 68-1719.

The Contract will identify the goals to be achieved and will include time lines and benchmarks that facilitate forward momentum. The goals should be clear and specific; measurable and verifiable; realistic - within the control of the individual; adequate - contribute to accomplishment of the goal; congruent with the individual’s values; and time-limited - can be accomplished in a reasonable time frame *and within the overall time limit.*

(Emphasis supplied.) 468 Neb. Admin. Code, ch. 2, § 020.05 (1997).

It is undisputed in this case that Kosmicki did not meet, nor did she intend to meet, the requirements of her self-sufficiency contract as set forth in the May 12, 2000, service plan. The issue is whether the Department was correct in its determination that Kosmicki’s proposal, to obtain a bachelor’s degree at UNL, would not be an acceptable goal of an amended self-sufficiency contract. We conclude that the Department’s position is supported by the language and purpose of the Act.

[6-8] 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. It is the court’s duty to discover, if possible, the Legislature’s intent from the language of the statute itself. *Capitol City Telephone v. Nebraska Dept. of Rev.*, ante p. 515, 650 N.W.2d 467 (2002). When construing a statute, an appellate court must look to the statute’s purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction

which would defeat it. *Volquardson v. Hartford Ins. Co.*, ante p. 337, 647 N.W.2d 599 (2002). The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible. *Willers v. Willers*, 255 Neb. 769, 587 N.W.2d 390 (1998).

Considered as a whole, the Act reflects the Legislature's intent that recipients of public assistance become self-sufficient as quickly as possible and that they attain self-sufficiency within 2 years of initially receiving benefits. The Department's regulations, consistent with the purpose and language of the Act, require that postsecondary education must lead to economic self-sufficiency to be included in a self-sufficiency contract and that the goals set forth in a self-sufficiency contract must be attainable within the 24-month overall time limit imposed by the Act. See §§ 020.05 and 020.06B1. In this case, it is not disputed that Kosmicki's proposed goal—a bachelor's degree from UNL—could not be achieved within the 24 month overall time limit. It was, therefore, unacceptable pursuant to § 020.05.

The legislative history of § 68-1721 supports the conclusion that the Legislature did not intend for recipients of public assistance to pursue a course of postsecondary education that cannot be completed prior to the end of the cash assistance limitation period. The inclusion of "postsecondary education" as acceptable work activity under the Act was a result of a committee amendment to 1995 Neb. Laws, L.B. 455. See Executive Sessions, Health and Human Services Committee, 94th Leg., 1st Sess. 4 (Mar. 29, 1995). A floor amendment was offered to remove the language added by the committee amendment, and in voting to reject the floor amendment, the Legislature specifically debated the intent of the postsecondary education provision. See, generally, Floor Debate, 94th Leg., 1st Sess. 4244-65 (Apr. 10, 1995). The debate, considered as a whole, reflects the Legislature's understanding that the postsecondary education provision was intended to permit a recipient of public assistance to complete a course of postsecondary education within the cash assistance limitation period. See *id.* As stated by the principal introducer of L.B. 455:

A community college is a postsecondary education. It was always the intent that that be included. [One senator] brought forward the fact that he wanted it stated more plainly. And, certainly, if a woman came in and only had three semester hours left for her college degree, it would make no sense in that individual initial assessment to say, well, we aren't going to pay for that. I mean, how much sense does that make when, with that additional three hours, she could go out and get an excellent job? And so it's always been the intent to provide the new training, the new skills to women; it has never been the intent for the state to provide a four-year college education. This does not do that, it just give[s] the caseworker the possibility of allowing women to attend either a community college or what may be necessary in order to complete their education to go out and earn a living wage.

Floor Debate, Health and Human Services Committee, 94th Leg., 1st Sess. 4249 (Apr. 10, 1995).

In concluding that Kosmicki should have been permitted to pursue her bachelor's degree, the district court reasoned that there are many occupations in which employers require education, but not necessarily a degree. For instance,

[b]y attending UNL business college for two years and taking a number of accounting classes, an individual may make themselves [sic] marketable to a company that is looking to hire a bookkeeper or accountant and does not require the person to be a CPA or to have a bachelor's degree. . . . Likewise, an individual who takes two years of college courses at UNL in the area of Computer Science may be able to find excellent employment and become self sufficient without ever having obtained a bachelor's degree.

The district court's reasoning is plausible, but is misplaced in the instant case. The record clearly establishes that Kosmicki's course of education at UNL was not intended to make Kosmicki self-sufficient before the end of her cash assistance limitation period. We recognize that there is testimony in the record to suggest that the Department has applied a de facto rule that a recipient of benefits must obtain a degree within 2 years in order for postsecondary education to be included in a self-sufficiency

contract. The validity of such a standard, if it exists, is not before us in this case. It may be possible for a recipient of benefits to demonstrate that even without obtaining a degree, his or her course of postsecondary education will lead to self-sufficiency within the cash assistance limitation period. That circumstance, however, is not presented in the instant case.

The purpose of the Act is to ensure, to the greatest extent possible, that recipients of public assistance benefits become self-sufficient before the expiration of their 2-year limitation period on cash assistance benefits. The Act, and regulations promulgated by the Department, require that self-sufficiency contracts establish reasonable goals to achieve that purpose. While postsecondary education is acceptable work-related activity under the Act, a course of postsecondary education is only an appropriate goal for a self-sufficiency contract if the postsecondary education will lead to economic self-sufficiency within the cash assistance limitation period. There is no evidence in the present record to suggest that Kosmicki's pursuit of a bachelor's degree at UNL would satisfy that criterion. Therefore, the district court erred in determining that Kosmicki was entitled to have her education at UNL included in her self-sufficiency contract.

CROSS-APPEAL

In her cross-appeal, Kosmicki contends that the district court erred in determining that the self-sufficiency contract set forth in her May 12, 2000, service plan was not void and unenforceable. Kosmicki's assignment of error seems to advance two claims: (1) The self-sufficiency contract is void because of the relative bargaining position of the parties and (2) the self-sufficiency contract is void because the Department failed to reassess Kosmicki when she reapplied for benefits.

There are several reasons that Kosmicki's argument fails. First, we note that even a declaration that the May 12, 2000, service plan was void would not permit Kosmicki to pursue a bachelor's degree from UNL while receiving cash assistance benefits. The Act requires that a self-sufficiency contract be in place and that a recipient of benefits engage in approved work activity in order for cash assistance benefits to be paid. Even if the May 12 service plan was void, pursuit of a bachelor's degree at

UNL would still be an unacceptable goal of a new service plan, based on our reasoning set forth above. In other words, even if Kosmicki's cross-appeal has merit, it furnishes no discernible basis for relief.

[9] Second, although the Act uses the word "contract" to describe the documents setting forth the respective obligations of the recipient and the State, we are not persuaded that the Legislature's use of the term was intended to import the body of law associated with contractual interpretation and enforcement. The self-sufficiency contracts created under the Act are creatures of statute, and not common law. At common law, a contract, in its broad sense, is an agreement, obligation, or legal tie whereby a party binds itself, or becomes bound, expressly or impliedly, to pay a sum of money or to perform or omit to do some certain act or thing. *McNally v. Ponce*, 150 Neb. 267, 34 N.W.2d 262 (1948). In this case, however, the legal ties between the parties, and their rights and remedies, are created by and set forth in the Act, not the self-sufficiency contract. The self-sufficiency contract serves as a means for the State and a recipient of public assistance to memorialize a specific plan of action by which a recipient can attain self-sufficiency; however, it is not given legal effect by the agreement of the parties and therefore is not a contract as that term is generally used in civil law. Given that, we are not convinced that the enforceability of statutory requirements can be voided in the same manner as a civil contract that is created solely by agreement of the parties.

[10-12] Third, even assuming that principles of contract law are applicable to the instant case, Kosmicki failed to show that the May 12, 2000, self-sufficiency contract should be rescinded due to duress. The burden of proving duress is placed upon the party alleging it. *Lustgarten v. Jones*, 220 Neb. 585, 371 N.W.2d 668 (1985). What constitutes duress is a question of law, but existence of duress is a question of fact. *Id.* To be voidable because of duress, an agreement must not only be obtained by means of the pressure brought to bear, but the agreement itself must be unjust, unconscionable, or illegal. *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989); *Lustgarten, supra*. There is no evidence in the record to support a finding that the self-sufficiency contract is itself unjust, unconscionable, or illegal.

[13] Furthermore, there is no evidence to support a finding that the self-sufficiency contract was the result of duress on the part of the State. The essence of duress is the surrender to unlawful or unconscionable demands. It cannot be predicated upon demands which are lawful or the threat to do that which the demanding party has a legal right to do. *Id.* Clearly, the State's requirement that Kosmicki enter into a self-sufficiency contract in order to receive cash assistance was lawful, as it was required by the Act.

Kosmicki also claims that the May 12, 2000, self-sufficiency contract is unconscionable and void because the Department failed to conduct a new comprehensive asset assessment when she reapplied for benefits after moving to Scottsbluff. First, we note that Kosmicki's caseworker in Lincoln testified that when he was assigned to Kosmicki's case, he reviewed her previous assessment and went over that assessment with Kosmicki to determine what, if anything, had changed. The caseworker testified that he had performed an acceptable assessment based on Kosmicki's change of circumstances. Furthermore, we are unable to discern precisely how the Department's alleged failure to perform a reassessment bears on whether the May 12 self-sufficiency contract was the result of duress. A comprehensive assets assessment "shall structure personal resources information and control subjectivity," and is used "[t]o develop a self-sufficiency contract . . . and promote services which specifically lead to self-sufficiency." § 68-1718(3)(a). The assessment does not function, however, to enhance the bargaining position of an applicant in any substantive way. For the foregoing reasons, the district court's finding that Kosmicki's May 12 self-sufficiency contract was not the product of duress is supported by competent evidence.

[14] Kosmicki finally argues that the May 12, 2000, self-sufficiency contract is an adhesion contract and is therefore void. Again, even if we were to assume that contract principles apply under these circumstances, Kosmicki's argument is without merit. Even if the self-sufficiency contract could somehow be construed as an adhesion contract, adhesion contracts are not automatically unconscionable or void. See *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571 (Tex. 1999) (citing authorities). Kosmicki does

not contend that the self-sufficiency contract is unconscionable, and there is no evidence that the May 12 self-sufficiency contract did not fall within Kosmicki's reasonable expectations as the allegedly adhering party. See, generally, *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1981) (citing authorities). In short, Kosmicki's assignment of error on cross-appeal is without merit.

CONCLUSION

The purpose of the Act is to make sure that recipients of public assistance benefits attain economic self-sufficiency within 2 years of receiving public assistance. To that end, recipients are required to engage in work activity and pursue goals that will lead to such self-sufficiency within the 2-year limitation period on cash assistance. Kosmicki failed to demonstrate that her desired goal of pursuing a bachelor's degree at UNL was consistent with achieving self-sufficiency within 2 years of receiving public assistance, and the district court erred in concluding that Kosmicki was entitled to include that goal in her self-sufficiency contract. The judgment of the district court is reversed to that extent. The district court correctly determined, however, that Kosmicki's May 12, 2000, self-sufficiency contract was valid, and that determination is affirmed. The judgment of the district court is, therefore, affirmed in part and in part reversed, and the cause is remanded to the district court with directions to affirm the decision of the Department.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CARLOS AGUILAR,
ALSO KNOWN AS JUAN CARLOS, APPELLANT.
652 N.W.2d 894

Filed November 8, 2002. No. S-01-733.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility.

2. **Rules of Evidence: Other Acts: Appeal and Error.** Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 1995), and the trial court's decision will not be reversed absent an abuse of discretion.
3. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
4. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
5. **Rules of Evidence: Other Acts: Proof: Words and Phrases.** Prior bad act evidence is evidence of other crimes, wrongs, or acts, aside from the crime charged, which tend to prove the character of a person and to show that he or she acted in conformity therewith when committing the charged crime.
6. **Rules of Evidence: Other Acts.** Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
7. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means its relevance does not depend upon its tendency to show propensity.
8. **Rules of Evidence: Other Acts.** Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the coverage under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
9. **Convictions: Appeal and Error.** Not all trial errors, even those of a constitutional magnitude, entitle an accused to a reversal of an adverse trial result. It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside.
10. **Motions to Strike: Jury Instructions.** When an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

Jim K. McGough, of Copple, Rockey & McGough, P.C., for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

McCORMACK, J.

NATURE OF CASE

Carlos Aguilar was convicted by jury of four counts of delivery of a controlled substance, all Class III felonies. During the trial, outside the presence of the jury, Aguilar objected to testimony that he characterized as prior bad acts. He argues that this evidence had not been subject to a Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), hearing (404 hearing) and moved for a mistrial. That motion was overruled. After the jury returned its verdict, Aguilar moved for a new trial because of the alleged erroneous admission of certain evidence. In addition, he asserted the trial court erroneously allowed the jury to read transcripts of alleged drug transactions while the recording was being played. Aguilar timely filed his appeal.

BACKGROUND

Aguilar was charged with four separate counts of delivery of a controlled substance, methamphetamine. All four counts occurred between March and June 2000.

MARCH 25, 2000

The first count occurred on March 25, 2000. Ramon Rodriguez agreed to be a confidential informant for the Norfolk police, and he was to receive \$100 for each attempt to make a controlled purchase of illegal drugs. Rodriguez was supervised by Officer Steven Mills. He was to attempt to purchase illegal drugs from a woman named "Yolanda" who lived in a trailer park near Johnson's Park in Norfolk. Before Rodriguez was sent to make the purchase, Mills searched his body, planted a tape recorder on him, and gave him money to make the purchase.

At about 8 p.m., Mills drove Rodriguez to a location near Johnson's Park near Yolanda's trailer. Tricia Frazier, Aguilar's girl friend, was at the trailer when Rodriguez arrived. Bobbie Kleinberg arrived at about the same time. While Rodriguez was inside the trailer, several other individuals arrived, including Aguilar. Kleinberg left, as did another individual, leaving only Rodriguez, Frazier, and Aguilar at the trailer. Later, Yolanda arrived.

After Yolanda arrived, Kleinberg returned and spoke to Aguilar. Kleinberg was going to "hook up" Aguilar with some drugs, i.e., get him drugs from a third-party source. Rodriguez then asked Yolanda if she had any drugs to sell him, but he was unable to purchase any drugs from her. Rodriguez then left the trailer, walked back to Johnson's Park, and made contact with Mills. Rodriguez was searched and informed Mills of what had transpired.

Rodriguez returned to the trailer at around 10 p.m. Before leaving for the trailer, Rodriguez was again searched by Mills and had a recording device planted on him. When Rodriguez arrived at the trailer, he observed Aguilar and Frazier. He asked Aguilar if he had any "coke" or "crank," and Aguilar stated that he was waiting for some. About a half hour later, Kleinberg arrived and talked to Aguilar about a possible drug purchase. Kleinberg then left. While she was gone, two other individuals came to the trailer.

Kleinberg again returned to the trailer, and she, Rodriguez, Aguilar, and Frazier left to obtain the drugs. The two other individuals left and went their own way. According to Rodriguez, he rode with Frazier in her van and they followed Aguilar and Kleinberg in her "Tracker" automobile. They drove to a parking lot by 12th Street and Prospect Avenue in Norfolk. Mills observed the van and the Tracker leave the trailer home, but did not follow them. According to Rodriguez, Kleinberg got out of the Tracker and went into a house across the street from the parking lot where they were parked. Aguilar climbed into the van.

Kleinberg later exited the house, walked over to Frazier's van, and climbed in. Once inside the van, she gave Aguilar the illegal drugs. Rodriguez, Aguilar, and Frazier then drove in Frazier's van to the apartment of Toni Shipley and went into a bedroom. According to Rodriguez, Aguilar separated a portion of the drug, which he concluded to be roughly an "eight ball" in quantity. He then bagged it up and sold it to Rodriguez. An "eight ball" is approximately 3 to 3½ grams of a drug. Rodriguez, Aguilar, and Frazier then drove back to the trailer in Frazier's van, and once they arrived, Rodriguez walked to Mills' vehicle and was searched. He gave Mills the drug and the tape recorder and told Mills what had occurred.

MAY 15, 2000

On May 15, 2000, Rodriguez met with Mills and another officer at approximately 7 p.m. Rodriguez was again searched, equipped with a recording device, and given money to make a controlled purchase. He was instructed to try to purchase another "eight ball" of methamphetamine from Aguilar.

Rodriguez was let out of the car by Mills and walked down an alley to a house located on Indiana Street in Norfolk, where Aguilar and Frazier were residing. He knocked on the door and went into the home. He saw Aguilar, Frazier, and Shipley sitting at the dining room table smoking methamphetamine from a piece of aluminum foil. Rodriguez also observed an "eight ball" or more of methamphetamine in a plastic bag on the table. They began conversing, and Aguilar sprinkled more methamphetamine from the table into another piece of foil. He, Frazier, and Shipley proceeded to smoke the second foil. After the parties were finished smoking the second foil, Shipley left the home and Frazier went into the kitchen. Rodriguez then purchased methamphetamine from Aguilar. Aguilar picked the drugs up from the table, and Rodriguez paid him. Aguilar gave Rodriguez the drugs, and Rodriguez put them in his pocket. Rodriguez then left and met with Mills and told him what had happened. Mills searched Rodriguez and took the recording device and the drugs. Mills also took the leftover purchase money from him.

MAY 19, 2000

On May 19, 2000, Rodriguez was again instructed by Mills to purchase drugs from Aguilar. Rodriguez was searched, given the money to make the controlled purchase, and equipped with a recording device. He was instructed to go to the corner of Eighth Street and Norfolk Avenue, where a laundromat was located, to attempt the purchase. Mills and Rodriguez parked their vehicle a couple of blocks south of the laundromat, and Rodriguez walked to it.

Upon entering the laundromat, Rodriguez saw Frazier and spoke with her about purchasing an "eight ball" of methamphetamine. She had some methamphetamine and put it in her laundry basket. Rodriguez then placed his money in the laundry

basket and took the drugs. He then walked outside and noticed Aguilar drive by in Frazier's van. He walked to the side of the building where the van was parked and stopped to talk to Aguilar. Rodriguez showed the methamphetamine that Frazier gave him to Aguilar, and Aguilar exchanged it for a larger amount.

After he was finished talking to Aguilar, Rodriguez found Mills. Mills searched Rodriguez and took the recording device and the drugs given to Rodriguez by Aguilar, and Rodriguez discussed what had happened. According to Mills, when Rodriguez was in the laundromat, he saw Frazier's van drive by, so he followed the van. He was able to observe Rodriguez and Aguilar talking at the van.

JUNE 6, 2000

The fourth count against Aguilar arose out of another controlled purchase of illegal drugs by Rodriguez on June 6, 2000. Before making the purchase, Rodriguez was again searched by Mills and was given purchase money and a recording device. Rodriguez testified that he was dropped off on the corner of Fourth Street and Omaha Avenue and that he walked to the Indiana Street location. He knocked on the door, went inside, and noticed Aguilar and Frazier sitting in the dining room playing a dice game. As Rodriguez was standing in the dining room, Aguilar pulled a Ziploc bag from his pocket, containing what appeared to be a gram of methamphetamine. In exchange for the bag, Rodriguez gave him \$100.

Rodriguez later saw Mills and got into Mills' car. He gave Mills the drugs and the recording device and told Mills what had happened.

PROCEDURAL HISTORY

The recordings of the alleged transactions were duplicated onto compact discs, and transcribed by Rodriguez with the help of a police officer. Much of the recorded conversations were in Spanish, so Rodriguez translated the conversations into English, while the officer typed. The translations were verified by two interpreters.

According to Rodriguez, the recordings of the conversations at issue and the partial transcripts of those conversations accurately portray the conversations that took place during and around the

time of the alleged transactions. Exhibits 41, 42, 43, 48, and 49 accompany the March 25, 2000, transaction. Exhibits 44 and 50 accompany the May 15 transaction. Exhibits 45 and 51 accompany the May 19 transaction. Finally, exhibits 46 and 52 accompany the June 6 transaction.

The trial court held a 404 hearing to determine whether the purported prior bad act evidence would be admissible at trial. The particular acts found relevant and admissible included (1) Aguilar's acquisition of drugs from Kleinberg on March 25, 2000, before selling drugs to Rodriguez and (2) evidence of Aguilar's smoking a foil of methamphetamine on May 15. The trial court found that the above events were proved by clear and convincing evidence and demonstrated opportunity, identity, and knowledge.

The trial court also found that there was a need for transcripts of the recordings and that it was within its discretion to allow them to be used. Aguilar argued that the recordings and the transcripts contained evidence of other acts committed by Aguilar that was not argued at the 404 hearing. The trial court noted that it wanted redacted compact discs and transcripts to be introduced to the jury.

Aguilar filed a motion in limine to exclude the State from using any testimony or evidence on the recordings or the transcripts. Aguilar argued that they contain inadmissible prior bad act evidence not subject to the 404 hearing. The record does not reflect additional discussions or rulings on the admissibility of the recordings or transcripts prior to the trial.

During the trial, the State offered exhibits 41 and 48, a redacted transcript and recording of Rodriguez' first attempt to purchase illegal drugs at Yolanda's trailer on March 25, 2000. Aguilar voir dired Rodriguez about the manner in which the transcripts were created, and he did so again each time a recording and transcript of an alleged transaction occurred. Following voir dire, Aguilar objected to the offer, but his objection was overruled.

Outside the presence of the jury, Aguilar argued the allegations contained in his April 12, 2001, motion in limine, which motion states as follows:

1. Both the audiotapes and the transcripts contain evidence of prior bad acts in violation of *Neb. Rev. Stat.*

§ 27-404(2) in the absence of a 404 hearing to determine the admissibility of any prior bad acts therein;

2. They contain inadmissible hearsay;

3. They are irrelevant to the charges against [Aguilar];

4. The prejudicial weight of the tapes and accompanying transcripts outweigh their probative value in violation of *Neb. Rev. Stat.* § 27-403;

5. The accompanying transcripts supplied with the audiotapes violate the best evidence rule, *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000) and *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000), and places undue emphasis on testimonial evidence; and

6. There is insufficient foundation to support the allocation of speakers on the accompanying transcript.

The trial court overruled the motion. It noted that such evidence is testimonial in nature and should not go back to the jury room, but that the jury could use the transcripts to follow along with the recording. Aguilar expressed his concern about the existence of rule 404 evidence on the recordings and transcripts. The State noted that it would excise as much of that information as it could out of the tapes and that it tried to pare down the evidence to just the transaction charged. To that, Aguilar responded:

To the extent that there's any other conversations on these tapes that have to do with other drug deals, our position is, No. 1, they shouldn't come in as 404 evidence. However, if they do come in, we'd ask the Court to give a limiting instruction telling [the jury] they don't apply to this case.

The trial court stated that it would give a limiting instruction at the time the evidence was published to the jury.

The instruction actually given by the trial court was not the limiting instruction contemplated. The instruction given told the jurors that the transcript was allowed for the limited purpose of following along with the recording, for assistance in identifying speakers, and for the benefit of an English translation of the portions of the conversations in Spanish. That same basic instruction was given to the jury each time a recording and transcript was offered.

When the recording and transcript of the May 15, 2000, transaction were offered to the jury, Aguilar again specifically

requested a rule 404 limiting instruction. The trial court stated that it would wait until the completion of the recording for any additional instruction, but never issued a rule 404 instruction in regard to the recording or transcript.

Aguilar complains of Rodriguez' being allowed to testify, over objection, that he observed Aguilar smoke a second foil of methamphetamine on May 15, 2000. Aguilar claims that this evidence exceeded the trial court's order because at the 404 hearing, the court limited the admission of prior bad act evidence with regard to smoking to the statement that Aguilar was seen "smoking a foil" of methamphetamine. Aguilar claims that his second foil was never subject to a 404 hearing.

Kleinberg testified at trial about events surrounding the March 25, 2000, delivery. Her testimony centered on events occurring immediately after she obtained the drugs for Aguilar on March 25 and gave the drugs to him. According to Kleinberg, she asked if Aguilar would give her some of the drugs that she had given to him. She stated that he then placed a quantity of the drug in a cellophane cigarette package and gave it to her.

At that point, Aguilar made a motion for mistrial, arguing that such evidence was not subject to a prior hearing outside the presence of the jury and was offered in violation of rule 404. The trial court overruled the motion. The trial court did, however, give a limiting instruction, which stated:

Before we go any further, ladies and gentlemen, I'm going to give you an instruction at this time that any evidence that [Aguilar] may have been involved in a drug transaction with this witness on or about March 25, 2000, has been received only for the limited purposes of identity and for preparation, plan, or the opportunity to commit the crimes that have been charged in this case. You must consider the evidence for those limited purposes and for no other purposes.

After the direct examination of Kleinberg, the trial court stated that it had reviewed the motion for mistrial. It concluded that part of her testimony went beyond the testimony and evidence of the 404 hearing regarding Aguilar's giving drugs to Kleinberg. The trial court determined that it was error to include such testimony but that had there been a hearing on that part of

the transaction, it would have been admissible subject to the same limiting instruction previously given to the jury.

At the close of the State's evidence, Aguilar made motions to reconsider striking the testimony of Kleinberg and for directed verdict. The trial court overruled the motion for directed verdict. However, the court sustained the motion to reconsider and struck the additional testimony of Kleinberg not subject to the 404 hearing which did not directly deal with Rodriguez' purchase from Aguilar. Aguilar renewed his motion for mistrial due to the error, but was overruled. The jury was ordered to disregard the stricken testimony of Kleinberg about Aguilar's giving her some drugs. The jury was also reminded of the rule 404 limiting instruction that had been given during Kleinberg's testimony.

After the jury returned its verdict of guilty on all four counts, Aguilar filed a motion for new trial. Aguilar alleged that (1) the manner in which the tapes were handled at the time of trial placed an undue emphasis on them and (2) rule 404 evidence was allowed which was not subject to the previous 404 hearing. The trial court overruled the motion for new trial.

ASSIGNMENTS OF ERROR

Aguilar alleges that the trial court erred in (1) admitting evidence of other crimes in violation of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and rule 404; (2) not granting a mistrial or motion for new trial; and (3) allowing the jury to review transcripts of the tapes of the controlled buys.

STANDARD OF REVIEW

[1] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

[2] Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 403 and 404(2), and the trial court's decision will not be reversed absent an abuse of discretion. *Trotter, supra*.

[3] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999).

[4] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002).

ANALYSIS

RULE 404 EVIDENCE

According to Aguilar, the trial court erred in admitting evidence of other crimes in violation of rules 403 and 404. In Aguilar's brief, he focuses on the evidence of his smoking drugs with Frazier and Shipley on May 15, 2000, and the March 25 incident when he gave Kleinberg drugs after he had initially obtained drugs from her. In addition, he argues that the recordings and accompanying transcripts contained prior bad act evidence.

[5] Prior bad act evidence is evidence of other crimes, wrongs, or acts, aside from the crime charged, which tend to prove the character of a person and to show that he or she acted in conformity therewith when committing the charged crime. *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000).

[6,7] Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2). *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means its relevance does not depend upon its tendency to show propensity. *Id.*

[8] Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of rule 404(2) coverage. See *U.S. v. Heidebur*, 122 F.3d 577 (8th Cir. 1997), quoting *U.S. v. Williams*, 95 F.3d 723 (8th Cir. 1996). In *U.S. v. Swinton*, 75 F.3d 374 (8th Cir. 1996), the court said that where evidence of crimes is so blended or connected with the ones on trial so that proof of one incidentally involves the other or explains the circumstances, it is admissible as an integral part of the immediate context of the crime charged. The

court further said where the other evidence is so integrated, it is not extrinsic and therefore not governed by rule 404(2). The trial court must, however, still follow rule 403, which excludes evidence where the probative value is outweighed by the prejudicial value.

In *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), the alleged prior bad act evidence was that the defendant smoked marijuana just before he shot the victim. We said the act of smoking marijuana was not subject to the statute governing the admissibility of prior bad acts, as the State did not introduce the prior smoking of marijuana as evidence of the defendant's character to prove that he acted in conformity with that behavior on a later occasion, but, rather, smoking marijuana was contemporaneous with his other acts immediately before shooting the victim and was offered to explain the circumstances of the victim's death. See, *U.S. v. Carroll*, 207 F.3d 465 (8th Cir. 2000); *U.S. v. O'Dell*, 204 F.3d 829 (8th Cir. 2000); *U.S. v. Phelps*, 168 F.3d 1048 (8th Cir. 1999); *U.S. v. Tate*, 821 F.2d 1328 (8th Cir. 1987); *State v. Powers*, 10 Neb. App. 256, 634 N.W.2d 1 (2001).

The first inquiry is to determine if the evidence which Aguilar claims constitutes prior bad acts is, in fact, rule 404 evidence.

METHAMPHETAMINE FOILS

The first alleged error raised by Aguilar is the admission of evidence that Aguilar smoked either one or two foils of methamphetamine when Rodriguez purchased drugs on May 15, 2000.

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

Because the exercise of judicial discretion is implicit in rule 401, it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 403 and 404(2), and the trial court's decision will not be reversed absent an abuse of discretion. *Trotter, supra*.

[9] Not all trial errors, even those of a constitutional magnitude, entitle an accused to a reversal of an adverse trial result. It

is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside. *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996).

The smoking of the foil or foils occurred on May 15, 2000, at Aguilar's residence. Rodriguez was present because he had gone to the residence to purchase methamphetamine from Aguilar. Rodriguez did, in fact, purchase methamphetamine from Aguilar, and Aguilar smoked one or two foils of methamphetamine during this visit. We determine that the evidence of Aguilar's smoking the foils of methamphetamine on this occasion was not rule 404 evidence. It is part of the factual setting of the crime of Aguilar's selling methamphetamine to Rodriguez and is intrinsically intertwined with the charged offense.

KLEINBERG'S TESTIMONY

The second alleged error raised by Aguilar is the admission of evidence of delivery by him of drugs to Kleinberg on March 25, 2000.

Aguilar complains of the following portion of Kleinberg's testimony:

Q. You gave the whole half ounce to [Aguilar]?

A. Yes.

Q. Did you ask him if he would hook you up with some of that?

A. I asked for some.

Q. Did he?

A. Huh?

Q. Did he hook you up with some crank?

A. I was given some, yes, for the —

Q. How much did he give you approximately?

A. I really don't know. I can't recall.

Q. Did he weigh it out?

A. No.

Q. Or did he eyeball it?

A. It was just grabbed that I saw.

Q. Did you have anything to put it in or did you just take it in your hand?

A. Cigarette cellophane.

Q. Like in a cigarette pack?

A. Yes.

The trial court, on a motion to reconsider its rulings as to Kleinberg's testimony, stated the following:

However, on the motion to reconsider striking the testimony of Bobbie Kleinberg, I too have thought about that since that time, and as I indicated from my statements, that was, while I considered that error, it was harmless error because it could have come in.

I guess the fact that it's error means that there should be something done about it. And looking at harmless error is after the fact, you know. Well, what was done at the time and was that — is that a real problem. Well, if it's error, the error should be removed whether it's harmless or otherwise, so I'm going to sustain [Aguilar's] motion to reconsider. And having reconsidered, I'm going to give an instruction to the jury which will direct that they [sic] — that the testimony of Bobbie Kleinberg as to [Aguilar's] giving some of the drugs to her after she had given drugs to [Aguilar], that is stricken and the jury will be directed to disregard that part of the testimony. But the prior testimony about the drugs being given by Miss Kleinberg to Mr. Aguilar are still admitted for the limited purpose of showing preparation, plan, identity, and opportunity.

The delivery of drugs by Kleinberg to Aguilar is not rule 404 evidence, but is direct evidence that forms the factual setting of the crime charged to show the source of the drugs Aguilar received and then sold to Rodriguez. See, *U.S. v. Heidebur*, 122 F.3d 577 (8th Cir. 1997); *U.S. v. Williams*, 95 F.3d 723 (8th Cir. 1996). As to all other testimony of Kleinberg, it was stricken by the court and the jury was instructed not to consider it.

[10] The trial court concluded that the admission of Kleinberg's testimony, other than the testimony of the dealing of drugs by Kleinberg to Aguilar, was error. The trial court then concluded, however, that this error was harmless. The trial court's action in striking the portion of Kleinberg's testimony that the trial court considered the admission of to be error and instructing the jury to disregard such testimony removed any

prejudice to Aguilar. When an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). We conclude, therefore, that this assignment of error is without merit.

RECORDINGS AND TRANSCRIPTS

At the pretrial hearing, the trial court noted that the recordings and transcripts contain information beyond the scope of the hearing, but did not believe that conversations contained in the recordings fit within the category of bad acts. However, the court asked the parties to get together and redact the recordings and transcripts.

Despite any attempts to remove references to alleged prior bad acts, the transcripts that the jury read contained references to other bad acts or crimes committed by Aguilar that were not discussed at the 404 hearing. Prior bad act evidence is evidence of other crimes, wrongs, or acts, aside from the crime charged, which tend to prove the character of a person and to show that he or she acted in conformity therewith when committing the charged crime. *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000).

The tapes and transcripts contain past drug dealings involving purchases and distribution by Aguilar. The trial court overruled Aguilar's objection and did not give a limiting instruction.

We conclude that the acts complained of are prior bad acts which would be subject to rule 404. We further conclude that the trial court erred in admitting the prior bad acts contained in the recordings and transcripts at issue, and particularly so in not giving a proper limiting instruction to the jury. The actions discussed by Aguilar were not proved outside of the presence of the jury by clear and convincing evidence. See, *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001); *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Additionally, Aguilar requested, but never received, a proper rule 404 limiting instruction.

Having determined that the trial court erred in admitting the transcripts in the manner described above, we now determine if this error is harmless.

On each occasion that Rodriguez purchased drugs from Aguilar, Rodriguez was first searched by Mills and then provided money for the purchase. On each occasion, immediately after the purchase, Rodriguez returned to Mills, to whom he turned in the drugs and relayed what had occurred. On most of these occasions, Rodriguez was being directly observed by Mills for a portion of the time. Based on this evidence, we determine that the evidence properly admitted at trial overwhelmingly establishes Aguilar's guilt beyond a reasonable doubt. As a result, we conclude that the error in admitting that portion of the tapes containing prior bad act evidence did not materially influence the jury in reaching its verdict and was harmless beyond a reasonable doubt. As such, we determine that Aguilar's assignment of error as to receipt of the tapes is without merit.

MOTION FOR MISTRIAL

Aguilar assigns as error the trial court's failure to grant a mistrial at the conclusion of Kleinberg's testimony concerning the events occurring on March 25, 2000.

The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999).

Aguilar's argument in support of his motion for mistrial was that the evidence produced by Kleinberg was not subject to a prior hearing outside the presence of the jury and was offered in violation of rule 404. As previously explained, the testimony of Kleinberg, with the exception of the direct delivery of drugs by Kleinberg to Aguilar, was subsequently stricken by the court, and the jury was instructed in this regard. If there was an abuse of discretion on the part of the trial court in initially denying the motion for mistrial, this abuse of discretion was corrected by the court's subsequently striking the majority of the testimony of Kleinberg and instructing the jury to disregard the stricken testimony. We conclude that Aguilar's assignment of error in regard to the denial of the motion for mistrial is without merit.

We have reviewed Aguilar's assignment of error of the failure of the trial court to grant his motion for new trial and conclude that his assignment of error is without merit.

TRANSCRIPTS OF TAPES

Aguilar complains of the court's allowing the jury to review the transcripts of the tapes. The tape recordings were mainly in Spanish. The transcripts that were given to the jury during the playing of the tapes were in English. Neither the transcripts nor the tapes were permitted to go back to the jury room. The reason the jury was allowed to review transcripts of the tapes while the tapes were being played in open court was because portions of the tapes were in Spanish and the transcripts were in English. In *State v. Wade*, 7 Neb. App. 169, 581 N.W.2d 906 (1998), the Nebraska Court of Appeals held that the transcripts of audiotape recordings of a defendant's conducting drug transactions was admissible for the limited purpose of assisting the jury in identifying the speakers at any particular time. The Court of Appeals cited *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976), which stated that the need or desire for transcripts of a tape arises from two circumstances: (1) where portions of the tape may be inaudible and (2) where it may be difficult to identify the speakers. In *State v. Loveless*, 209 Neb. 583, 308 N.W.2d 842 (1981), we held that it was not an abuse of discretion of the trial court in admitting a tape and the transcript of the tape, noting that the limited purpose of the transcript was to identify the speakers at any particular time.

In Aguilar's case, since the tapes were partly in Spanish, the English transcripts would assist in identifying speakers and allowing the jury to understand what was being said. We determine that Aguilar's assignment of error in this regard is without merit.

CONCLUSION

For the reasons set out above, we determine that the admission of the evidence concerning Aguilar's smoking of foils of methamphetamine was not rule 404 evidence. We further determine that any error assigned to the admission of Kleinberg's testimony is without merit for the reasons that Kleinberg's testimony, with the exception of the testimony of the direct sale of drugs from Kleinberg to Aguilar, was stricken and the jury instructed to disregard it. As to any prior bad act evidence that was contained in the tape recordings played for the jury, we determine that any error in the failure to redact the tapes, failure to hold a 404

hearing, failure to give a rule 404 limiting instruction, and in the admission of any prior bad acts evidence on these tapes was harmless error beyond a reasonable doubt because the evidence properly admitted at trial overwhelmingly established Aguilar's guilt. As to the motions for mistrial and for new trial, we determine that the court did not abuse its discretion in denying both of the motions and further find that the trial court did not abuse its discretion in allowing the jurors to read transcripts in English of the conversations on the tapes, which were in Spanish, during the time that the tapes were being played.

AFFIRMED.

WRIGHT, J., participating on briefs.

DAVID WAYNE HENDERSON, APPELLANT, V.
MICHELE LYN HENDERSON, APPELLEE.

653 N.W.2d 226

Filed November 8, 2002. No. S-01-843.

1. **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.
2. **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.
3. **Divorce: Child Support: Public Policy.** Public policy provides that parents have a duty to support their minor children until they reach majority or are emancipated, and a parent is not relieved of this duty by virtue of divorce.
4. **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.
5. **Social Security: Public Assistance.** Social Security disability insurance program benefits are not means-tested public assistance benefits, but are based on prior earnings of the recipient, not on the financial need of the recipient.
6. **Child Support: Social Security.** A noncustodial parent is entitled to credit against a monthly child support obligation for Social Security benefits paid to his or her minor child as a result of the noncustodial parent's disability.
7. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed in part, and in part reversed and remanded with directions.

Julie A. Effenbeck, of Law Office of Julie A. Effenbeck, for appellant.

Michele Lyn Henderson, pro se.

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

WRIGHT, J.

NATURE OF CASE

David Wayne Henderson appeals from a dissolution decree entered on July 20, 2001. In the decree, the district court included an adult child in its child support calculation, made a finding concerning competency of the adult child, awarded custody of the adult child, and divided the property of the parties.

SCOPE OF REVIEW

[1] 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. *Brockman v. Brockman*, ante p. 106, 646 N.W.2d 594 (2002).

FACTS

David and Michele Lyn Henderson were married in Oklahoma City, Oklahoma. Two children were born to the marriage: Dustin Wayne, born May 11, 1981, and Nicole Renee, born December 29, 1984.

In his petition for dissolution of marriage, David sought custody of Nicole. Dustin, who is developmentally disabled, was living independently in Salina, Kansas, when the parties separated. At the time of the dissolution hearing, Dustin was living with Michele in Texas, awaiting placement in housing in Irving, Texas.

The district court awarded the parties the personal property in their possession and awarded certain real estate and a van to David. The court ordered David to pay all liens on that property. The court also ordered David to deliver to Michele certain property she requested in a letter to the court, including "the diploma,

her AOT certification, her medical books and supplies, the silverware and Dustin's records."

The district court found that "Dustin is not competent and is in need of his parents' financial care." Michele was ordered to pay child support of \$200 per month until one or both children "become emancipated from the control and care of their parent or are otherwise of age, competent, or emancipated." Custody of Dustin was awarded to Michele, and custody of Nicole was awarded to David, with reasonable rights of visitation for both parents. David was directed to provide medical coverage for Nicole and for "his adult son if possible," and Michele was directed to pay 61 percent of any medical bills not covered by insurance. Michele was ordered to pay \$250 toward David's attorney fees.

The child support calculation worksheet completed by the district court has been summarized as follows:

	Mother	Combined	Father
Total income from all sources	\$21,132		\$14,000
Fed. HH-2 exempt	(1,361)	HH-2 exempt	(291)
Deductions			
a. Taxes - State	(357)		(226)
b. FICA .0675			(945)
. . . .			
f. Total disposable	19,414		12,538
Monthly net income - disposable	1,618		1,045
Combined monthly net income		2,663	
Percent contribution of each parent	61		39
Monthly support from table 1		633 - 1 910 - 2	
Each parent's monthly share	386 - 1 555 - 2		247 - 1 355 - 2
SPLIT CUSTODY CALCULATION			
Total amount owed to father by mother	\$555		

Total amount owed to

mother by father \$355

Support to be paid by mother \$200

\$139 when there is only one child supported.

Michele, who was living in Texas, did not attend the dissolution hearing. David testified that Michele does not work but receives disability payments because she is disabled with disconnection disorder and congestive heart failure. David testified that Michele receives a monthly total of \$2,271 in disability and Social Security payments. David testified that Dustin was receiving Supplemental Security Income and \$274 per month in disability payments based on Michele's disability. Dustin was also employed part time.

At the time of the dissolution hearing, David worked for Nutri-Shield, Inc., in Horton, Kansas, where his gross earnings were \$731 twice a month. He had health insurance through his employer, but Nicole's insurance was provided by the state. Nicole was receiving \$174 in monthly Social Security payments based on Michele's disability. After August 2001, the amount was scheduled to be \$274 per month.

Michele wrote a letter to the district court stating that she was unable to attend the hearing and unable to afford an attorney to represent her. She stated that she received \$916 monthly from Social Security and \$845 monthly in private long-term disability payments. She stated that Dustin cannot drive, cook, clean, or handle his own affairs. She indicated that Dustin receives \$241 per month in Social Security benefits and \$200 per month in Supplemental Security Income benefits. The letter indicates that Michele enclosed a number of credit slips, bills, and other documents, but they are not included in the bill of exceptions filed with this court.

ASSIGNMENTS OF ERROR

David asserts that the district court erred (1) in considering an adult child when calculating child support, (2) in making a finding of competency as to the adult child of the parties, (3) in entering a custody order pertaining to the adult child, and (4) in dividing the parties' property and assets.

ANALYSIS

CHILD SUPPORT CALCULATION

David first assigns as error the inclusion of Dustin, an adult child, in the child support calculation made by the district court. The court entered an order which clearly indicates that it based its decision on two children, even though Dustin is an adult.

Neb. Rev. Stat. § 42-351 (Reissue 1998) provides that the district court has jurisdiction in divorce actions to render judgments and make orders concerning, inter alia, "the custody and support of minor children." See, also, *Kimbrough v. Kimbrough*, 228 Neb. 358, 422 N.W.2d 556 (1988). Neb. Rev. Stat. § 42-364(1) (Reissue 1998) states that "[w]hen dissolution of a marriage or legal separation is decreed, the court may include a parenting plan developed under the Parenting Act, if a parenting plan has been so developed, and such orders in relation to *any minor child* and the child's maintenance as are justified . . ." (Emphasis supplied.) See, also, *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986). Additional provisions throughout § 42-364 refer only to "minor" children. A minor is an unmarried person under the age of 19. Neb. Rev. Stat. § 43-2101 (Reissue 1998). Based on these statutes, the district court had no authority to include Dustin, who is more than 19 years of age, in its child support calculations.

[2] In *Meyers*, 222 Neb. at 375, 383 N.W.2d at 788, this court noted that the issue of whether courts have the power to compel divorced parents to "directly support a handicapped child beyond minority . . . presents an exercise in statutory construction." 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. *In re Estate of Krumwiede*, ante p. 378, 647 N.W.2d 625 (2002).

The *Meyers* court found that § 42-364 was clear and unambiguous in conferring authority to compel divorced parents to support minor children, but also clear and unambiguous in conferring no authority for the support of adult children.

In effect, the mother asks us to read the word "minor" out of the statute and to add words such as to include adult children who are handicapped to the extent they cannot

support themselves. More than that, she wishes us to write into the statute a requirement that divorced parents maintain their handicapped offspring in an institution of higher learning to an indefinite age. This we cannot do; as the foregoing rules of statutory construction demonstrate, it is the function of courts to apply statutes, not to enact them.

Meyers, 222 Neb. at 376, 383 N.W.2d at 789.

[3] The public policy of this state provides that parents have a duty to support their minor children until they reach majority or are emancipated, and a parent is not relieved of this duty by virtue of divorce. *Reinsch v. Reinsch*, 259 Neb. 564, 611 N.W.2d 86 (2000). See, also, *Waldbaum v. Waldbaum*, 171 Neb. 625, 107 N.W.2d 407 (1961). The deciding factor is whether the child has reached the age of majority or become emancipated. Dustin is an adult, and he lived independently in Kansas prior to moving to Texas with his mother, where he was awaiting placement in housing for persons with disabilities. Nebraska law does not provide that payments for his support should be included in a decree of dissolution.

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. *Brockman v. Brockman*, ante p. 106, 646 N.W.2d 594 (2002). The district court abused its discretion in basing the child support award on two children, when one of the children is an adult.

[4,5] The child support guidelines provide that in calculating the amount of support to be paid, the 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. *Dueling v. Dueling*, 257 Neb. 862, 601 N.W.2d 516 (1999). Social Security disability insurance program benefits are not means-tested public assistance benefits, but are based on prior earnings of the recipient, not on the financial need of the recipient. *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001).

The worksheet included here indicates that the district court used the figures provided by Michele to determine her annual income. We are unable to determine if such figures were a part of the record. In Michele's letter to the court, she stated that she received \$916 monthly in Social Security benefits and \$845

monthly from a disability insurance policy, for a total of \$1,761 per month, or \$21,132 per year. This is the figure used by the court to calculate Michele's annual income.

[6] The district court order stated that Michele should receive a credit against her child support obligation for any Social Security payments made to David or Nicole. A noncustodial parent is entitled to credit against a monthly child support obligation for Social Security benefits paid to his or her minor child as a result of the noncustodial parent's disability. See *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990). Social Security benefit payments which are the result of the obligor's disability are a substitute for the obligor's loss of earning power and his or her obligation to pay for the support of his or her dependents. *Gress v. Gress*, 257 Neb. 112, 596 N.W.2d 8 (1999). We have held that when a noncustodial parent becomes disabled *after* a child support order has been issued, "Social Security dependency benefits paid on behalf of the child based on the noncustodial parent's disability can be applied to satisfy the noncustodial parent's child support obligation." See *Hartman*, 261 Neb. at 365, 622 N.W.2d at 876. The same principle applies here. The court should have ordered that Michele receive credit for only those benefits received by Nicole based on Michele's disability. Dustin is an adult, and no child support credit should have been entered for him.

In addition, David testified that he earned \$731 twice a month, for a total of \$1,462 per month or \$17,544 per year. The worksheet indicates that David's yearly income is \$14,000. The only evidence concerning David's wages, other than his testimony, is a photocopy of one pay stub, which also shows the \$731 bimonthly amount. The child support calculation worksheet itself states that the court will "require copies of [the] last 2 years' tax returns to verify 'total income' figures and copies of present wage stubs to verify the pattern of present wage earnings." None of these documents are in the record.

Therefore, the judgment must be reversed and the cause remanded for a recalculation of child support based only on the minor child, Nicole. The district court is directed to comply with the guidelines and to use correct figures in recalculating child support.

FINDING OF COMPETENCY CONCERNING ADULT CHILD

[7] David assigns as error the district court's finding of competency as to Dustin. However, this alleged error is not discussed in the brief. Errors that are assigned but not argued will not be addressed by an appellate court. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002). This error is subsumed in the court's error in basing the child support calculation on two children.

CUSTODY ORDER CONCERNING ADULT CHILD

David's final assignment of error asserts that the district court erred in entering a custody order pertaining to Dustin, the adult child. Custody of Dustin was awarded to Michele, and custody of Nicole was awarded to David, with reasonable rights of visitation to each parent. David does not specifically address this alleged error in his brief, and this court is not required to consider it. We note, however, that for the same reasons we found the child support order to be an abuse of discretion, the court's order concerning custody is in error.

DIVISION OF PROPERTY AND ASSETS

David next argues that the district court erred in its division of property and assets. The court awarded each party the personal property in his or her possession, and it awarded certain real estate and a van to David. David was also directed to deliver certain property to Michele as requested in her letter to the court.

The record before us makes it impossible to determine the method used by the district court to arrive at the property division. David testified at the hearing concerning debts and the responsibility for them, but Michele did not appear. The court may have considered letters and other information sent to it by Michele. The journal entry indicates that a letter from Michele was marked as an exhibit. Exhibit 3, which was filed on May 11, 2001, states that it includes copies of various documents to support Michelle's requests related to the division of property, but the documents are not included in the bill of exceptions. The court noted at the end of the hearing that other materials had been included with the letters, but the court had not looked at them.

We are unable to determine whether the district court abused its discretion in the division of property. David complains that the exhibits were marked by the court but not received into evidence

and that he would have objected to their offer if given the opportunity. This error has not been assigned, and therefore, we do not address it.

CONCLUSION

That portion of the district court's order concerning division of the parties' property is affirmed. However, the court abused its discretion by including Dustin, a disabled child over the age of 19 years, in the child support calculation. The court also erred in awarding custody of an adult child. That portion of the court's order concerning child support and custody is reversed, and the cause is remanded for a recalculation of child support.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.

THE GOVERNOR'S POLICY RESEARCH OFFICE AND
LAUREN L. HILL, IN HER OFFICIAL CAPACITY AS DIRECTOR
OF THE GOVERNOR'S POLICY RESEARCH OFFICE,
STATE OF NEBRASKA, APPELLEES, v. KN ENERGY,
A DIVISION OF KINDER MORGAN, INC., APPELLANT.
652 N.W.2d 865

Filed November 8, 2002. No. S-01-1217.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **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.
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. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
5. **Standing.** Either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.
6. **Actions: Parties: Standing.** To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some

real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.

7. **Standing: Proof.** In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public.
8. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
9. **Administrative Law: Statutes.** The Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded for further proceedings.

M.J. Bruckner and John C. Fowles, of The Bruckner/Fowles Law Firm, P.C., and B.J. Becker for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

The Lancaster County District Court found that KN Energy (KNE) lacked standing to challenge a request by the Governor's Policy Research Office (GPRO) for repayment of \$390,000 from a revolving loan fund created by the Municipal Natural Gas Regulation Act (Act). The court granted summary judgment in favor of the GPRO in the amount of \$390,000 plus interest and costs. KNE timely appealed.

SCOPE OF REVIEW

[1] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002).

[2] 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. *In re Application No. C-1889*, ante p. 167, 647 N.W.2d 45 (2002).

MUNICIPAL NATURAL GAS REGULATION ACT

The Act, Neb. Rev. Stat. §§ 19-4601 to 19-4623 (Reissue 1997 & Cum. Supp. 2000), makes provision for the Municipal Natural Gas Regulation Revolving Loan Fund (Fund). The Fund was created to make loans to municipalities for rate regulation, to pay the costs of administration, and to fund a study of natural gas utility systems. § 19-4617. The GPRO administers the Fund. See *id.* Municipalities which apply for a loan from the Fund must provide a budget statement that specifies the proposed use of the loan proceeds, which may only be used for the costs and expenses incurred by a municipality to analyze rate filings by utilities and establish area-wide rates, and to finance litigation costs of any appeals. *Id.*

The Act provides that the GPRO bills the utility for the amounts disbursed and that the utility may recover these amounts through a special surcharge added to utility bills. See § 19-4617(1)(b). The surcharge may be billed on monthly statements for up to 12 months and shown as a charge for rate regulation expense. *Id.*

BACKGROUND

KNE provides natural gas to customers within municipalities around the State of Nebraska. The municipalities are divided into 11 geographic rate areas. From February through October 1999, a number of municipalities served by KNE adopted resolutions stating their intention to conduct a review of one or more elements of KNE's total end rate. Four of the rate areas filed applications for loans from the Fund, and payments totaling \$390,000 were made to municipalities by the GPRO.

During December 1999, at rate hearings in areas 2, 3, 4, and 7, KNE presented evidence that its current area-wide rates were insufficient (1) to enable it to meet the cost of furnishing natural gas service, including adequate provisions for depreciation of its utility property, and (2) to earn a fair and reasonable return

upon the investment in such property. KNE also presented evidence to show that the disallowance of certain contract costs would exacerbate this insufficiency.

Between February and June 2000, governing bodies in 16 municipalities in rate areas 2, 3, 4, and 7 adopted rate ordinances that prohibited KNE from including in its rates certain above-market costs. On May 30, 2000, the GPRO wrote to KNE requesting payment of \$390,000 within 30 days. The \$390,000 figure represented loans the GPRO had made in the following amounts: rate area 2, \$84,864; rate area 3, \$79,482; rate area 4, \$106,119; and rate area 7, \$119,535.

In a letter dated June 15, 2000, KNE refused to remit the amount, claiming it had no legal obligation to reimburse the Fund. KNE asserted that it had informed the municipalities' attorneys that the review process was flawed and that the hearings were not covered by the Act. KNE stated that it had previously communicated to a division of the GPRO its concerns about the receipt of loans by municipalities that had failed to meet statutory requirements. KNE alleged that it received no response to its concerns.

On July 27, 2000, the Attorney General's office, on behalf of the GPRO, made written demand for the \$390,000. In response, KNE reiterated that it was not obligated to repay the amount. Two representatives of KNE met with representatives of the Attorney General's office, and a second written request was sent on October 4. KNE did not respond or make payment.

In December 2000, the GPRO filed a declaratory judgment action against KNE, alleging that it had violated the Act by refusing to pay the requested \$390,000. The GPRO alleged that as a result of KNE's refusal, it had been unable to disburse loan proceeds to compensate legal representatives and expert witnesses and for other services necessary to complete the rate review proceedings. The GPRO asked the district court to declare that the requirement for payment of loan amounts in § 19-4617 is direct and unconditional and that KNE has no discretion to decline to pay the amounts billed.

In its answer, KNE asserted what it labeled as "affirmative defenses," including:

- a. The [GPRO] did not have legal authority to make the payments from the [Fund because]

i. the municipalities did not conduct a *NEB. REV. STAT.* §19-4618 review;

ii. appropriate resolutions were not adopted by municipalities representing 70% or more of the customers in Rate Areas 2, 3, 4 and 7; and

iii. the resolutions adopted by those municipalities which purported to conduct the review did not conform to the provisions of §19-4618.

b. The amounts . . . include costs incurred by other Rate Areas that did not initiate rate reviews.

....
f. [KNE] has no obligation to reimburse the [GPRO] or the [Fund] for amounts improperly disbursed from the [Fund].

The cities of Alliance, Broken Bow, Burwell, Chappell, Gordon, Kimball, Loup City, Ord, Oshkosh, Ravenna, and Sidney and the villages of Ansley and Hemingford intervened, alleging that appropriate resolutions had been adopted by the municipalities representing 70 percent or more of the KNE customers. Subsequently, the intervenors filed a notice of dismissal without prejudice, stating that their interests were aligned with and adequately represented by the GPRO.

In its reply, the GPRO asserted that KNE lacked standing to assert claims or defenses related to the loan amounts under the Act and that KNE had no discretion to refuse to pay the amounts billed. The GPRO filed a motion for summary judgment and motion in limine.

In granting the GPRO's motion for summary judgment, the district court stated:

Consequently, even if [KNE] is successful with any of its affirmative defenses, [KNE] has no legally protectable interest or right which is benefitted by the relief it requests. [KNE] is not entitled to the avails of the action and has not sustained a direct injury which will be satisfied by success on any of the affirmative defenses.

The district court found that the GPRO had established a prima facie case based upon the following undisputed facts:

1. The municipalities applied for loan funds under *NEB. REV. STAT.* §19-4617.

2. The GPRO determined the applicants were entitled to receive loan funds authorized by §19-4617.

3. The funds the GPRO distributed to the municipalities were from [the Fund] authorized by §19-4617.

4. The amount of the loan was \$390,000.00.

5. [The] GPRO first made demand on [KNE] for repayment of the funds on May 30, 2000.

6. [KNE] failed to make payment of the loan amount within 30 days of when demand was made.

7. [KNE] has not paid any portion of the \$390,000.00 loan.

The court concluded that KNE had produced no evidence to rebut or place at issue any of these material facts.

The district court found that the GPRO had established its right to payment from KNE and that KNE had raised no legal issue other than the affirmative defenses already addressed. The court entered judgment as a matter of law against KNE in the amount of \$390,000 plus prejudgment and postjudgment interest and costs.

ASSIGNMENTS OF ERROR

KNE's assignments of error can be summarized into three claims: The district court erred (1) in finding that KNE does not have standing to challenge the request for reimbursement by the GPRO; (2) in ignoring the judgments of the Lancaster County District Court in *KN Energy v. Cities of Alliance et al.*, case No. CI 00-1309; *KN Energy v. Cities of Chappell et al.*, case No. CI 00-1310; and *KN Energy v. Village of Hemingford et al.*, case No. CI 00-1311, involving rate areas 2, 3, and 4, in which the court held that the resolutions and actions of the municipalities in those rate areas did not comply with § 19-4618; and (3) in ignoring the plain and unequivocal language of the Act.

ANALYSIS

The basis for the district court's judgment was its conclusion that KNE lacked standing to raise the affirmative defenses asserted and that, therefore, there were no material issues of fact in dispute and that GPRO was entitled to judgment as a matter of law. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record

disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002). The State asserts that once the loan was made, KNE was precluded from objecting to payment. The State claims that after the loan funds were disbursed, KNE had no standing to object to repayment of the loan and that KNE's only remedy was to seek reimbursement from its customers.

[3,4] KNE asserts that the district court erred in finding that it lacked standing when the issue of standing was not raised by the GPRO in its summary judgment motion. 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. *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. *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000).

[5] We have held that the requirement of standing is fundamental to a court's exercise of jurisdiction and that either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. See *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). The district court did not err in addressing the question of KNE's standing in this action.

The remaining question is whether the Act gives KNE standing to challenge repayment of the loan funds. The Act provides that the utility must pay the loan amount to the GPRO within 30 days of billing. The utility is permitted to recover the amount by adding a special surcharge to utility bills for up to 12 months as a rate regulation expense.

[6] The district court addressed the issue of standing in terms of whether KNE was the real party in interest. Neb. Rev. Stat. § 25-301 (Cum. Supp. 2000) provides: "Every action shall be prosecuted in the name of the real party in interest . . ." In *Eli's, Inc. v. Lemen*, 256 Neb. 515, 527, 591 N.W.2d 543, 552 (1999), we stated:

"To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy."

[7] Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. See *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001). In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public. *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000).

Although KNE acknowledged that it did not directly benefit from any of the affirmative defenses, it argued that it is a fiduciary of those who are obligated to repay the loan and that it has a duty to defend on behalf of the ratepayers. The district court found that KNE did not suggest that standing was conferred on it through an assignment of rights from the ratepayers, but its relationship with its customers "appears to be no different than that which exists between any purveyor of goods and the purveyor's customer." The court concluded that the Act did not confer any responsibility on KNE as a fiduciary and that KNE had no standing to raise issues belonging to its customers.

The district court then addressed KNE's assertion that it has a legitimate interest in the outcome because KNE incurred expenses defending the rate reviews which were instigated as a result of the funding provided by the loan. KNE claimed it incurred expenses in cases that were decided earlier in the Lancaster County District Court and were on appeal at the time of the final order in this case. The court stated that Neb. Rev. Stat. § 25-10,105 (Reissue 1995) provides that costs are determined and assessed by the trial court at the time of judgment. Shifting of attorney fees and costs is allowed only by statute or where the uniform course of procedure has been to allow recovery of fees. The court found that in the prior rate cases, each

party was ordered to bear its own costs, and that those judgments are res judicata as to the issue of KNE's costs in this case. Therefore, the court concluded that KNE did not have standing to raise affirmative defenses in this case merely because it was forced to defend the earlier rate cases.

KNE also argued that if it did not have standing to raise the affirmative defenses, no other party had standing. The district court stated:

That is not an issue this court must resolve. It is worth noting that some issues in this world do not involve disagreements that are suitable for decision by courts. *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999). Some disputes are purely political. On some issues, it is up to the electors to determine whether an action of government is one which warrants retention or discharge of their elected officials. Whether this is one of those cases, or is one for which a remedy is available to an entity with standing is left for another case. [KNE] does not possess standing to raise the affirmative defenses.

[8] In addressing the issue of standing, we must consider the entire Act and its purpose. 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. *In re Application No. C-1889*, ante p. 167, 647 N.W.2d 45 (2002). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Ottaco, Inc. v. McHugh*, 263 Neb. 489, 640 N.W.2d 662 (2002).

[9] We conclude that KNE has standing to question whether there has been a proper disbursement of funds under the Act. An administrative agency such as the GPRO has limited power, and its power is to be strictly construed. The Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute. *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995). However, this delegated authority is limited to the powers delegated to the agency by the statute which the agency

is to administer. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). The GPRO must adhere to the Act in disbursing loans from the Fund.

The Act requires that the utility reimburse the Fund within 30 days of the demand and that to recover the amount, the utility must surcharge its customers within 12 months. The question of whether the GPRO acted in excess of its authority in making an unauthorized distribution relates to the utility's interest in having to surcharge its customers to recover a distribution that may not have been authorized. KNE, which is being requested to pay \$390,000, has a real interest in the subject matter of the controversy. Its interest in the matter is more than a general interest common to all members of the public.

Sections 19-4617 and 19-4618 set forth the terms and conditions under which a loan may be made by the GPRO to the requesting municipality. Under § 19-4617(1)(b), loans are required to be repaid by the utility, which may then recover the amount through a special surcharge on customers.

We conclude that a utility which is subject to the terms of the Act has standing to challenge the validity of the GPRO's actions if and when the utility alleges that amounts were improperly disbursed from the Fund or if it is alleged that the GPRO has exceeded its authority granted by the Legislature. The affirmative defenses raised by KNE present questions of both law and fact regarding these issues that prevent the case from being summarily decided. The district court erred in concluding that KNE lacked standing and therefore erred in granting summary judgment to the GPRO.

CONCLUSION

KNE has standing to assert defenses to the GPRO's demand for payment. Therefore, the judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

HENDRY, C.J., and CONNOLLY, J., not participating.

ROBERT E. DAY, JR., APPELLANT, V.

ROBIN E. HELLER, APPELLEE.

653 N.W.2d 475

Filed November 22, 2002. No. S-00-928.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose 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 benefits of all reasonable inferences deducible from the evidence.
3. ____: _____. In an appellate review, the grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.
4. **Torts: Marriage: Divorce.** A tort action against a former or current spouse is not inherently prohibited.
5. **Actions: Fraud: Paternity: Public Policy.** A fraud claim against a mother for her misrepresentation of biological fatherhood is contrary to public policy.
6. **Actions: Equity: Paternity: Public Policy.** An assumpsit claim against a mother for her misrepresentation of biological fatherhood is contrary to public policy.
7. **Actions: Pleadings.** In actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader.
8. **Courts: Public Policy.** It does not lie within the power of any judicial system to remedy all human wrongs, and to attempt to correct such wrongs or give relief from their effects may do more social damage than if the law leaves them alone.
9. **Actions: Mental Distress: Paternity: Public Policy.** An intentional infliction of emotional distress claim against a mother for her misrepresentation of biological fatherhood is contrary to public policy.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and INBODY and CARLSON, Judges, on appeal thereto from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

John W. Ballew, Jr., of Ballew, Schneider & Covalt, for appellant.

Robert F. Peterson and Mark L. Laughlin, of Laughlin, Peterson & Lang, for appellee.

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

CONNOLLY, J.

This appeal presents the question whether we will recognize a tort or assumpsit cause of action against a mother for her misrepresentation of biological fatherhood. Robert E. Day, Jr., alleges that for 12 years, his former wife, Robin E. Heller, represented that Robert was the biological father of a child born during their marriage. Robert now seeks damages for fraud, assumpsit, and intentional infliction of emotional distress. The district court entered summary judgment for Robin.

The Nebraska Court of Appeals reversed, holding that neither res judicata nor collateral estoppel barred Robert's action. *Day v. Heller*, 10 Neb. App. 886, 639 N.W.2d 158 (2002). The Court of Appeals' decision impliedly recognized tort and assumpsit causes of action for a mother's misrepresentation of biological fatherhood. Because we determine that Robert's tort and assumpsit causes of action are contrary to public policy, we reverse.

BACKGROUND

Robert and Robin married on August 30, 1986, and on July 14, 1987, Robin gave birth to a child, Adam. On May 31, 1991, the marriage was dissolved. Robin was granted custody of Adam, subject to Robert's reasonable visitation rights. The court ordered Robert to pay child support in the initial amount of \$270 per month and to provide medical insurance coverage for Adam. According to Robert's petition, the trial court entered subsequent orders increasing Robert's child support obligation and requiring him to pay one-half of Robin's employment-related daycare costs for Adam. Also, the court entered a modification order in which Robert was ordered to pay one-half of Adam's uninsured medical expenses. Robert also alleged that he paid legal fees for enforcement of his visitation rights.

Robert alleged that at all times following Adam's birth, Robin represented to him that he was Adam's biological father. According to Robert's answers to Robin's interrogatories, Robin misled him as to the due date for Adam's birth, telling him that Adam was due 3 weeks before his actual due date. Robert alleges that it was not until July 1997, following the birth of his daughter with his current wife, that he first became suspicious of whether he was Adam's biological father. According to

Robert, it was at this time that a doctor told him “‘there is no reason to let a healthy baby and mom go over term in a pregnancy.’” This statement led Robert to count back from the time of Adam’s birth to the likely time of conception. Robert realized that Adam’s conception “would have taken place while [Robert] had been away from [Robin] for several weeks.” Robert sought DNA testing in April 1999. (The record does not show how this was accomplished.) The testing, according to Robert’s allegations, showed a 0-percent probability that Robert was Adam’s father. Robert also alleged that he could not have, through due diligence, discovered before April 1999 that he was not Adam’s biological father.

On May 19, 1999, Robert consented to the adoption of Adam by Robin’s new husband, Patrick Heller. On July 27, Patrick adopted Adam.

On February 15, 2000, Robert filed the present action. Robert pled three causes of action. In his first cause of action, fraud, Robert alleged that Robin had intentionally and willfully concealed that another man was Adam’s biological father; that Robin misrepresented and concealed Adam’s biological parentage with the intention that Robert would rely on it, which he did; and that as a direct and proximate result of Robin’s concealment, he suffered damages.

In his second cause of action, *assumpsit*, Robert alleged that since the entry of the decree in 1991, he had paid child support, employment-related daycare expenses, and health insurance for Adam. Robert alleged that because he is not Adam’s biological father, Robin has been unjustly enriched, and that fairness and justice require Robin to repay him.

In his third cause of action, emotional distress, Robert alleged that Robin intentionally and recklessly misrepresented that Robert was Adam’s father when she knew this was false and that she continued to conceal the fact from Robert; that Robin’s conduct in misrepresenting and concealing the true paternity of Adam for nearly 12 years was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency; and that given the emotional bond that he formed with Adam, he suffered and continues to suffer emotional distress.

Robert sought damages for the following: (1) amounts he paid under the original and modified decree for child support, daycare costs, health insurance, and medical expenses; (2) costs he paid to exercise and enforce his visitation privileges with Adam; (3) general damages for Robin's alleged intentional infliction of emotional distress; and (4) attorney fees incurred in the present action.

Robin moved for summary judgment. The district court rejected Robin's argument that under *res judicata* and collateral estoppel, the recital of paternity in the dissolution decree barred Robert's claims. But, the court concluded that there were no genuine issues of material fact for each of Robert's causes of action and that Robin was therefore entitled to judgment as a matter of law. Robert appealed.

The Court of Appeals reversed. *Day v. Heller*, 10 Neb. App. 886, 639 N.W.2d 158 (2002). It determined that the trial court, instead of deciding whether any real issue of material fact existed, had attempted to decide the factual issues. It also determined that neither *res judicata* nor collateral estoppel barred Robert's action. The Court of Appeals noted that whether, after a dissolution proceeding has become final, a party can bring a tort action against a former spouse is an issue of first impression in Nebraska and concluded that such an action should be allowed. *Id.* In reversing, the Court of Appeals implicitly recognized that a party could maintain tort and assumpsit actions against a mother for her misrepresentation of biological fatherhood. We granted Robin's petition for further review.

ASSIGNMENTS OF ERROR

Robin assigns that the Court of Appeals erred in determining that (1) *res judicata* and collateral estoppel do not bar Robert's claims and (2) factual issues exist which preclude summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose 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. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002).

[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 benefits of all reasonable inferences deducible from the evidence. *Id.*

[3] In an appellate review, the grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon. *Foreman v. AS Mid-America*, 255 Neb. 323, 586 N.W.2d 290 (1998).

ANALYSIS

[4] The Court of Appeals noted that whether a party can bring a tort claim against a former spouse after a dissolution proceeding has become final is a question of first impression in Nebraska. Nebraska abolished the interspousal tort immunity in *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979), and we agree with the Court of Appeals that a tort action against a former or current spouse is not inherently prohibited. This case, however, turns on a different question, Will Nebraska recognize a tort or assumpsit cause of action against a mother for her misrepresentation and concealment of biological fatherhood? Because we conclude that Robert's tort and assumpsit causes of action are contrary to public policy, we need not address Robin's *res judicata* and collateral estoppel arguments.

Robert's causes of action can be subdivided into two categories. The first consists of his fraud and assumpsit claims. These claims seek to recover for the creation of Robert's parent-child relationship with Adam. The second consists of Robert's intentional infliction of emotional distress claim. Liberally construed, this claim seeks to recover for the emotional harm suffered when a misrepresentation of biological fatherhood leads to the threatened destruction of a parent-child relationship. Because the two categories present different policy questions, we analyze them separately.

ROBERT'S FRAUD AND ASSUMPSIT CAUSES OF ACTION

[5,6] Robert's fraud claim seeks to recover the child support he was ordered to pay under the dissolution and supplemental

decrees and the costs associated with the enforcement of his visitation rights. Similarly, Robert's assumpsit claim is for Robin's unjust enrichment as a result of receiving child support payments. We conclude that Robert's fraud and assumpsit causes of action are contrary to public policy.

As we read his petition, Robert's fraud and assumpsit claims are for Robin's misrepresentation that led Robert to make investments of time, emotion, and money in Adam that he would not have made had he known that Adam was not his biological son. In effect, Robert is saying, "He is not my son; I want my money back." Robert's fraud and assumpsit causes of action focus on the burdens of the parent-child relationship, while ignoring the benefits of the relationship. We do not believe that having a close and loving relationship "imposed" on one because of a misrepresentation of biological fatherhood is the type of "harm" that the law should attempt to remedy. See *Nagy v. Nagy*, 210 Cal. App. 3d 1262, 258 Cal. Rptr. 787 (1989).

Moreover, a tort or assumpsit claim that seeks to recover for the creation of a parent-child relationship has the effect of saying "I wish you had never been born" to a child who, before the revelation of biological fatherhood, was under the impression that he or she had a father who loved him or her. Accord Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes With Parent-Child Relationships*, 33 Loy. L.A. L. Rev. 449 (2000) (advocating tort where misrepresentation of biological fatherhood threatens existing parent-child relationship, but questioning tort that allows recovery for creation of parent-child relationship). We decline to allow a party to use a tort or assumpsit claim as a means for sending or reinforcing this message.

ROBERT'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION

For his intentional infliction of emotional distress claim, Robert alleges:

2. Defendant intentionally and recklessly represented to Plaintiff after the birth of Adam Robert Day that Plaintiff was the father of said child when in fact Defendant knew

that Plaintiff was not the father of said child and continued to conceal this fact from Plaintiff.

3. Defendant's conduct in misrepresenting and concealing the true paternity of Adam Robert Day to Plaintiff for nearly twelve years was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency so as to be considered utterly intolerable.

4. As a result of Defendant's conduct and subsequent revelation that he is not the biological father of Adam Robert Day, Plaintiff has suffered and continues to suffer emotional distress given the emotional bond he formed with this child over a twelve year period.

5. Defendant's initial misrepresentation and concealment of the true paternity of this child over a twelve year period while accepting court ordered child support, employment-related daycare expense, health insurance and other economic benefits on the part of the child while at the same time preventing Plaintiff from exercising visitation rights with said child and causing Plaintiff to incur significant attorney fees in doing so constitutes outrageous conduct so severe that no reasonable person should be expected to endure it.

Paragraph 5 mirrors Robert's fraud and assumpsit claim. With this allegation, Robert is seeking to recover for nothing more than the anger he felt when he learned that he had made investments in Adam that he would not have made had he known there was no biological relationship. To the extent Robert's intentional infliction of emotional distress claim seeks to recover for the creation of a parent-child relationship, it is barred for the same reasons that his fraud and assumpsit claims are barred. See *Nagy v. Nagy, supra*.

[7] Robert's intentional infliction of emotional distress cause of action is subject however to a second interpretation which raises different policy questions. "[I]n actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader." *Fitzpatrick v. U S West, Inc.*, 246 Neb. 225, 229, 518 N.W.2d 107, 112 (1994). Thus, we also consider this second interpretation of Robert's intentional infliction of emotional distress claim.

Liberalistically construed, paragraphs 2 through 4 of Robert's intentional infliction of emotional distress claim seek recovery for the emotional harm Robert suffered when Robin's misrepresentation and concealment of biological fatherhood threatened to destroy his parent-child relationship with Adam. In other words, Robert's petition can be read as saying that before he learned he was not Adam's father, he and Adam had a loving relationship; that learning the truth damaged this relationship; and that as a result of the damage to the relationship, Robert suffered severe emotional distress.

[8,9] Whether to recognize an intentional infliction of emotional distress claim for the threatened destruction of a parent-child relationship presents a more difficult question than whether to recognize a claim for the creation of a parent-child relationship. Having a close and loving parent-child relationship suddenly destabilized by a revelation that there is no biological relationship has the potential to cause grief, anxiety, shock, and fear. Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes With Parent-Child Relationships*, 33 Loy. L.A. L. Rev. 449 (2000). However, "[i]t does not lie within the power of any judicial system . . . to remedy all human wrongs . . . [and to] attempt to correct such wrongs or give relief from their effects "may do more social damage than if the law leaves them alone." . . . ' Nagy v. Nagy, 210 Cal. App. 3d 1262, 1269, 258 Cal. Rptr. 787, 790-91 (1989). Not surprisingly, other courts have reached conflicting conclusions in deciding whether to recognize similar claims. Compare, e.g., *Doe v. Doe*, 358 Md. 113, 747 A.2d 617 (2000) (public policy bars tort claim against former spouse based on misrepresented paternity), *Nagy v. Nagy*, *supra* (Johnson, J., concurring), and *Steve H. v. Wendy S.*, 67 Cal. Rptr. 2d 90 (Cal. App. 1997), *superseded by* 946 P.2d 817, 68 Cal. Rptr. 2d 859, and *review dismissed and cause remanded* 960 P.2d 510, 77 Cal. Rptr. 2d 706 (1998), with *G.A.W. v. D.M.W.*, 596 N.W.2d 284 (Minn. App. 1999) (public policy is not bar), *Doe v. Doe*, 122 Md. App. 295, 712 A.2d 132 (1998), *rev'd* 358 Md. 113, 747 A.2d 617 (2000), and *Koelle v. Zwiren*, 284 Ill. App. 3d 778, 672 N.E.2d 868, 220 Ill. Dec. 51 (1996). See, also, Berger, *supra* (advocating extension of tort);

Robert G. Spector, *Marital Torts: The Current Legal Landscape*, 33 Fam. L.Q. 745 (1999) (questioning propriety of tort based on misrepresentations of biological fatherhood). Although persuasive arguments exist for both positions, we conclude that the law should not hold a mother liable in tort when her misrepresentation of paternity threatens an existing parent-child relationship.

Intentional infliction of emotional distress claims, like Robert's, present risks to the parties' child by unavoidably thrusting the child and his relationship with Robert into the center of the litigation. A child's emotional development and psychological well-being are tied to the level of conflict between the child's parents. See, *Steve H. v. Wendy S.*, *supra*; Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 Wm. Mitchell L. Rev. 495 (2001); Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. Va. L. Rev. 547 (2000). While we recognize that generally, the mere danger of parental conflict is not enough to bar an otherwise valid tort claim, see *Steve H. v. Wendy S.*, *supra* (Vogel, J., dissenting), the tort Robert proposes presents a particularly unique brand of intrafamilial warfare. Unlike a case involving a battery or a car accident, the quality of the parent-child relationship will be at the center of the lawsuit. The closer the plaintiff was to the child before he learned that he was not the biological father, the greater the potential for disruption and the more likely that a disruption to the relationship would cause him severe emotional distress.

Because the tort necessarily places the quality of the parent-child relationship at its center, the child will become a focal point of litigation. In many cases, the mother will turn to the child to rebut the plaintiff's characterization of the parent-child relationship. As a result, the child will be subject to discovery concerning the nature of his or her relationship with the plaintiff and may even be called to testify at trial. The temptation for one party to manipulate the child's view of the other will be great, and we can conceive of the situation where the child "become[s] a strategic tool for advantageous use of one family member over another." See *Steve H. v. Wendy S.*, 67 Cal. Rptr. at 95 (quoting *Bock v. Lindquist*, 278 N.W.2d 326 (Minn. 1979)).

A custody dispute is the only other type of action that is between parents and has at its center the quality of a parent-child relationship. The negative consequences of a bitter custody battle are well established:

Qualitative and quantitative research conducted over the past thirty years demonstrates that highly conflicted custody cases are detrimental to the development of children, resulting in perpetual emotional turmoil, depression, lower levels of financial support, and a higher risk of mental illness, substance abuse, educational failure, and parental alienation. The level and intensity of parental conflict is now thought to be the most dominant factor in a child's post divorce adjustment and the single best predictor of a poor outcome. Research shows that children exposed to violence and high levels of conflict "bear an acutely heightened risk of repeating the cycle of conflicted and abusive relationships as they grow up and try to form families of their own."

Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 Wm. Mitchell L. Rev. 495, 496-97 (2001). Custody determinations, however, are a necessary adjunct to the resolution of a relationship turned sour. The legal system cannot force parents to stay together when they have made the decision to separate. The child's only option is to endure the bitterness of the custody battle.

But no similar compelling reasons exist for adopting an intentional infliction of emotional distress claim with the quality of the parent-child relationship at its center. Even advocates of the tort concede that it will not deter others from engaging in similar conduct:

It may be especially unlikely that a spouse intent on preserving a marriage will be deterred from lying about the paternity of a child born during the marriage, or that a spouse intent on ending a marriage and winning custody will be deterred from telling the truth about the paternity of the child.

Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes With Parent-Child Relationships*,

33 Loy. L.A. L. Rev. 449, 527 (2000). Moreover, although advocates of the tort claim that it affirms societal values, *id.*, we believe that it sends an incoherent message. We can conceive of the situation where a successful claimant executes a judgment lien on the mother's only automobile or garnishes the mother's wages. It would be inherently inconsistent to allow a person to premise a tort claim on his love for a child and then allow him to execute on property or garnish income necessary for that child's well-being.

Ultimately, the only valid reason for adopting the tort is to compensate the plaintiff for his emotional injury. We are not unsympathetic to a plaintiff who has been led to believe that a child is his when in fact the child is not. But, forced to choose between adopting a tort that carries all the detrimental effects of a custody battle or asking a plaintiff to go uncompensated for his emotional pain, we choose the latter.

CONCLUSION

Because we conclude that Robert's fraud, intentional infliction of emotional distress, and assumpsit causes of action are contrary to public policy, Robin is entitled to summary judgment. Accordingly, we reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to enter an order affirming the district court's entry of summary judgment for Robin.

REVERSED AND REMANDED WITH DIRECTIONS.

STEVEN J. HAUSER, APPELLANT AND CROSS-APPELLEE, V.
NEBRASKA POLICE STANDARDS ADVISORY COUNCIL AND
NEBRASKA COMMISSION ON LAW ENFORCEMENT AND
CRIMINAL JUSTICE, APPELLEES AND CROSS-APPELLANTS.

653 N.W.2d 240

Filed November 22, 2002. No. S-01-476.

1. **Actions; Equity; Public Meetings; Appeal and Error.** Actions for relief under the public meetings laws are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. Thus, the approach taken is that such cases are tried and reviewed by the appellate courts as equity cases.

Cite as 264 Neb. 944

2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Public Meetings: Notice: Waiver: Time.** Any person who has notice of a meeting and attends the meeting must object specifically to the lack of public notice at the meeting or the person will be held to have waived his or her right to object on that ground at a later date.
4. ____: ____: ____: _____. A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given.
5. **Public Meetings: Waiver.** If a person present at a meeting observes an alleged public meetings laws violation in the form of an improper closed session and fails to object, that person waives his or her right to object at a later date.
6. **Pleadings: Appeal and Error.** Where a particular theory of the case is not stated in a plaintiff's petition, he or she cannot raise it for the first time on appeal.
7. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

R. Bradley Dawson, of Clough, Dawson & Piccolo, for
appellant.

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

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

McCORMACK, J.

NATURE OF CASE

For the second time, we consider issues raised by the revocation of Steven J. Hauser's law enforcement certificate. Hauser's certificate was revoked by the Nebraska Police Standards Advisory Council (Council), an action later approved by the Nebraska Commission on Law Enforcement and Criminal Justice (Commission).

After the revocation, Hauser filed two separate petitions in the district court for Hall County. In the first, docketed as case

No. CI00-923 in the district court, Hauser alleged that the actions of the Council violated Neb. Rev. Stat. § 84-1413 (Reissue 1999) of Nebraska's public meetings laws, Neb. Rev. Stat. § 84-1408 et seq. (Reissue 1999 & Cum. Supp. 2002). In Hauser's other petition, case No. CI00-983 in the district court, he challenged the statutory authority of the Council and Commission to revoke his certificate.

In case No. CI00-983, the district court reversed the revocation, finding that the Commission acted in excess of its statutory authority. In case No. CI00-923, the district court concluded that there could be no violation of the public meetings laws where the hearings had already been found in case No. CI00-983 to be a nullity.

On appeal, we reversed the district court's decision entered in case No. CI00-983 and remanded the cause. See *Hauser v. Nebraska Police Stds. Adv. Council*, ante p. 605, 650 N.W.2d 760 (2002). Hauser now appeals the district court's decision entered in case No. CI00-923.

BACKGROUND

On February 24, 2000, the Nebraska Law Enforcement Training Center filed an administrative complaint with the Council seeking to revoke Hauser's law enforcement certificate. A hearing on the matter was held by the Council on August 21 through 23. At the start of the hearing, the acting chairman of the Council indicated that the hearing was closed, as requested by Hauser.

The hearing before the Council was bifurcated. The first stage of the hearing addressed whether the Council had jurisdiction to consider the complaint and revoke Hauser's certificate. After all the evidence was received, the acting chairman stated that "we will entertain a motion to go into executive session to make a determination." The next notation in the bill of exceptions indicates that a discussion was held off the record and that the Council was in recess from 4:10 to 7:40 p.m. After returning from the recess, the acting chairman announced in the presence of Hauser and his counsel that

in regard to the jurisdiction and authority interest, it's by full consensus of the Police Standards Council, it's been

determined that we do have the authority and jurisdiction to hear the decertification of Mr. Steven Hauser. The findings will follow with the final memorandum in order at the completion of this hearing.

Hauser did not object to any perceived public meetings laws violations at that time.

The Council immediately proceeded to the second stage of the hearing for consideration of the merits of the complaint. Various miscellaneous matters were resolved before the Council adjourned for the evening. The next day, the Council received evidence until late afternoon. After closing arguments were made by each party, the acting chairman stated:

We're going to directly go to executive session. I'm not sure that we're going to have — even though it's 4:30, I don't know if we'll have enough time to arrive at any type of decision tonight. I would like to reconvene at 9 o'clock in the morning. Any problems with that?

The parties answered no, and the Council adjourned at 4:35 p.m. The bill of exceptions next indicates that on August 23, at 9:25 a.m., the acting chairman announced that it was the unanimous decision of the Council to recommend to the Commission that Hauser's law enforcement certificate be revoked. The acting chairman also stated that a written report and recommendations would follow. The record on appeal includes a written report of the Council's findings and conclusions, signed by the acting chairman and dated September 18, 2000. Again, Hauser and his counsel were present for the announcement of the Council's decision, and no objection was made.

After the Council's actions, the matter was forwarded to the Commission, where a hearing was held on October 27, 2000. The Commission's hearing was closed on the vote of the Commission members, evidence was received, and the Commission went into executive session to deliberate the matter. The Commission continued its deliberations in executive session on November 1. That afternoon, the Commission returned to open session and voted to revoke Hauser's law enforcement certificate.

Hauser filed two petitions in district court seeking to overturn the revocation of his certificate. In case No. CI00-923, Hauser alleged that the Council's actions violated § 84-1413 of

the public meetings laws and were thus void under § 84-1414. In case No. CI00-983, Hauser alleged, among other things, that the actions of the Council and the Commission were made in excess of their statutory authority or jurisdiction. Also alleged in this petition was that the Council and Commission violated § 84-1413.

On March 30, 2001, the district court entered orders in each case. In case No. CI00-983, the district court reversed the revocation of Hauser's law enforcement certificate. The court found that the Commission acted beyond its statutory authority, that the Commission's decision was based upon unlawful procedure, and that the Council did not promulgate any rules and regulations governing the revocation. This order was later reversed, and the cause remanded by this court in *Hauser v. Nebraska Police Sids. Adv. Council*, ante p. 605, 650 N.W.2d 760 (2002), where we held that the rules and regulations were valid.

In the order entered in case No. CI00-923, the district court concluded that because the decision in case No. CI00-983 was null and void, there could not be a violation of the public meetings laws. Hauser appeals from this decision, and the Council and Commission (collectively the appellees) cross-appeal. We moved the case to our docket on our own motion.

ASSIGNMENTS OF ERROR

Hauser assigns, rephrased, that the district court erred in finding that the Council did not violate § 84-1413 of the public meetings laws.

On cross-appeal, the appellees claim the district court erroneously concluded that the revocation proceedings were without the authority of law and a nullity.

STANDARD OF REVIEW

[1,2] Actions for relief under the public meetings laws are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. Thus, the approach taken is that such cases are tried and reviewed by the appellate courts as equity cases. *Wasikowski v. Nebraska Quality Jobs Bd.*, ante p. 403, 648 N.W.2d 756 (2002). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided

that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

Hauser claims that the Council violated § 84-1413 of the Nebraska public meetings laws. Hauser concedes that the Council was entitled to deliberate in executive session after each phase of the hearing. However, to comply with § 84-1413, Hauser argues that the Council should have conducted a rollcall vote on the question of whether to exit executive session after such question had been properly moved and seconded. Then, Hauser claims that the Council should have conducted a rollcall vote in open session on the question of whether the Council had jurisdiction to revoke Hauser's law enforcement certificate after that question had likewise been properly moved and seconded. Hauser contends that similar actions were required of the Council after the second phase of the hearing. Although Hauser fails to identify which provision of § 84-1413 was violated, in light of these arguments, we analyze this case under § 84-1413(2), which provides in relevant part: "Any action taken on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted or if the member was absent or not voting."

[3,4] We have previously held that the failure to timely object to purported public meetings laws violations prevents parties from asserting such violations to this court. In *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992), we stated that any person who has notice of a meeting and attends the meeting must object specifically to the lack of public notice at the meeting, or be held to have waived his or her right to object on that ground at a later date. See, also, *Witt v. School District No. 70*, 202 Neb. 63, 273 N.W.2d 669 (1979); *Alexander v. School Dist. No. 17*, 197 Neb. 251, 248 N.W.2d 335 (1976). A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given. *Otey v. State*, *supra*; *Witt v. School District No. 70*, *supra*; *Alexander v. School Dist. No. 17*, *supra*.

In *Wasikowski v. Nebraska Quality Jobs Bd.*, ante p. 403, 648 N.W.2d 756 (2002), we extended this principle to prevent a party from arguing that a public body failed to properly convene a closed session. In that case, several plaintiffs challenged the Nebraska Quality Jobs Board's decision to approve an application for wage benefit tax credits under the Quality Jobs Act, Neb. Rev. Stat. § 77-4901 et seq. (Reissue 1996 & Cum. Supp. 2002). One of the plaintiffs attended the board's meeting where it considered the application in closed session; however, the plaintiff did not object to the board's convening a closed session.

[5] *Wasikowski* dealt with a purported closed session violation under § 84-1410, and not with a lack of sufficient public notice under § 84-1411. We held, however, that under the logic of *Otey* and *Witt*, "[i]f a person present at a meeting observes an alleged public meetings laws violation in the form of an improper closed session and fails to object, that person waives his or her right to object at a later date." *Wasikowski v. Nebraska Quality Jobs Bd.*, ante at 417, 648 N.W.2d at 768.

Hauser claims the Council violated § 84-1413(2); however, Hauser's failure to object acts as a waiver of this argument. Hauser never objected to the lack of a rollcall vote when the Council exited executive sessions. He also never objected to the lack of a rollcall vote when the Council announced its decision after each phase of the bifurcated hearing. Our decisions in *Otey v. State*, supra, and *Wasikowski v. Nebraska Quality Jobs Bd.*, supra, dealt with purported violations of §§ 84-1411 and 84-1410, respectively. However, we made it clear in *Wasikowski* that each of those provisions relate to § 84-1414, under which citizens may commence lawsuits regarding compliance with or violations of the public meetings laws. Section 84-1413 is equally related to § 84-1414. "Thus, despite the difference in grounds for objection," the logic of *Wasikowski* applies in this case: If a person present at a meeting observes and fails to object to an alleged public meetings laws violation in the form of a failure to conduct rollcall votes before taking action on questions or motions pending, that person waives his or her right to object at a later date. See *Wasikowski v. Nebraska Quality Jobs Bd.*, ante at 417, 648 N.W.2d at 768. Had Hauser made a proper objection,

the Council could easily have considered the purported shortcomings of its proceedings.

[6] In his brief to this court, Hauser also identifies § 84-1410 as a provision the Council violated. However, in his petition filed in case No. CI00-923, the only statute identified by Hauser that the Council violated was § 84-1413. Where a particular theory of the case is not stated in a plaintiff's petition, he or she cannot raise it for the first time on appeal. *Wait v. Cornette*, 259 Neb. 850, 612 N.W.2d 905 (2000).

[7] The district court correctly rejected Hauser's public meetings laws argument, albeit for reasons different than those articulated here. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002). Because of our conclusion in this case, we need not address the appellees' cross-appeal.

CONCLUSION

Hauser's failure to object to an alleged violation of § 84-1413 by the Council waives his right to make that argument to this court. Therefore, the decision of the district court is affirmed.

AFFIRMED.

BRADLEY T. AND DONNA T., HUSBAND AND WIFE, AS PARENTS,
GUARDIANS, AND NEXT FRIENDS OF D.T., A MINOR CHILD,
APPELLEES, V. CENTRAL CATHOLIC
HIGH SCHOOL, APPELLANT.
653 N.W.2d 813

Filed November 22, 2002. No. S-01-552.

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. ____: _____. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
3. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.

4. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
5. **Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence, waives any error in the ruling on the motion.
6. **Directed Verdict: Records.** While a renewed motion for directed verdict need not state with precision every basis asserted in the initial motion for directed verdict, the substance of the renewed motion must appear in the record.
7. **Verdicts: Jury Instructions.** Objections to the verdict form should be made at the jury instruction conference or at the time the verdict is returned.
8. **Verdicts: Waiver.** A failure to raise an objection to the verdict form constitutes a waiver of the same.
9. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

William A. Francis, of Cunningham, Blackburn, Francis, Brock & Cunningham, for appellant.

James H. Truell, of Truell, Murray & Walters, P.C., for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Bradley T. and Donna T. as "parents, guardians, and next friends" of D.T., a minor, filed this action in the district court for Hall County on behalf of D.T. against Central Catholic High School (CCHS), of Grand Island, Nebraska, after D.T. was sexually assaulted at CCHS by another student while D.T. was enrolled at the school. Following trial, the jury found in favor of Bradley and Donna. CCHS appeals. For the reasons set forth below, we affirm.

STATEMENT OF FACTS

On Thursday, November 6, 1997, D.T. was a sophomore attending CCHS. After classes had been dismissed for the day,

D.T. remained at school to participate in conditioning exercises with friends on the wrestling team. She ran the hallways and stairs with the wrestling team for approximately 45 minutes and then went to the stage area in the gymnasium and began operating the wrestling clock, timing wrestlers who were working out. No adults were present in the gymnasium while the students were working out.

While D.T. was sitting on the stage, J.R., also a sophomore at CCHS, entered the stage area of the gymnasium. J.R. had just completed daily conditioning exercises with the basketball team. J.R. tackled D.T. as she was sitting on the stage and began grabbing D.T.'s chest and groin. J.R. then pinned D.T. to the floor, stating, " 'If you don't get up within the next five seconds, you'll have to give me a hand job.' " Another student finally pushed J.R. off of D.T., and D.T. left the stage area and went to the girls' locker room.

Unbeknownst to D.T., J.R. followed her into the girls' locker room, and as D.T. sat down on a locker room bench, J.R. shoved her back onto the bench and straddled her body. No school personnel were present in the girls' locker room.

As he was straddling D.T., J.R. attempted to put his hand up D.T.'s shirt and down her pants. When he was unsuccessful in those attempts, he stood up, pulled his pants down, and attempted unsuccessfully to pull D.T.'s pants down. While his pants were down, J.R. sat on D.T.'s chest and rubbed his exposed penis over her mouth and cheeks. When D.T. would not open her mouth, J.R. pinched her nose to block her breathing, to try to force her to open her mouth. During the trial, D.T. described these events as follows: "And I clenched my mouth even harder and just went — turned my head away, and he kind of laughed and thought it was funny, but that — you know, like it was a game. He did that two or three times, trying to clench my nose." J.R. then stood up, and D.T. was able to get off the bench and leave the locker room.

J.R. followed D.T. after she had left the locker room and was headed toward the school lobby, suggesting to her that her locker door was open and that " '[they] should go check it.' " When D.T. told him that the door was shut, he threatened, " 'Well, I can go open it. Then you'll have to come shut it.' "

Ultimately, D.T. reached the school lobby, where she encountered friends. She caught a ride home with one of these friends.

D.T. did not tell her parents about J.R.'s actions when she reached home. The next day, Friday, November 7, 1997, she reported the incident to Joyce Messing, CCHS' guidance counselor. D.T. testified about her initial meeting with Messing as follows:

[W]hen I walked in to Mrs. Messing, the first thing I did was start bawling.

....

... She asked me what was wrong, and I told her that I had been harassed by — I kept on using the word "harassed." I never used the word "assault," even though that's what it was — I told her by another student. She said, "Wait a second here." She stopped me from going any further, and she mentioned, she goes, "Is this person [J.R.]" And I said, "Yes." And I didn't know why she guessed, but I said, "Yes."

Messing then asked D.T. to wait while she brought John Golka, the principal of CCHS, into the office. D.T. then informed Golka and Messing about the preceding day's incident involving J.R. Golka told D.T. that he would meet with J.R. on Monday.

On Sunday, November 9, 1997, D.T. told her mother, Donna, about the assault. On Monday, November 10, D.T. returned to school. During the day, she passed J.R. at least twice in the hallway. On these occasions, J.R. would make "gestures" to D.T., such as unbuttoning his shirt. On Monday afternoon, Golka advised D.T. that he had not yet talked to J.R.

On Tuesday, November 11, 1997, D.T. continued to see J.R. in school, where he would give her "weird looks." On Tuesday, Golka required that D.T. produce evidence of the incident with J.R., and during the day, D.T. brought three or four students to Golka to inform him about what they knew concerning the incident. During this period, D.T. spoke with Messing more than once about her apprehension due to continuing to encounter J.R. at school.

J.R. was expelled from school on Wednesday, November 12, 1997, after admitting a portion of the allegations reported by D.T. D.T. learned about J.R.'s expulsion the same day.

Prior to J.R.'s removal from school, Donna had taken D.T. to the Crisis Center and the Family Violence Coalition in Grand Island so that D.T. could receive counseling as a result of J.R.'s assault. On Wednesday, November 12, 1997, a representative of the Family Violence Coalition contacted the Grand Island Police Department regarding the incident. A police officer with the Grand Island Police Department investigated the incident as a sexual assault and spoke to D.T. on November 16.

Shortly after D.T. and Donna had sought help at the Crisis Center, D.T. began to see Linda Renter Beran, a mental health practitioner associated with the Crisis Center. Beran testified at trial over objection. Initially, Beran saw D.T. once a week for 4 weeks. D.T. again had several sessions with Beran in the fall of 1998. Beran testified that D.T. reported that the incident affected her physically, hampered her ability to sleep, caused nervousness and a decrease in her self-confidence, and diminished her trust in the system and in the ability of the people that she would have trusted to protect her.

In addition to D.T.'s testimony recounting the assault, she testified as to the distress she suffered as a result of the incident. D.T. testified that as a result of the assault, she was scared, tense, nervous, and angry. She testified that her grades dropped after the assault and that she stopped participating in afterschool athletic activities because she "was kind of scared." She further testified that following the assault, her relationship with her parents changed in that "my relationship with . . . my parents actually didn't go so well." She stated that the assault also affected her relationship with her friends. "I just felt like nobody else wanted to listen, so I wouldn't talk to anybody, not family, not friends, not boyfriends. Nobody just knew about me. I just kept everything quiet."

Donna also testified at trial concerning the changes she witnessed in D.T. after the November 6, 1997, incident. She stated that before the incident, D.T. had been very talkative, outgoing, and friendly. Donna testified that after the incident, D.T. became "very angry, very controlling, difficult to communicate with, very quiet" and that she ceased to be an outgoing individual. Donna also testified that D.T.'s grades in school dropped, from A's to B's and C's. Following the November 6 incident, Bradley

and Donna took D.T. to her physician at least twice, seeking treatment for D.T.'s inability to sleep and for the stomach pains she was experiencing.

Bradley and Donna brought a two-count negligence action on behalf of D.T. against CCHS, Golka, and Robert Ripp, CCHS' superintendent. During the proceedings, Golka and Ripp were dismissed as defendants. An amended petition was filed on November 13, 2000. In the amended petition, Bradley and Donna alleged that as a result of CCHS' negligence, D.T. had suffered psychological and emotional injury, public humiliation, and pain and suffering associated with the incident, for which Bradley and Donna sought special and general damages. CCHS did not demur to the amended petition.

The 2-day jury trial began on February 5, 2001. The record contains approximately 300 pages of testimony from seven witnesses and seven exhibits. The narrative of events recited above in this opinion is taken from the testimony.

Golka testified at trial. Golka testified, *inter alia*, that he was aware of a previous incident involving J.R. resulting in a referral in which a female student other than D.T. had alleged that J.R. had inappropriately touched her. At the time of the earlier alleged assault, Golka stated that he had advised J.R. that "if the allegations were true, he'd need to stop. If they were not [true], that then he needed to continue to not engage in anything of that nature." Golka acknowledged that providing for the safety of children attending CCHS was a "top priority" of the school.

Ripp also testified at trial. Ripp agreed with Golka that maintaining a safe environment for students at CCHS was the school's responsibility. During cross-examination, Ripp was asked whether he agreed with Golka that one of the priorities of the school system was to watch out for the safety of the children. Ripp responded, "Absolutely."

Messing also testified at trial. According to Messing, it was her understanding generally that incidents such as that of November 6, 1997, "need[ed] to be immediately reported to law enforcement." She testified specifically that she believed CCHS had an obligation to report J.R.'s assault of D.T. to law enforcement authorities. Messing testified that she felt she had met her obligation when she reported the assault to Golka. Messing testified that

following D.T.'s meeting with Messing and Golka, Messing asked Golka what should be done next, and Golka responded that "he would take care of it." It is uncontroverted that CCHS did not notify law enforcement officials of J.R.'s assault of D.T.

Although the substance of the motion is not contained in the record on appeal, an order entered by the district court reflects that the district court denied CCHS' motion for directed verdict made at the close of all the evidence. The case was submitted to the jury on February 6, 2001. The jury was instructed on both counts I and II. The jury verdict form given to the jury did not separately identify the two counts. The general verdict form stated that the jury finds "for the plaintiff [sic] and against the defendant in the amount of \$_____." On February 7, the jury returned a unanimous verdict in favor of Bradley and Donna and against CCHS in the amount of \$125,000. The district court entered judgment on the jury verdict. On February 15, CCHS filed a motion for new trial for various reasons, which the district court overruled on April 17. CCHS appeals.

ASSIGNMENTS OF ERROR

On appeal, CCHS assigns four errors. CCHS claims, restated, that the district court erred (1) in overruling CCHS' motion for judgment on the pleadings, (2) in overruling CCHS' motions for directed verdict, (3) in overruling CCHS' motion for new trial due to an irregularity in the verdict form, and (4) in overruling CCHS' motion for new trial due to an excessive jury verdict.

STANDARDS OF REVIEW

[1,2] 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. *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001). A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001).

[3] The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Id.*

ANALYSIS

MOTION FOR JUDGMENT ON PLEADINGS

[4] For its first assignment of error, CCHS claims that the district court erred in denying CCHS' motion for judgment on the pleadings. This assignment of error, however, is not argued in CCHS' brief. Errors that are assigned but not argued will not be addressed by an appellate court. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002); *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

MOTION FOR DIRECTED VERDICT

For its second assignment of error, CCHS claims that the district court erred in denying CCHS' motions for a directed verdict made "at the close of Plaintiffs' case and at the close of the evidence." For the reasons stated below, we do not consider this assignment of error.

[5] The record reflects that CCHS moved for a directed verdict at the close of Bradley and Donna's case, and the bases for that motion appear and were argued on the record. The district court overruled the motion, and CCHS proceeded to offer evidence. We have long held that a defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence, waives any error in the ruling on the motion. *Spulak v. Tower Ins. Co.*, 251 Neb. 784, 559 N.W.2d 197 (1997). By proceeding with trial and introducing evidence, CCHS waived any error in the district court's ruling on CCHS' motion for directed verdict made at the close of Bradley and Donna's case.

On appeal, CCHS also claims the district court erred in overruling CCHS' motion for a directed verdict at the close of all the evidence. The judge's notes indicate that CCHS renewed its motion for directed verdict at the close of all the evidence, but the record does not contain either the motion or, more particularly, the substance of such motion.

Pages 257 to 259 of the bill of exceptions reflect that after presenting the testimony of several witnesses, CCHS informed the district court that CCHS had no additional evidence. The district court then asked Bradley and Donna if they had any rebuttal evidence, and they stated they did not. After this dialog,

the trial went into recess. Following the recess, Bradley and Donna reopened the record to reflect the parties' stipulation that two of the originally-named defendants were employees of CCHS, acting within the scope of their employment, and as a result, were dismissed from the case. Thereafter, both counsel rested and the case proceeded to closing arguments. The bill of exceptions does not reflect that CCHS moved for a directed verdict at the close of all the evidence or thereafter when the record was reopened to permit the inclusion of the stipulation. Moreover, no written motion appears in the record.

[6] In order to preserve for appeal the question whether CCHS was entitled to a directed verdict, CCHS' renewed motion for directed verdict must appear in the record. See, generally, *State v. Williams*, 247 Neb. 878, 883, 530 N.W.2d 904, 908 (1995) ("[i]t is a basic tenet of Nebraska law that the party appealing has the responsibility for including within the bill of exceptions matters from the record which the party believes are material to the issues presented for review"). A renewed motion for directed verdict need not restate with precision every basis asserted in the initial motion for directed verdict. The two should be considered together. See, *Aronson v. Harriman*, 321 Ark. 359, 901 S.W.2d 832 (1995); *Stacy v. Merchants Bank*, 144 Vt. 515, 482 A.2d 61 (1984). To consider the motions together, however, the substance of the renewed motion must appear in the record. Otherwise, an appellate court has no way of knowing whether grounds remained the same as the original motion for directed verdict.

Because the defense proceeded with trial and introduced evidence, CCHS waived any error in the district court's ruling on CCHS' motion for directed verdict made at the close of Bradley and Donna's case. Because the substance of CCHS' renewed motion for directed verdict does not appear in the record, we have nothing of substance to review on appeal. Therefore, we do not consider CCHS' second assignment of error, because the correctness of the district court's rulings on CCHS' motions for directed verdict is not before us.

MOTION FOR NEW TRIAL: VERDICT FORM

On appeal, CCHS claims that the district court erred in overruling its motion for new trial due to "irregularity" based upon

the use of a general verdict form by the jury. We reject this assignment of error.

[7,8] We have previously stated that objections to the verdict form should be made at the jury instruction conference or at the time the verdict is returned. See, *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 235 Neb. 207, 454 N.W.2d 671 (1990); *In re Estate of Kajewski*, 134 Neb. 485, 279 N.W. 185 (1938); *McGrew Machine Co. v. One Spring Alarm Clock Co.*, 124 Neb. 93, 245 N.W. 263 (1932). We have also stated that a failure to raise such an objection constitutes a waiver of the same. See *McGrew Machine Co.*, *supra*. Further, for the sake of completeness, we observe that the use of a general verdict form, even where there are multiple causes of action, may be permissible. See *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997) (citing Neb. Rev. Stat. § 25-1122 (Reissue 1995)).

[9] Nothing in the record of the trial indicates CCHS objected to the verdict form at the jury instruction conference, see *Hiway 20 Terminal, Inc.*, *supra*, or at the time the jury verdict was returned, see *In re Estate of Kajewski*, *supra*. The record in the instant appeal does not include the jury instruction conference. It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed. *Reisig v. Allstate Ins. Co.*, ante p. 74, 645 N.W.2d 544 (2002); *Harders v. Odvody*, 261 Neb. 887, 626 N.W.2d 568 (2001). CCHS has failed to present a record supporting the assigned error, and accordingly, we reject this assignment of error.

MOTION FOR NEW TRIAL: EXCESSIVE VERDICT

The jury awarded Bradley and Donna \$125,000 in damages. For its final assignment of error, CCHS claims the district court erred in denying its motion for new trial based upon the claim that the jury verdict was excessive. The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001). On

appeal, the fact finder's determination of damages is given great deference. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000); *Seeber v. Howlette*, 255 Neb. 561, 586 N.W.2d 445 (1998).

The record in the instant appeal contains evidence of changes in D.T.'s personality and behavior, the erosion of D.T.'s relationship with her parents, and D.T.'s difficulties with friends, all as a result of the sexual assault and the events which soon followed the assault. D.T.'s grades dropped, and she ceased to participate in afterschool activities. She experienced difficulty sleeping and pains in her stomach, both of which forced her to seek medical attention. Given this record, we determine that the award of damages was not so excessive as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. See, *Norman, supra*; *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998). The jury's determination of damages is supported by the evidence and bears a reasonable relationship to the elements of damages proved, and thus, we do not disturb the award on appeal. See *id.* The district court did not err when it denied CCHS' motion for new trial based on the claim of an excessive jury verdict. Accordingly, we find no merit to this assignment of error.

CONCLUSION

Finding no error in the entry of judgment in favor of Bradley and Donna and against CCHS, we affirm.

AFFIRMED.

MICHAEL JACOBSON, APPELLEE, v. SOLID WASTE AGENCY
OF NORTHWEST NEBRASKA (SWANN), APPELLANT.

653 N.W.2d 482

Filed November 22, 2002. No. S-01-602.

1. **Evidence: Stipulations: Appeal and Error.** In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.

2. **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.
3. **Municipal Corporations.** A municipality has an affirmative duty to supervise and control the collection of garbage within its corporate limits.
4. **Statutes: Ordinances: Presumptions.** All ordinances are presumed to be valid. However, the power of a municipality to enact and enforce any ordinance must be authorized by state statute.
5. **Statutes: Ordinances.** Where there is a direct conflict between a municipal ordinance and a state statute, the statute is the superior law. However, if the municipal ordinance and state statute in question are not contradictory and can coexist, then both are valid.
6. **Courts: Statutes: Ordinances.** A court has a duty to harmonize state and municipal legislation on the identical subject.
7. **Statutes: Legislature: Intent.** In construing an ambiguous statute, a court may examine the legislative history of the act in question to assist in ascertaining the intent of the Legislature.
8. **Ordinances: Presumptions: Proof.** In considering the validity of a regulation, courts generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those who challenge their validity.
9. **Ordinances: Evidence.** To overturn an ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Reversed and remanded with directions.

Dennis D. King, of Smith, King, and Freudenberg, P.C., for appellant.

Thomas A. Hawbaker, of Law Offices of Thomas A. Hawbaker, and Joe M. Hawbaker for appellee, and, on brief, Michael Jacobson, pro se.

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

STEPHAN, J.

Solid Waste Agency of Northwest Nebraska (SWANN) appeals from a declaratory judgment entered by the district court for Dawes County which determined that Michael Jacobson was not liable to SWANN for solid waste collection, transportation, and disposal service charges.

BACKGROUND

PROCEDURAL BACKGROUND

Jacobson, a resident of Gordon, Nebraska, initiated this action by filing a pro se petition for declaratory judgment in the district court for Dawes County. He sought a declaration that he is not obligated to pay solid waste collection, transportation, and disposal charges assessed by SWANN because he does not use or benefit from SWANN's services. In its answer, SWANN denied Jacobson's claim that he does not use or benefit from its services and alleged that Jacobson did not comply with its rules and regulations for opting out of service charge liability.

At a hearing on November 7, 2000, the parties advised the court that Jacobson would be filing a motion for summary judgment challenging the legal validity of the rules and regulations relied upon by SWANN. Jacobson subsequently filed a motion for summary judgment asserting that three specific rules adopted by SWANN on January 21, 1999, were not authorized under the Integrated Solid Waste Management Act, Neb. Rev. Stat. §§ 13-2001 to 13-2043 (Reissue 1997), and violated his rights under the state and federal Constitutions. A hearing on the motion was held on January 31, 2001. The parties offered a stipulation of facts which was received in evidence. Counsel for SWANN then advised the court that the parties had agreed to file an additional stipulation and requested that the matter be deemed submitted on the merits for final disposition. Thereafter, the parties filed a "Stipulation for Submission of Case" which referred to the prior receipt by the court of the factual stipulation and further stated that "the parties agree that this case shall be deemed submitted for a decision on the merits, and the decision of the Court shall be considered a final judgment in this matter."

STIPULATED FACTS

Jacobson is the sole resident and tenant of real property located at 613 North Ash Street, Gordon, Nebraska. SWANN is a political subdivision created under the Interlocal Cooperation Act, Neb. Rev. Stat. §§ 13-801 to 13-827 (Reissue 1997), and the Integrated Solid Waste Management Act. The city of Gordon, located in Sheridan County, Nebraska, is a member of

SWANN, and Jacobson's residence in Gordon is located within SWANN's jurisdictional area.

SWANN was formed for the purpose of management, collection, disposal, and recycling of solid waste within its jurisdictional area. As part of its official functions, SWANN picks up and disposes of or receives solid waste in each of its member jurisdictions. SWANN provides additional services and benefits within each member jurisdiction, including the provision of dumpsters and solid waste containers, the provision of recycling services, the sponsorship of educational programs and community events dealing with solid waste management, the collection of hazardous materials and paint, the provision of crushed concrete for the use of municipalities, and the provision of special disposal sites and assistance for natural disasters.

Since January 21, 1999, SWANN has regularly billed Jacobson for solid waste collection, transportation, and disposal services at the rate of \$14.80 per month. SWANN claims that the sum of \$382.29 is due and owing on such billings as of November 1, 2000. Jacobson denies that he utilized the services of SWANN during the period covered by such billings, or at any time. Jacobson claims that he personally collects and transports all of his solid waste to an alternate solid waste landfill owned and operated by the Oglala Lakota Nation. In support of his position, Jacobson produced 13 "receipt[s] of payment" from Oglala Lakota Nation Solid Waste Management in Pine Ridge, South Dakota, bearing dates between April 30, 1999, and January 22, 2001. He also produced a receipt, dated November 23, 1999, from an entity designated as "Solid Waste Mgmt." Some of the receipts describe "bags of trash" or "bags of garbage" in varying or unspecified quantities and further describe amounts paid by Jacobson, presumably for disposal of such items. The receipts also reflect Jacobson's address as "613 N. Ash, Gordon, NE." Although it is not clear from the stipulation of facts whether any of these receipts were ever submitted to SWANN, it is clear that Jacobson has not complied with SWANN's rules and regulations adopted pursuant to § 13-2023. Specifically, Jacobson has not provided the written statement required by SWANN's regulation § 4.05(B), and he has not provided the receipts required by § 4.05(E).

DISPOSITION BY DISTRICT COURT

Based upon the foregoing stipulated facts, the district court determined that although Jacobson was a “solid waste generator,” SWANN had no authority to “regulate” Jacobson or his solid waste because Jacobson had taken the steps required by § 13-2020(4) to exempt himself from SWANN’s charges by providing evidence that he disposed of his solid waste at an alternate facility. The court further held that a portion of SWANN’s rules and regulations requiring specific proof to exempt a solid waste generator from SWANN’s charges was unreasonable and therefore invalid. Based upon these determinations, the district court concluded that Jacobson was not liable to SWANN for any fees or charges it sought to collect, and entered judgment in favor of Jacobson. SWANN perfected this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

SWANN assigns, restated and consolidated, that the district court erred in (1) construing the Integrated Solid Waste Management Act to limit SWANN’s jurisdiction and authority to regulate and (2) granting Jacobson’s motion for summary judgment as to SWANN’s regulation § 4.05.

STANDARD OF REVIEW

[1] In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment. *J.D. Warehouse v. Lutz & Co.*, 263 Neb. 189, 639 N.W.2d 88 (2002); *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 571 N.W.2d 64 (1997).

[2] 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. *Shirley v. Neth*, ante p. 138, 646 N.W.2d 587 (2002); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

ANALYSIS

APPLICABLE STATUTES AND REGULATIONS

SWANN derives its authority from the Integrated Solid Waste Management Act (hereinafter the Act), enacted in 1992, in which the Legislature expressly recognized that local governments are “best positioned to develop efficient solid waste management programs.” § 13-2002(5). The Act requires each county or municipality to provide for disposal of solid waste generated within its jurisdiction. § 13-2020(1). Under the Act, “[t]he governing body of a county, municipality, or agency may make all necessary rules and regulations governing the use, operation, and control of a facility or system.” § 13-2020(4). Section 13-2023 grants express authority to pass such regulations and states in relevant part: “A county, municipality, or agency may, by ordinance or resolution, adopt regulations governing collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste within its solid waste jurisdiction area as necessary to protect the public health and welfare and the environment.” It is clear from established case law, as well as from a plain reading of the Act, that a political subdivision such as SWANN is “expressly empowered to establish ordinances regulating the collection and removal of garbage.” See *Tracy v. City of Deshler*, 253 Neb. 170, 174, 568 N.W.2d 903, 907 (1997). Accord *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996).

In *Village of Winside v. Jackson*, 250 Neb. at 856, 553 N.W.2d at 480, we held that under the Act as it was then written, “[a] municipality can impose a garbage fee on only those persons that actually use the garbage services provided.” We therefore concluded that a village ordinance which imposed a garbage fee on every occupied residence and business, regardless of whether the resident or business owner chose to use the village garbage system, was contrary to the plain language of the Act and thus invalid insofar as it required payment for services which were not used.

In response to *Village of Winside*, a bill was introduced during the 1997 session of the Legislature to amend the language of § 13-2020 in order to “more clearly define when a premises

is served by a solid waste collection system” and to “ensure that the solid waste systems remain viable.” Introducer’s Statement of Intent, L.B. 135, Natural Resources Committee, 95th Leg., 1st Sess. (February 26, 1997). The amendment, as initially proposed during the committee’s hearing, would have allowed subdivisions which owned and operated solid waste systems to charge a flat fee to all residents by reason of the fact that a waste disposal system was present and available for their use. Additional language, however, was later added to provide an opportunity for a waste generator to opt out of the system. Floor Debate, L.B. 495, 95th Leg., 1st Sess. 8906 (May 30, 1997). The final version of the amendment was incorporated into § 13-2020(4) as follows:

For purposes of the charges authorized by this section, the premises are served if solid waste collection service is available to the premises or if a community solid waste drop-off location is provided, unless the person who would otherwise be subject to such rates or charges proves to the governing body of the county, municipality, or agency that his or her solid waste was lawfully collected and hauled to a permitted facility. Such proof shall be provided by a receipt from a permitted facility, a statement from a licensed hauler, or other documentation acceptable to the governing body of the county, municipality, or agency.

This amendment creates a rebuttable presumption that premises of a solid waste generator located within an area served by a public solid waste collection and disposal system are “served” by such a system. The generator is therefore subject to the system’s charges unless the generator takes the steps necessary to obtain an exemption.

On January 21, 1999, SWANN issued Ordinance/Resolution No. 1999-01, which enacted rules and regulations governing disposal and transportation of solid waste within its jurisdiction. The ordinance recited that the rules and regulations promulgated therein were based upon the authority of the Act and the Interlocal Cooperative Act creating SWANN, for the purposes of the following:

A. Identifying those actions, standards and activities necessary to assure effective solid waste handling and disposal of solid waste within the agency jurisdiction;

B. To follow the direction, standards and requirements of state and federal laws as the same may be set from time to time for management of solid waste;

C. To describe the responsibility of persons generating, storing, collecting and transporting solid waste within the jurisdiction of the SWANN agency.

The rules which are at issue in this action provide as follows:

2.06 PERMITTED FACILITY/PERMITTED LAND-FILL shall mean a landfill approved by the Director of the Nebraska Department of Environmental Quality and shall include that term as set forth under NEB. REV. STAT. §13-2020 and applicable rules and regulations of the state of Nebraska, or a landfill located in any other state which has been approved by that state's Department of Environmental Quality or equivalent governing agency and which landfill is an approved landfill facility under the laws, rules and regulations of that state, also meeting applicable federal standards as well as the standards adopted by that state.

....
4.04 STORAGE/NUISANCE. No person shall be permitted to store or stockpile solid waste within the limits of any municipality located within the jurisdiction of the Agency, when such solid waste would create a nuisance as described in the Nebraska state law, any city or village ordinance governing nuisances within such jurisdiction, and **no person shall store or stockpile solid waste within the limits of such municipality for a period of fourteen (14) days or more.**

4.05 MUNICIPAL SOLID WASTE ACCOUNT LIABILITY. All solid waste generators within the limits of any municipality located within the jurisdiction of the Agency shall be subject to and liable for the rates and charges established by the Agency for solid waste collection, handling and disposal by the Agency, except as exempted hereinafter by these rules and regulations.

A. Exemption from Rates and Charges/Alternate Permitted Landfill, Out of State. Any solid waste generator within the municipal limits may elect to transport and dispose of such generator's solid waste at a permitted facility located outside the state of Nebraska. So long as the solid waste of such solid waste generator is safely and sanitarily transported by the solid waste generator to a permitted landfill located outside of the state of Nebraska, and so long as such solid waste generator shall further comply with these rules and regulations and provide the Agency with a written statement and receipts as hereinafter described, then such solid waste generator shall be exempt from payment of the rates and charges of the Agency for solid waste collection and disposal during the applicable period.

B. Written Statement, Receipt, Governing Rules. The solid waste generator desiring to be exempt from the rates and charges of the Agency shall first provide to the Agency a written statement described herein and be governed as follows:

1. The statement shall set forth the full legal name of the solid waste generator and/or person liable for the solid waste account if such solid waste were collected and disposed by the Agency;

2. The statement shall be signed by the solid waste generator;

3. The statement shall set forth the date when the solid waste generator will cease using the services of the Agency and will commence transporting and disposing of all of the generator's solid waste to a permitted landfill or permitted facility located outside the state of Nebraska;

4. The statement shall acknowledge that the solid waste generator is utilizing an alternate landfill facility and is therefore not permitted, licensed or authorized to use or receive services of the Agency for collection, handling or disposal of solid waste generated by such person;

5. The statement shall provide that the solid waste generator acknowledges that any violation of rules and regulations of the Agency or any breach of the rules and regulations of the Agency including the unauthorized use of the

Agency facilities during such period that the statement is in effect, will subject the solid waste generator to liability for the noncompliance fee as hereinafter set forth;

6. The statement shall further provide that the solid waste generator acknowledges the responsibility to provide the Agency with the "receipts" as required from time to time proving the safe and sanitary transportation and disposal of the solid waste generator's solid waste at a permitted facility located outside of the state of Nebraska.

C. Written Statement Effective Period. The foregoing written statement may be executed and provided to the Agency at any time, and shall be effective with regard to exemption for rates and charges commencing the next billing period of the Agency. The statement once filed with the Agency shall be deemed to be an election by the solid waste generator to opt out of the Agency's collection and disposal services, and the solid waste generator shall be deemed to remain as a *person* opting out of the Agency's services for collection and disposal until such time as the solid waste generator gives written notice that the generator desires to become a customer of the Agency, or the solid waste generator fails to provide the receipts as hereinafter provided.

D. Rejoining Agency. In the event that any person shall have elected to "opt out" of the Agency's jurisdiction, and shall thereafter become a customer of the Agency as provided in paragraph 4.05(C), then such person shall not be eligible to again "opt out" for a period of one year after the solid waste generator has rejoined the Agency as a customer of the Agency.

E. Receipt. A receipt from a "permitted facility" shall mean a written receipt from the "permitted facility". The "receipt" shall set forth the solid waste generator's name, address, date of disposal, quantity of disposal, type of waste disposed, the name and an address of the "permitted facility" and shall bear the original signature of the authorized agent of the "permitted facility".

The solid waste generator shall submit at least two (2) receipts monthly from the alternate "permitted facility".

The Agency reserves at all times, the right to reject any receipt or written statement if the same is not prepared and filed with the Agency in accordance with these rules and regulations. Each written statement and receipt shall first be approved by the Agency pursuant to NEB. REV. STAT. §13-2020.

AUTHORITY TO REGULATE

Although Jacobson stipulated that his residence was located within the geographical jurisdiction of SWANN, he contends that the agency's regulatory jurisdiction does not extend to solid waste that is "inside his own home." Brief for appellee at 5. The district court interpreted SWANN's regulatory jurisdiction as extending only to solid waste which is "discarded" and thus "enter[s] the system." It concluded that solid waste generated by Jacobson did not "enter the system" because Jacobson hauled his waste to an alternate facility as permitted by § 13-2020(4) and that therefore SWANN had no regulatory authority over Jacobson or any solid waste generated at his residence. SWANN contends that this interpretation of its regulatory authority over solid waste is overly restrictive. We agree.

[3] As we noted in *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996), the Act is designed to provide a comprehensive scheme to control the collection and disposal of solid waste. The Act permits a municipality to adopt ordinances or regulations governing solid waste within its jurisdiction as necessary to protect the public health and welfare as well as the environment. *Id.* See, also, § 13-2023. In *Tracy v. City of Deshler*, 253 Neb. 170, 175, 568 N.W.2d 903, 907 (1997), we recognized as "well settled" the principle that a municipality has an affirmative duty to supervise and control the collection of garbage within its corporate limits.

This court is guided by the presumption that the Legislature intended a sensible rather than an absurd result. *Spaghetti Ltd. Partnership v. Wolfe*, ante p. 365, 647 N.W.2d 615 (2002). The Act specifically assigns the responsibility of regulation and oversight of solid waste to local governing bodies because the Legislature determined that such bodies were in the best position to develop efficient waste management programs. § 13-2002(5).

To impose on local governments the responsibility to regulate solid waste and then not grant them the authority necessary to fulfill their obligations would lead to an absurd result. Accordingly, we conclude that SWANN's regulatory authority extends to all solid waste generated within its area of jurisdiction. Although § 13-2020(4) provides a means by which a resident or business may avoid paying a service fee to a municipality having regulatory jurisdiction under the Act, it does not alter the power to regulate conferred by the Act.

VALIDITY OF REGULATIONS

Having determined that SWANN had authority to regulate solid waste generated at Jacobson's residence, we must now consider whether it exercised such authority in a lawful manner. As a preliminary matter, we note that while Jacobson challenged the validity of §§ 2.06, 4.04, and 4.05(E) of the rules and regulations promulgated by SWANN in January 1999, the judgment of the district court invalidated only portions of § 4.05 and did not address the validity of §§ 2.06 and 4.04. Jacobson did not file a cross-appeal contending that the district court should have also held §§ 2.06 and 4.04 to be invalid, and we therefore do not consider that issue. See *Wasikowski v. Nebraska Quality Jobs Bd.*, ante p. 403, 648 N.W.2d 756 (2002).

[4-6] All ordinances are presumed to be valid. *Village of Winside v. Jackson*, supra; *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 660, 515 N.W.2d 390 (1994). However, the power of a municipality to enact and enforce any ordinance must be authorized by state statute. *Village of Winside v. Jackson*, supra; *State v. Austin*, 209 Neb. 174, 306 N.W.2d 861 (1981). As noted by the district court, Jacobson's principal contention is that § 13-2020(4) does not authorize the requirement in SWANN's regulation § 4.05(E) that a solid waste generator submit "at least two (2) receipts monthly from the alternate 'permitted facility'" in order to avoid SWANN's service charges. Where there is a direct conflict between a municipal ordinance and a state statute, the statute is the superior law. *Village of Winside v. Jackson*, supra. However, if the municipal ordinance and state statute in question are not contradictory and can coexist, then both are valid. *Gillis v. City of Madison*, 248 Neb. 873, 540

N.W.2d 114 (1995). A court has a duty to harmonize state and municipal legislation on the identical subject. *Id.*

[7] Section § 13-2020(4) authorizes public entities owning or operating solid waste disposal systems to establish rates or charges for their use, to be paid “by each person whose premises are served by the facility or system.” The 1997 amendment to this statute added the following language:

For purposes of the charges authorized by this section, the premises are served if solid waste collection service is available to the premises or if a community solid waste drop-off location is provided, *unless the person who would otherwise be subject to such rates or charges proves to the governing body of the county, municipality, or agency that his or her solid waste was lawfully collected and hauled to a permitted facility. Such proof shall be provided by a receipt from a permitted facility, a statement from a licensed hauler, or other documentation acceptable to the governing body of the county, municipality, or agency.*

(Emphasis supplied.) 1997 Neb. Laws, L.B. 495. The statute is silent as to the frequency with which such proof must be provided in order to exempt a property owner or occupant from service charges. To that extent, the statute cannot be adequately understood from the plain meaning of its language or when considered in *pari materia* with related statutes, and it is therefore ambiguous. See *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). In construing an ambiguous statute, a court may examine the legislative history of the act in question to assist in ascertaining the intent of the Legislature. *Premium Farms v. County of Holt*, *supra*; *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002).

The question of how frequently one must provide proof of alternate solid waste disposal in order to avoid liability for charges was specifically discussed during floor debate on the 1997 amendment to § 13-2020(4). The discussion proceeded as follows:

SENATOR WICKERSHAM: . . . I’m wondering what the duration or the period is to be covered by the receipt or the statement is. For example, if you have weekly billings, do you need to present a weekly receipt? If you have

monthly billings, do you have to present a monthly receipt? . . .

SENATOR BEUTLER: . . . I believe there is a degree of flexibility in the amendment and it would seem to me that that's been left to the parties to work out what is reasonable on a reasonable basis.

. . . .

SENATOR WICKERSHAM: . . . I would assume that the amendment means that if you have a monthly billing period or a weekly billing period that that is the duration of the receipt

SENATOR BEUTLER: . . . I would certainly think that a monthly requirement would be reasonable. I don't have knowledge of weekly billings, but certainly . . . requiring it on a monthly basis would seem perfectly reasonable, under this amendment, to me.

Floor Debate, L.B. 495, 95th Leg., 1st Sess., 8907, 8909 (May 30, 1997).

From this, we conclude that although the statute uses the singular form of the word "receipt," the Legislature intended that periodic submissions of proof would be necessary in order to avoid payment to a municipal system serving the premises, and that the frequency of such submissions would be determined under a standard of reasonableness. So construed, § 13-2020(4) and § 4.05 of the SWANN ordinance are not contradictory. The validity of § 4.05 therefore depends upon whether it is a reasonable specification of the general proof requirement set forth in § 13-2020(4).

[8,9] In considering the validity of a regulation, courts generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those who challenge their validity. *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 623 N.W.2d 672 (2001); *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996). To overturn an ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory. *City of Omaha v. Cutchall*, 173 Neb. 452, 114 N.W.2d 6 (1962). We find no evidence in this stipulated record upon

which we could declare § 4.05 unreasonable or arbitrary and therefore invalid.

As part of a comprehensive scheme to control collection and disposal of solid waste authorized by the Act, § 13-2020(1) requires municipalities to "provide or contract for facilities and systems as necessary for the safe and sanitary disposal of solid waste generated within its solid waste jurisdiction area." With respect to waste generators which utilize its system, SWANN can control the frequency of waste pickup and disposal. Although SWANN cannot require a waste generator to use its system and pay its charges, it is authorized by § 13-2020(4) to require such persons or entities, as a condition of being exempted from liability for such charges, to prove that they are disposing of solid waste through alternate means which are consistent with SWANN's statutory obligation to provide for safe and sanitary disposal of solid waste within its jurisdictional area. Section 4.05 seeks to accomplish this objective by requiring those waste generators electing not to use SWANN's services to provide a written statement that they will use an alternate permitted facility and will not use SWANN's services from and after the date of the statement. Under § 4.05, this election to opt out of SWANN's collection and disposal services is effective until the waste generator either uses SWANN's services or fails to provide proof, consisting of receipts showing that waste is being taken to a permitted facility at least twice monthly.

As noted above, we construe § 13-2020(4) to permit a municipal waste disposal agency to require periodic evidence that a generator not using its system is disposing of waste at an alternate permitted facility on a regular basis. We find nothing in this record upon which we could conclude that requiring such evidence be submitted twice monthly is unreasonable.

We have considered Jacobson's other arguments with respect to the claimed invalidity of § 4.05 and conclude that they are without merit.

CONCLUSION

For the reasons discussed, we conclude that § 4.05 of the rules and regulations adopted by SWANN in Ordinance/Resolution No. 1999-01 is valid. Jacobson's residence is located within

SWANN's jurisdictional area, and he did not comply with lawful regulatory requirements necessary to exempt himself from SWANN's charges for solid waste collection, transportation, and disposal services. Jacobson's charges were stipulated to be \$382.29 as of November 1, 2000. The judgment of the district court is reversed, and the cause remanded to the district court for entry of judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, v.
JOHN V. HALTOM, APPELLANT.

653 N.W.2d 232

Filed November 22, 2002. No. S-01-1400.

1. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
2. **Constitutional Law: Obscenity: Appeal and Error.** In reviewing a fact finder's determination that certain material is obscene, the threshold duty of an appellate court is to conduct an independent review and determine, as a matter of constitutional law, if the material falls within the substantive limitations set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., is the material the type of "hardcore" sexual material that may be constitutionally regulated under the First Amendment.
3. **Obscenity: Appeal and Error.** In reviewing the determinations of the trier of fact under the three-part obscenity standard set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), and Neb. Rev. Stat. § 28-807(10) (Reissue 1995), the appellate court should give appropriate deference to the trier of fact regarding the first two prongs of the test, i.e., the "prurient interest" test and the "patently offensive" test, as these issues depend on knowledge of contemporary community standards which are uniquely within the province of the trier of fact.
4. ____: _____. An appellate court should apply a de novo review in considering the third prong of the test in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., the "value" of the material at issue, since this determination does not depend upon community standards and is particularly amenable to appellate review.
5. **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 indicative of a probable miscarriage of justice.
6. **Trial: Jury Instructions.** The submission of proposed instructions by counsel does not relieve the parties in an instruction conference from calling the court's

attention by objection to any perceived omission or misstatement in the instructions given by the court.

7. **Criminal Law: Trial: Motions to Suppress: Pretrial Procedure: Appeal and Error.** In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement to preserve the question for review on appeal.
8. **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.
9. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.
10. **Obscenity: Evidence: Appeal and Error.** The determination of whether evidence is relevant to show contemporary community standards is subject to an abuse of discretion standard of review.
11. **Obscenity: Evidence.** An exhibit of comparable materials is not in and of itself admissible to demonstrate contemporary community standards regarding the material at issue. Availability of similar material by itself means nothing more than that other persons are engaged in similar activities.

Appeal from the District Court for Douglas County, MARY G. LIKES, Judge, on appeal thereto from the County Court for Douglas County, JOSEPH P. CANIGLIA, Judge. Judgment of District Court affirmed.

Andrew M. Ferguson and Joseph M. Acierno, of Ferguson, Chesterman & Acierno, P.C., and John Fahle, of Carter & Fahle, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

CONNOLLY, J.

John V. Haltom appeals the district court's order affirming his conviction and sentence in county court for distributing obscene material. The county court sentenced Haltom to 9 months in jail. At issue is a video depicting a variety of sexual acts. Haltom contends that the county court erred in various respects, including failing to suppress statements and failing to grant a mistrial. He also contends that the trial court erred by instructing the jury

that "prurient" means a tendency to excite lustful ideas or desires, but that lustful desires do not include a normal interest in sex. We affirm.

BACKGROUND

Haltom owns a store known as Dr. John's Lingerie and Novelty Boutique in Omaha, Nebraska. The store carries a variety of merchandise, including adult videos.

The video that is the subject of this appeal was sold on February 6, 2000. The video, entitled "Snatch Patch," features a variety of heterosexual sex acts, including intercourse in a variety of positions, oral-vaginal sex, and oral-penile sex. Some of these scenes involve one woman engaging in sex acts with two men. The video shows ejaculation and spanking. In addition, the video includes scenes involving penile-rectal sex, including a scene in which two males simultaneously penetrate a woman, one vaginally, and the other rectally.

Before trial, the court held a hearing on a motion to suppress statements. Several Omaha police officers testified concerning the day Haltom was arrested. According to the officers, they advised Haltom of his *Miranda* rights. The officers stated that Haltom then told them that he had previous arrests, that he had been in business in other states, and that he was the owner of the store. The officers gave Haltom a citation, but he was not taken to the police station. According to Haltom, the officers did not advise him of his *Miranda* rights before he made the statements and the officers told him that if he cooperated, they would not take him down to the station and book him. The trial court denied the motion to suppress. At trial, Haltom did not object to testimony about his statement that he was the owner of the store.

Haltom also moved to exclude evidence of his prior arrests. During a hearing on the motion, the State agreed not to discuss prior arrests or convictions. At trial, however, Ronald Cole, a sergeant with the Omaha Police Department, was asked about conversations he had had with Haltom. Cole testified: "He stated he was the owner of the establishment. He referenced that he owned a place like this in St. Louis, that he's been arrested several times there." Haltom objected, and the court told the jury to disregard the testimony. Haltom then moved for a mistrial. The

motion was overruled. The record shows that the jury was not given any additional instruction to prevent drawing further attention to the testimony.

The video was played for the jury, and the State rested. Haltom moved for a directed verdict, which was denied.

Haltom presented witnesses who testified about the community standards in Omaha. They expressed opinions that the video was not obscene. Haltom also gave his opinion of the community standards. He testified that his store is oriented to heterosexual adults and that he had not watched the video before trial. He stated that it was a "regular adult video" and that he had sold those types of videos across the country. According to Haltom, most of the videos in his store would portray depictions similar to those in the video.

Before trial, Haltom discussed with the court his intention to offer evidence of comparable materials to show community standards. He mentioned a previous judgment that found him not guilty in an obscenity case in Omaha. The court stated that it would not allow any evidence of comparable materials. At trial, Haltom made an offer of proof for a video of a movie available on pay-per-view at a local hotel. According to Haltom, the content of the movie is comparable to the content of the video. He also offered two videos that were available at another store. The court did not allow any of the videos into evidence. During the offer of proof, there was no discussion of videos that were the subject of a not guilty verdict determination in the other cases. The record contains two videos that bear exhibit stickers from a different proceeding. The videos do not have exhibit stickers indicating that they were marked as exhibits in this case.

The jury was instructed on the definition of "obscene" as follows:

"Obscene" shall mean (a) that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion, (b) the work, material, conduct, or live performance depicts or describes in a patently offensive way sexual conduct . . . and (c) the work conduct, material, or live performance

taken as a whole lacks serious literary, artistic, political, or scientific value.

In a separate instruction, the jury was instructed that "[p]rurient" means material having a tendency to excite lustful ideas or desires. However, lustful ideas or desires do not include a normal interest in sex."

Haltom initially proposed a different definition of "prurient" and objected to instructions offered by the State which defined "prurient" as "a tendency to excite lustful thoughts." The court discussed the definition of "prurient" with the attorneys. During the discussion, Haltom's attorney expressed concern that by defining "prurient" in terms of lust, the State was presenting an instruction that would allow a jury to convict even if the material appealed to a normal interest in sex. The court ultimately suggested that the definition be worded to include language about a normal interest in sex. When the court suggested the instruction that was given, Haltom's attorney stated that he thought the instruction was "as close as we can get to the exact words of the Supreme Court." The court then stated that it would give the instruction, and Haltom's attorney stated, "Great." There was no objection to the instruction.

The jury found Haltom guilty. Haltom moved for judgment notwithstanding the verdict. The court overruled the motion. The record does not reflect that a motion for a new trial was filed. The district court affirmed.

ASSIGNMENTS OF ERROR

Haltom assigns that the county court erred in (1) its instruction to the jury on the definition of "prurient interest"; (2) overruling his motion for a mistrial when the jury heard evidence of prior bad acts; (3) refusing to allow evidence of comparable material; (4) denying his motion to suppress statements; and (5) failing to grant his motions to dismiss, for judgment notwithstanding the verdict, and for a new trial.

Haltom also assigned that the court erred by failing to instruct the jury that knowledge of the character or content of the material is an element of the crime. At oral argument, Haltom conceded that the assignment was without merit and withdrew it from consideration. We do not discuss that assignment of error.

STANDARD OF REVIEW

[1] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999); *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998).

[2,3] In reviewing a fact finder's determination that certain material is obscene, the threshold duty of an appellate court is to conduct an independent review and determine, as a matter of constitutional law, if the material falls within the substantive limitations set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), i.e., is the material the type of "hardcore" sexual material that may be constitutionally regulated under the First Amendment. Thereafter, the appellate court must review the determinations of the trier of fact under the three-part obscenity standard set forth in *Miller v. California*, *supra*, and Neb. Rev. Stat. § 28-807(10) (Reissue 1995). In doing so, the appellate court should give appropriate deference to the trier of fact regarding the first two prongs of the test, i.e., the "prurient interest" test and the "patently offensive" test, as these issues depend on knowledge of contemporary community standards which are uniquely within the province of the trier of fact. *State v. Haltom*, 263 Neb. 767, 642 N.W.2d 807 (2002); *Tipp-It, Inc. v. Conboy*, 257 Neb. 219, 596 N.W.2d 304 (1999).

[4] An appellate court should apply a de novo review in considering the third prong of the *Miller v. California* test, i.e., the "value" of the material at issue, since this determination does not depend upon community standards and is particularly amenable to appellate review. *Id.*

ANALYSIS

DEFINITION OF "PRURIENT"

Haltom contends that the trial court wrongly instructed the jury on the definition of "prurient" because the instruction states that prurient means a "tendency to excite lustful ideas or desires." The definition also states that lustful desires do not include a normal interest in sex. The State contends that the issue was waived. Haltom offered an alternate instruction, but he agreed to the instruction that was ultimately given without objection.

[5,6] 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 indicative of a probable miscarriage of justice. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002); *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999). We have held that the submission of proposed instructions by counsel does not relieve the parties in an instruction conference from calling the court's attention by objection to any perceived omission or misstatement in the instructions given by the court. *Haumont v. Alexander*, 190 Neb. 637, 211 N.W.2d 119 (1973). We explained that "[t]he 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.* at 641, 211 N.W.2d at 122.

Here, Haltom's attorney submitted proposed instructions and then discussed at length with the court how the jury should be instructed about the definition of "prurient." He expressed concern that the instructions needed to inform the jury that "prurient" did not include a normal interest in sex. When the court agreed and suggested language about a normal interest in sex, Haltom's attorney stated that it was "as close as we can get to the exact words of the Supreme Court." When the court then stated that it would give the instruction, Haltom's attorney stated, "Great." The record shows that Haltom not only failed to object to the instruction that was given, but expressed satisfaction with it. We determine that the issue has been waived, and we do not find plain error.

MOTION TO SUPPRESS STATEMENTS

Haltom contends that statements he made to the police officers were involuntary because the officers said they would not take him downtown and book him if he cooperated. Before trial, the court determined that the State could offer the statements into evidence. Haltom did not object when the statements were offered at trial.

[7] In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement to preserve the question for review on appeal. *State v. Cody*, 236

Neb. 69, 459 N.W.2d 195 (1990). This rule also applies to pre-trial determinations about the voluntariness of the statements. *Id.* Because Haltom did not object to the evidence when it was introduced at trial, he has not preserved the question for review and we do not consider it.

COMPARABLE MATERIALS

Haltom contends that he was entitled to present the following comparable materials at trial: a pay-per-view video from a local hotel, two videos sold at another store, and videos from two other trials where he was found not guilty.

Haltom did not mark the two videos that were the subject of not guilty verdicts as exhibits and did not provide an offer of proof for them. Those videos were never offered into evidence, and we do not discuss them on appeal. We do discuss, however, the hotel video and the videos sold at another store.

[8-10] 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. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). The determination of whether the evidence is relevant to show contemporary community standards is subject to an abuse of discretion standard of review.

[11] We have stated that “[a]n exhibit of comparable materials is not in and of itself admissible to demonstrate contemporary community standards regarding the material at issue. Availability of similar material by itself means nothing more than that other persons are engaged in similar activities.” *Main Street Movies v. Wellman*, 257 Neb. 559, 570, 598 N.W.2d 754, 763 (1999), citing *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974).

Here, the hotel video and the videos sold at another store demonstrate only that other videos are available in the community. This alone does not provide evidence that the videos would not be considered to be obscene in the community. We determine

that the trial court did not abuse its discretion by refusing to allow the videos into evidence.

MOTION FOR MISTRIAL

Haltom contends that the court should have granted his motion for a mistrial when the jury heard that he had previously been arrested. The decision whether to grant a motion for mistrial is within the discretion of the trial court. See *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999).

Unlike cases where detailed evidence of prior bad acts have the potential to confuse the jury and prejudice it against the defendant, here the jury briefly heard only that Haltom said he had been arrested several times in Missouri. The jury did not hear any details about the arrests or hear whether he had been convicted. The jury was immediately told to disregard the testimony. No further instruction was given to avoid drawing attention to the matter. We determine that the trial court did not abuse its discretion in overruling the motion for a mistrial.

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

Finally, Haltom contends that the court should have granted his motions to dismiss, for judgment notwithstanding the verdict, and for a new trial because no reasonable jury could find beyond a reasonable doubt that the video was obscene. We note that the record does not contain a motion for a new trial, and we do not address that issue. We have viewed the video and determine that under *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), this assignment of error is without merit.

CONCLUSION

We determine that Haltom waived assignments of error concerning the definition of "prurient" and the denial of his motion to suppress statements. We determine that the trial court did not err by refusing evidence of comparable materials and by refusing to grant Haltom's motion for a mistrial. Finally, we determine that the trial court properly overruled Haltom's motion for judgment notwithstanding the verdict. Accordingly, we affirm.

AFFIRMED.

FRANKIE LEVI COLE, APPELLANT, V.
SCOTT ISHERWOOD ET AL., APPELLEES.

653 N.W.2d 821

Filed December 6, 2002. No. S-00-665.

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. **Political Subdivisions Tort Claims Act: Tort Claims Act.** Generally, provisions in the Political Subdivisions Tort Claims Act should be construed in harmony with similar provisions in the State Tort Claims Act.
3. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
4. **Tort Claims Act: Jurisdiction.** The district court has exclusive subject matter jurisdiction over suits under the State Tort Claims Act pursuant to Neb. Rev. Stat. § 81-8,214 (Reissue 1996).
5. **Jurisdiction.** Generally, when subject matter jurisdiction is vested in one judicial tribunal, it cannot simultaneously be exercised in another.
6. **Tort Claims Act: Jurisdiction.** The filing requirements set forth in Neb. Rev. Stat. § 81-8,212 (Reissue 1996) and the final disposition requirements set forth in Neb. Rev. Stat. § 81-8,213 (Reissue 1996) of the State Tort Claims Act are conditions precedent to the commencement of suit, but are not jurisdictional prerequisites for the adjudication of a tort claim against the State.
7. **Jurisdiction: Civil Rights: Prisoners: Case Overruled.** Exhaustion of administrative remedies is not a jurisdictional prerequisite to the commencement of an action pursuant to 42 U.S.C. § 1983 (2000). Rather, a prisoner's failure to exhaust administrative remedies is an affirmative defense which may be raised in a § 1983 action. To the extent that *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999), held that exhaustion of administrative remedies is a jurisdictional component of a § 1983 action, it is overruled.
8. **Actions: Words and Phrases.** A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, CARLSON, and MOORE, Judges, on appeal thereto from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Frankie Levi Cole, pro se.

Don Stenberg, Attorney General, and Jennifer M. Amen for appellees.

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

STEPHAN, J.

Frankie Levi Cole, an inmate, brought an action against various prison employees asserting claims for personal injury and property loss. Defendants successfully demurred to Cole's third amended petition on grounds that the district court lacked jurisdiction and that the petition failed to state a cause of action. The action was dismissed. The Nebraska Court of Appeals affirmed the dismissal, holding the district court lacked subject matter jurisdiction. *Cole v. Isherwood*, 11 Neb. App. 44, 642 N.W.2d 524 (2002). We granted Cole's petition for further review.

I. FACTS

The facts in this case are fully set forth in the opinion of the Court of Appeals and are summarized here. In his original petition filed on July 2, 1999, Cole alleged that defendants refused his request to be transferred to a cell with a nonsmoking cellmate and denied him proper medical attention after two separate altercations with his cellmate. After the first altercation, Cole required surgery on his right thumb, and after the second, he required stitches near his left eye.

Defendants successfully demurred to Cole's initial petition, as well as his first and second amended petitions. Cole then filed his operative third amended petition, which alleges tort claims and violations of 42 U.S.C. § 1983 (2000) and is brought against defendants in their individual capacities for monetary damages and in their official capacities to the extent that prospective injunctive relief might apply. Defendants filed a demurrer asserting that the court lacked jurisdiction over Cole's claims and their persons and that the petition did not state a cause of action. After conducting a telephonic hearing, the district court sustained the demurrer on all grounds and dismissed the petition without articulating its rationale. The court found that it was reasonably unlikely that Cole could amend to correct the grounds stated in the demurrer.

The Court of Appeals affirmed in a published opinion. *Cole v. Isherwood, supra*. The court found that Cole's claims were subject to the Nebraska State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996), because his allegations were brought against state employees based upon alleged actions within the scope of their employment. The State Tort Claims Act provides in relevant part that "[n]o suit shall be permitted . . . unless the State Claims Board has made final disposition of the claim." § 81-8,213. The court noted that Cole filed his initial suit in district court on July 2, 1999. In his third amended petition filed April 3, 2000, Cole alleged that he filed his claim with the State Claims Board on March 31, 1999, and that it was denied on August 11, 1999. *Cole v. Isherwood, supra*. Based upon these facts, the Court of Appeals determined that the district court properly granted the demurrer because when "Cole filed his petition prior to the denial of his claims by the State Claims Board, the district court lacked jurisdiction to hear Cole's claim under the Act." *Id.* at 50, 642 N.W.2d at 530.

The Court of Appeals noted that a question remained as to whether Cole had a valid cause of action under § 1983. Citing *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999), the court found that when a prisoner has requested both monetary damages and injunctive relief with respect to prison conditions under § 1983, the Prison Litigation Reform Act requires that the prisoner exhaust his or her administrative remedies before bringing the action. The Court of Appeals determined that Cole failed to exhaust his remedies because he filed his State Tort Claims Act claim in an untimely manner, and concluded that "[t]herefore, the district court lacked jurisdiction to hear Cole's § 1983 claims and correctly granted the defendants' demurrer" *Cole v. Isherwood*, 11 Neb. App. 44, 51, 642 N.W.2d 524, 530 (2002).

II. ASSIGNMENTS OF ERROR

In his petition for further review, Cole asserts that the Court of Appeals erred as a matter of law (1) in finding that the district court lacked jurisdiction because final determination by the State Claims Board had not been made prior to initiation of the district court action and (2) in finding that the district court

lacked jurisdiction to hear the § 1983 action because administrative remedies had not been exhausted.

III. 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. *Regier v. Good Samaritan Hosp.*, ante p. 660, 651 N.W.2d 210 (2002); *Shirley v. Neth*, ante p. 138, 646 N.W.2d 587 (2002).

IV. ANALYSIS

1. SUBJECT MATTER JURISDICTION

Cole argues that the Court of Appeals erred in holding that the district court lacked subject matter jurisdiction over his claims. He generally contends that the filing of a suit in district court prior to final disposition of a claim filed with the State Tort Claims Board does not deprive the district court of subject matter jurisdiction. He further argues that exhaustion of administrative remedies is not a jurisdictional component of a § 1983 action.

(a) State Tort Claims Act

The relevant portion of the State Tort Claims Act provides that no suit can be brought in district court "unless the State Claims Board has made final disposition of the claim." § 81-8,213. Final disposition occurs either when the claims board decides the claim or when the claim is withdrawn. See *id.* The statute specifically states, however, that a claim may be withdrawn only if the board has not acted upon the claim within 6 months. *Id.* From the face of the operative third amended petition, it is apparent that Cole's suit was filed in the district court less than 6 months after the claim was submitted to the claims board and prior to final disposition by that board.

[2] Cole relies upon cases interpreting a separate but similar provision in the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997). See, *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001); *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). In *Keller* and *Millman*, we held that the failure to file or present a claim to the appropriate

political subdivision did not deprive the district court of subject matter jurisdiction. *Id.* See § 13-905. Generally, provisions in the Political Subdivisions Tort Claims Act should be construed in harmony with similar provisions in the State Tort Claims Act. *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994). The provisions in both acts requiring the presentment of claims prior to initiation of actions in the district court are nearly identical. Compare § 81-8,212 with § 13-905 (requiring that claims “shall be filed”). Thus, the rule that the filing or presentment of a claim is not a jurisdictional prerequisite to commencement of suit applies to the State Tort Claims Act, as well as the Political Subdivision Tort Claims Act.

This rule, however, does not fully resolve the question of subject matter jurisdiction in this case. In both *Keller* and *Millman*, the plaintiff wholly failed to file a claim with the applicable governing board. See §§ 81-8,212 and 13-905. In this case, the third amended petition alleges that Cole presented his initial claim to the board on March 31, 1999, thus complying with the initial presentment provision in the State Tort Claims Act. See § 81-8,212. Cole, however, filed suit in the district court on July 2, although the claims board did not finally deny his claim until August 11.

These facts meet the initial presentment requirement of § 81-8,212 but conflict with the requirement of § 81-8,213 that no suit can be brought in district court “unless the State Claims Board has made final disposition of the claim.” The issue presented is whether the reasoning of *Keller* and *Millman* applies to these facts. We conclude that it does.

[3,4] Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001); *Falotico v. Grant Cty. Bd. of Equal.*, 262 Neb. 292, 631 N.W.2d 492 (2001). The district court has exclusive subject matter jurisdiction over suits under the State Tort Claims Act pursuant to § 81-8,214. The requirements of § 81-8,213, like the requirements of § 81-8,212, are simply statutory conditions that a plaintiff must follow prior to instigating suit in district court. As we have noted:

“[S]tatutory conditions or conditions precedent have nothing to do with subject matter jurisdiction of [the trial court]. [Citations omitted.] They deal only with the appropriate conditions set by the legislature as a prerequisite for commencing or maintaining an action. Subject matter jurisdiction is conferred on the [trial court] by the constitution. [Citation omitted.] Whether or not a proper claim has been filed, the [trial court] has jurisdiction of the subject matter.”

Millman v. County of Butler, 235 Neb. 915, 922, 458 N.W.2d 207, 212 (1990), quoting *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 357 N.W.2d 548 (1984).

In this case, the statutory condition requiring final disposition by the board prior to instigation of a suit is analogous to the statutory condition requiring the initial presentment of a claim to the Board. In *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 368-69, 417 N.W.2d 757, 766 (1988), we explained the purpose or function of requiring an initial claim against a governing board:

[T]he written claim required by [the Political Subdivisions Tort Claims Act] notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made.

Summarized, the Political Subdivisions Tort Claims Act “affords a governmental subdivision a pre-action opportunity, or a period before commencement of a lawsuit, to examine the merits of a tort claim and possibly avoid the expense, time, and varied but frequent rigors of litigation to dispose of a claim.” *Millman v. County of Butler*, 235 Neb. at 925, 458 N.W.2d at 214.

This reasoning applies equally to the final disposition requirement in the State Tort Claims Act. Like the requirement of the initial filing of a claim, the final disposition requirement is simply a statutory procedural requirement enacted to benefit the State entity being sued by allowing it an opportunity to adequately examine and investigate the claim prior to commencement of a lawsuit. Thus, although filing a lawsuit prior to final disposition

of the claim by the claims board violates the statutory requirement of § 81-8,213, it does not deprive the district court of its general subject matter jurisdiction to hear the case. See *Millman v. County of Butler*, *supra*.

[5] The only remaining question is whether the filing of the claim with the board vested the board with subject matter jurisdiction so that the district court could not exercise its general subject matter jurisdiction prior to resolution of the claim. Generally, when subject matter jurisdiction is vested in one judicial tribunal, it cannot simultaneously be exercised in another. See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). This case, however, does not involve two judicial tribunals. According to § 81-8,211, the State Claims Board, acting on behalf of the State, has authority to “consider, ascertain, adjust, compromise, settle, determine, and allow any tort claim.” The plain language of the statute reveals that the claims board is not acting in a judicial manner, but is merely representing the State, one of the parties to the dispute. The filing of a claim with the board therefore cannot divest the district court of its subject matter jurisdiction to hear a tort claim.

[6] In summary, we hold that the filing requirements set forth in § 81-8,212 and the final disposition requirements set forth in § 81-8,213 of the State Tort Claims Act are conditions precedent to the commencement of suit, but are not jurisdictional prerequisites for the adjudication of a tort claim against the State. Accordingly, the Court of Appeals erred in concluding that the district court lacked subject matter jurisdiction to determine Cole’s tort claims under the State Tort Claims Act. While defendants may assert an affirmative defense alleging Cole’s failure to comply with § 81-8,213, such a defense is not jurisdictional in nature and therefore was not properly raised by defendants’ demurrer. See Neb. Rev. Stat. § 25-806(1) (Reissue 1995).

(b) 42 U.S.C. § 1983

The Court of Appeals also concluded that Cole’s failure to exhaust his administrative remedies under the State Tort Claims Act caused the district court to lack subject matter jurisdiction to hear his § 1983 claims.

In reaching its conclusion, the Court of Appeals relied upon our decision in *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999). In *Pratt*, a prisoner filed a § 1983 action alleging that prison employees were conspiring to deprive him of his rights under the U.S. Constitution. The prisoner sought both injunctive and monetary relief. The defendant prison employees demurred to the petition, alleging, inter alia, that it failed to state a cause of action and that the district court did not have subject matter jurisdiction.

In *Pratt*, we recognized that the Prison Litigation Reform Act (hereinafter PLRA), adopted in 1996, requires prisoners to exhaust administrative remedies prior to filing actions under § 1983 or any federal law. We found that Pratt had a number of administrative remedies available to him which he had not exhausted prior to filing his § 1983 action. *Id.*, citing Neb. Rev. Stat. §§ 83-4,111 and 83-4,135 through 83-4,139 (Reissue 1999) and 68 Neb. Admin. Code, ch. 2 (1994). After examining the available administrative prison grievance procedures, we stated:

We note that other remedies are not precluded. In particular, 68 Neb. Admin. Code, ch. 2, § 005.01 (1994), stated: "Claims against the Department involving miscellaneous or tort claims for money damages may be filed pursuant to the State Tort Claims Act." *Thus, prisoners in Nebraska must adhere to and exhaust these specific provisions before bringing a § 1983 claim.*

(Emphasis supplied.) *Pratt v. Clarke*, 258 Neb. at 407, 604 N.W.2d at 826. Our holding in *Pratt* clearly required a prisoner to exhaust his or her administrative remedies under the State Tort Claims Act prior to bringing a § 1983 action. Because Pratt failed to comply with the PLRA by exhausting his administrative remedies, we concluded that the district court lacked subject matter jurisdiction to hear his § 1983 claim.

Since *Pratt* was decided, however, the Eighth Circuit has held that a prisoner's failure to exhaust administrative remedies prior to bringing a § 1983 action does not deprive a court of subject matter jurisdiction. *Chelette v. Harris*, 229 F.3d 684 (8th Cir. 2000). The court in *Chelette* reasoned that the applicable provisions of the PLRA, codified at 42 U.S.C. § 1997e (2000), did not contain the "sweeping and direct" language

necessary to impose a jurisdictional requirement of exhaustion of administrative remedies. 229 F.3d at 687. See § 1997e(a). The court noted that this conclusion was reinforced by other provisions of § 1997e which permit a court to evaluate and dismiss a claim on the ground that it lacks substantive merit even when administrative remedies have not been exhausted. Similar conclusions have been reached by other federal circuit courts. *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000); *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999); *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532 (7th Cir. 1999); *Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998); *Wright v. Morris*, 111 F.3d 414 (6th Cir. 1997).

[7] We find this federal authority persuasive and therefore conclude that exhaustion of administrative remedies is not a jurisdictional prerequisite to the commencement of an action pursuant to § 1983. Rather, a prisoner's failure to exhaust administrative remedies is an affirmative defense which may be raised in a § 1983 action. To the extent that *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999), held that exhaustion of administrative remedies is a jurisdictional component of a § 1983 action, it is overruled. Because we have now determined that exhaustion of administrative remedies is not a jurisdictional component of a § 1983 action, the Court of Appeals was also in error in concluding that the district court lacked subject matter jurisdiction over the § 1983 claims due to Cole's failure to exhaust administrative remedies.

2. FAILURE TO STATE CAUSE OF ACTION

The district court also sustained defendants' demurrer on the ground that Cole's petition failed to state a cause of action. Although Cole assigned this disposition as error, the Court of Appeals did not reach the issue because it upheld the sustaining of the demurrer based on lack of subject matter jurisdiction. Because we disagree with the Court of Appeals on this issue, we must examine whether the district court nevertheless properly sustained the demurrer. See *Folgers Architects v. Kerns*, 262 Neb. 530, 633 N.W.2d 114 (2001) (this court upon granting further review may consider assignments of error Court of Appeals did not reach).

[8] A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). As noted, we determined in *Millman* that the filing or presentment of a claim under the Political Subdivisions Tort Claims Act is not a substantive element of a plaintiff's recovery in a negligence action. Instead, plaintiff's noncompliance with the condition precedent is an affirmative defense that may be raised by the defendant. For the reasons stated in the previous discussion, the final disposition requirement of the State Tort Claims Act is similarly only a condition precedent to the filing of a suit and is not a substantive element of the plaintiff's tort claim. In addition, we agree with those federal courts that have concluded that exhaustion of administrative remedies is merely a condition precedent to the filing of a § 1983 claim and not an element of such claim. See, *Chelette v. Harris*, 229 F.3d 684 (8th Cir. 2000); *Underwood v. Wilson*, *supra*. Therefore, the demurrer was not properly sustained on the ground that the petition failed to state a cause of action, and the Court of Appeals erred in affirming the sustaining of the demurrer and dismissal of the case.

3. PERSONAL JURISDICTION

As an alternative justification for the dismissal of Cole's action, defendants argue that they were not properly served. The record does not disclose the manner in which service was obtained, and the issue was not specifically addressed by either the district court or the Court of Appeals. Accordingly, we do not address it.

V. CONCLUSION

For the foregoing reasons, we conclude that the Court of Appeals erred in affirming the dismissal of this action. We reverse the decision and remand the cause to the Court of Appeals with directions to reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MICHAEL GALLNER, APPELLANT, v. JUDY HOFFMAN,
FORMERLY KNOWN AS JUDY GALLNER, APPELLEE.

653 N.W.2d 838

Filed December 6, 2002. No. S-01-773.

1. **Pretrial Procedure.** Generally, the control of discovery is a matter for judicial discretion.
2. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
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 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.
4. **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.
5. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
6. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered.
7. **Modification of Decree: Words and Phrases.** In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
8. **Child Support: Rules of the Supreme Court.** All orders for child support, including modifications, must include a basic income and support calculation worksheet from the Nebraska Child Support Guidelines.
9. **Modification of Decree: Alimony: Child Support.** Because alimony is not properly considered as income when child support is established, the cessation of alimony cannot be considered a diminution in income when determining whether there has been a material change of circumstances justifying a modification of child support.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed in part, vacated in part, and in part reversed and remanded for further proceedings.

Theodore R. Boecker, Jr., of Sherrets & Boecker, L.L.C., for appellant.

C. Gregg Larson for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Michael Gallner appeals from the June 4, 2001, order of the Douglas County District Court, which order denied Michael's application to modify and reduce his child support obligation for his one child from his marriage to his former wife, appellee, Judy Hoffman, formerly known as Judy Gallner. We affirm in part, vacate in part, and in part reverse and remand for further proceedings.

II. STATEMENT OF FACTS

This is the third appearance of this case on appeal. In *Gallner v. Gallner*, 257 Neb. 158, 595 N.W.2d 904 (1999), inter alia, we reversed a district court's order which permitted the subordination of child support and alimony liens on real property owned by Michael, based on our determination that the district court erred in subordinating the liens without first having been fully advised. The relevant facts and procedural history of this case are outlined in that opinion, and we will not repeat that history here, except as it is relevant to the instant appeal.

Michael and Judy were married January 3, 1982. The parties had one child, born October 6, 1983. The marriage was dissolved by decree dated May 5, 1994. The decree also divided the property, awarded custody of the minor child to Judy, and awarded Judy child support and alimony. According to the decree of dissolution, Michael's alimony obligation ended in approximately June 1999. His obligation to pay child support apparently ended on October 6, 2002, when the parties' child reached the age of majority.

At the time of the dissolution proceedings, Michael was engaged in the private practice of law in Council Bluffs, Iowa, with his brother Sheldon Gallner, a business relationship that

had started in 1976 and had been successful. Michael earned in excess of \$300,000 annually for each of the 3 years prior to the dissolution trial. During the dissolution proceedings, however, evidence was adduced to the effect that Michael's business relationship with Sheldon was "tenuous," that the brothers were having "significant problems" with disagreements concerning the operation of the law practice, and that Sheldon had offered Michael a plan to dissolve the law practice.

When awarding child support under the decree, the district court made the following factual findings:

The Court further finds that the Petitioner, Michael Gallner, has successfully earned in excess of \$300,000.00 each of the last three years as an attorney in private practice. The Court notes that testimony indicates that the Petitioner and his brother have encountered serious disputes regarding their law practice and that Petitioner sued his brother some months ago. Despite these facts, the Court finds that the Petitioner has an earning capacity of at least \$200,000.00 per year.

Judy is also an attorney. The record from the dissolution proceedings reflects that subsequent to her graduation from law school in 1976, Judy worked as an attorney for the Douglas County Public Defender's office, the Equal Employment Opportunity Commission, the Nebraska Attorney General's office, and the Union Pacific Railroad. In 1984, she took a full-time position with a private law firm, where she worked for approximately 1 year before leaving full-time employment to stay at home and take care of the parties' child. The trial record reflects that the minor child had certain medical problems and required special care.

When addressing the issue of alimony in the dissolution decree, the district court made the following factual findings:

Regarding [Judy's] ability to earn, the Court notes that she did earn in excess of \$40,000.00 in earlier years. However, the Court finds that she has generally earned less than \$10,000.00 a year net in recent years. Finally, the Court finds that her ability to earn, in the private practice of law, is probably not more than \$20,000.00 a year net at the present time. In making these findings, the Court does take

into account the special needs of the minor child and the amount of time required of [Judy] for his care.

On July 26, 2000, Michael filed an application to modify his child support obligation downward, asserting material changes in circumstances since the entry of the decree "in that [Michael's] income ha[d] substantially decreased and [Judy's] income ha[d] substantially increased." During discovery, Michael sought, inter alia, detailed, itemized information regarding Judy's living expenses. Judy did not provide all the information Michael sought, and Michael filed a motion to compel. A hearing was held on December 4, 2000. Due to the manner in which the parties argued at the hearing, the substance of the proceedings is not clear. As we understand the record, Judy produced income tax information. The district court found the requests for detailed, itemized expense information to be either not relevant or unduly burdensome. The district court ordered Judy to appear at a deposition. The district court also ruled that Michael could inquire into Judy's financial information during the deposition. The district court ordered Judy to provide Michael with information concerning the child's educational expenses.

Michael's application to modify came on for hearing on April 20, 2001. Four witnesses testified during the hearing, and 28 exhibits were offered into evidence.

During the hearing, Michael presented evidence regarding his claim of material changes in circumstances. Michael testified that his income had decreased since the dissolution of his marriage to Judy due to the dissolution of the private law practice he had shared with Sheldon. Michael offered evidence showing that the firm, Gallner & Gallner, P.C., whose difficulties had been noted at the time of the dissolution, was dissolved in approximately November 1998 and that Michael had started his own private practice. According to Michael's testimony, his earnings were reduced from the range of \$400,000 to \$500,000 per year to less than \$40,000 per year.

Michael claimed an additional material change of circumstances had occurred since the dissolution of the parties' marriage by virtue of the fact that Judy had procured employment at Metropolitan Community College. The evidence indicated that in the fall of 2000, Judy was appointed to the regular faculty of

Metropolitan Community College as a legal assistant instructor, at a salary of \$40,379. Evidence also indicated that Judy earned additional income from the private law practice she maintained, but the amount of these earnings is unclear in the record.

On June 4, 2001, the district court entered an order overruling Michael's application to modify his child support obligation. The district court indicated without other explanation that Michael's evidence was not "sufficiently credible" to allow the court to modify his child support obligation. With respect to Judy's income, the district court found no change in Judy's income and indicated its view that Judy's income prior to the proceedings to modify was composed of alimony plus earnings and that subsequent to the termination of alimony, her income was composed solely of her earnings. The district court specifically stated that although Judy's "earnings have increased over the years, her [total] income is not substantially different now as during the time she received alimony, which has since expired." In rendering its decision, the district court did not prepare an income and child support calculation worksheet as mandated under paragraph C of the Nebraska Child Support Guidelines. In further orders, the district court denied Michael's request for attorney fees and awarded Judy \$2,500 in attorney fees. Michael appeals.

III. ASSIGNMENTS OF ERROR

On appeal, Michael has assigned 10 errors which we reorder and restate as 4. In summary, Michael claims that the district court erred (1) in failing to permit Michael to gain certain information from Judy through discovery, (2) in denying his application to modify child support, (3) in failing to award Michael attorney fees, and (4) in awarding Judy attorney fees.

IV. STANDARDS OF REVIEW

[1] Generally, the control of discovery is a matter for judicial discretion. *Gallner v. Gallner*, 257 Neb. 158, 595 N.W.2d 904 (1999); *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999).

[2,3] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Crawford v. Crawford*,

263 Neb. 37, 638 N.W.2d 505 (2002); *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). 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. *Peter v. Peter*, *supra*.

[4] 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. *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001).

[5] In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

V. ANALYSIS

1. DISCOVERY

Following the filing of his application to modify child support, Michael sought, *inter alia*, detailed, itemized information regarding Judy's living expenses. Judy produced income tax information. However, Judy objected to certain of Michael's discovery requests, and Michael filed a motion to compel. Following a hearing on December 4, 2000, the district court ordered Judy to provide Michael with information regarding educational expenses of the parties' child, but denied Michael's motion to compel Judy to provide detailed, itemized expense information, concluding the requests were either not relevant or were unduly burdensome. Michael claims that the district court erred in failing to permit him to obtain the additional information he sought.

Generally, the control of discovery is a matter for judicial discretion. *Gallner v. Gallner*, *supra*; *State ex rel. Acme Rug Cleaner v. Likes*, *supra*. During the December 4, 2000, hearing, the district court ordered Judy to appear at a deposition. The district court also ruled that Michael could inquire into Judy's financial information during the deposition. Therefore, although the district

court overruled Michael's motion to compel, the district court ruled Michael could depose Judy regarding her financial information, and thus, Michael had access to the information he sought. Based upon our review of the record on appeal, we determine that the district court did not abuse its discretion with regard to its ruling on discovery matters. This assignment of error is without merit, and we affirm the district court's ruling in this regard.

2. MATERIAL CHANGE IN CIRCUMSTANCES

[6,7] A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered. *Peter v. Peter, supra*; *Noonan v. Noonan, supra*. In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999).

(a) Material Change: Michael's Law Practice

Michael states that a material change in circumstances has occurred since the entry of the decree in 1994 and asserts that such change is sufficient to justify a reduction in his child support obligation. In support of his assertion, Michael directs our attention to the 1998 dissolution of the private law practice which he had shared with Sheldon, his loss of income from that practice, and the subsequent expense incurred in connection with opening his own law practice. Michael asserts that although the findings in the decree anticipated that Michael's income would decline, it was not anticipated that the decline would be as severe as the facts demonstrated had in fact occurred.

In support of his claim that a material change of circumstances had occurred since the entry of the 1994 decree sufficient to reduce his child support obligation, Michael introduced into evidence his tax returns and the testimony of his accountant. Michael also testified.

We believe the record on appeal shows that Michael's evidence demonstrated without direct contradiction that he had sustained a significant decrease in income beyond that indicated in

the decree. In its June 4, 2001, order, however, the district court stated that Michael's evidence was not "sufficiently credible," and denied Michael's application to modify. The district court denied relief without discussion and without preparing a basic income and child support calculation worksheet.

[8] Paragraph C of the child support guidelines specifically mandates that "[a]ll orders for child support, including modifications, must include a basic income and support calculation worksheet" from the Nebraska Child Support Guidelines. The importance of adhering to this requirement has been repeatedly emphasized by the appellate courts of this state. See, *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001); *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994); *Lawson v. Pass*, 10 Neb. App. 510, 633 N.W.2d 129 (2001); *Laubscher v. Laubscher*, 8 Neb. App. 648, 599 N.W.2d 853 (1999); *State on behalf of Elsasser v. Fox*, 7 Neb. App. 667, 584 N.W.2d 832 (1998). It has been stated that "the trial courts must show the appellate courts, and the parties, that they have 'done the math.'" *Stewart v. Stewart*, 9 Neb. App. 431, 434, 613 N.W.2d 486, 489 (2000). As stated above, no worksheet is included in the district court order at issue in this case.

Given a record which shows without contradiction that Michael experienced a significant decline in income, and given the absence of an explanation of the district court's decision, coupled with the lack of an income and support worksheet, we conclude the district court abused its discretion in denying Michael's application.

(b) Material Change: Judy's Employment

Michael asserts that an additional material change of circumstances occurred subsequent to the entry of the decree in that Judy had procured full-time regular employment with Metropolitan Community College and that such change justifies a modification of his child support obligation. In this regard, we note that the district court determined that Judy's income was unchanged and denied Michael's petition to modify at least in part on this basis. Michael claims on appeal that the district court erred in its determination regarding Judy's income and that such error requires reversal. We agree with Michael that the district court erred as a matter of law in the manner in which it interpreted the Nebraska

Child Support Guidelines and evaluated Judy's income for child support purposes.

In its order of June 4, 2001, the district court noted that Judy's earnings had increased since the entry of the decree, but declined to find that such an increase constituted a material change of circumstances warranting a modification of Michael's child support, because "her income [was] not substantially different now as during the time she received alimony, which has since expired." Such statement by the district court reflects the fact that the district court treated Judy's prior receipt of alimony as an item of income in its assessment of the child support obligation. The district court erred as a matter of law in its interpretation of the Nebraska Child Support Guidelines by including Judy's alimony in its consideration of Judy's income.

[9] Paragraph M of the child support guidelines provides: "Alimony. These guidelines intend that spousal support be determined from income available to the parties after child support has been established." The clear language of paragraph M of the guidelines provides that child support obligations are to be calculated prior to the calculation of alimony. Obviously, in reviewing a party's income for child support purposes, alimony cannot be factored into income if alimony has not yet been determined. See *Kelly v. Kelly*, 2 Neb. App. 399, 510 N.W.2d 90 (1993), *reversed on other grounds* 246 Neb. 55, 516 N.W.2d 612 (1994). It logically follows that because alimony is not properly considered as income when child support is established, the cessation of alimony cannot be considered a diminution in income when determining whether there has been a material change of circumstances justifying a modification of child support. We conclude the district court erred as a matter of law when it determined that Judy's income at the time of the child support modification hearing was not substantially different when such conclusion was based on the erroneous legal reasoning that alimony had been an item of income in calculating child support, which item had been supplanted by Judy's subsequent earnings.

Given the district court's abuse of discretion and error of law, we reverse the district court's order denying Michael's petition for modification and remand the cause for further proceedings consistent with this opinion.

3. ATTORNEY FEES

Finally, Michael assigns as error the district court's denial of his request for attorney fees and the award of attorney fees to Judy. Given our decision above that the district court abused its discretion and committed error as a matter of law in denying Michael's application and our remand of the matter for further proceedings, we vacate the district court's order with regard to both motions for attorney fees. Applications for attorney fees may be made in the proceedings on remand.

VI. CONCLUSION

The district court did not err in its ruling regarding discovery, and such order is affirmed. The district court abused its discretion and erred as a matter of law in analyzing Michael's application for modification of child support. Such errors require reversal, and the matter is remanded for further proceedings regarding Michael's application for modification of child support. The district court's order with regard to both motions for attorney fees is vacated.

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

UTELCOM, INC., APPELLANT, v. MARY JANE EGR, TAX
COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

U.S. TELECOM, INC., APPELLANT, v. MARY JANE EGR, TAX
COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

UCOM, INC., APPELLANT, v. MARY JANE EGR, TAX COMMISSIONER
OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

653 N.W.2d 846

Filed December 6, 2002. Nos. S-01-874 through S-01-876.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review under the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the

record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. ____: ____: _____. An appellate court, in reviewing a district court judgment for errors appearing on the record, under the Administrative Procedure Act, will not substitute its factual findings for those of the district court when competent evidence supports those findings.
4. **Administrative Law: Statutes: Appeal and Error.** To the extent the interpretation of statutes and regulations is involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent.
5. **Administrative Law.** For purposes of construction, a rule or order of an administrative agency is treated like a statute.
6. _____. Absent anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
7. _____. A regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.
8. _____. When an agency offers an interpretation of a disputed regulation during litigation that is inconsistent with its prior statements and actions regarding the regulation, the interpretation is not entitled to deference.
9. _____. A court will construe regulations relating to the same subject matter together to maintain a consistent and sensible scheme.
10. _____. It is not within the province of the courts to read a meaning into a regulation that is not there.
11. **Taxes: Corporations: Time.** When a corporate taxpayer is granted an automatic extension for filing its tax return, the 3-year limitation period for claiming a refund begins to run on the date of the extended deadline for filing the return, rather than on the date the taxpayer actually filed its return. Neb. Rev. Stat. § 77-2793(1) (Reissue 1996); 316 Neb. Admin. Code, ch. 33, § 005.01B(3) (1983).

Appeals from the District Court for Lancaster County:
BERNARD J. MCGINN, Judge. Reversed and remanded with directions.

William E. Peters, of Peters & Chunka, P.C., L.L.O., for appellants.

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

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

CONNOLLY, J.

In this consolidated appeal, we determine how an automatic extension of time for filing a corporate income tax return affects

the determination of when the 3-year limitation period for claiming a refund begins. Neb. Rev. Stat. § 77-2793(1) (Reissue 1996) requires that a taxpayer file a claim for an income tax refund within 3 years from the time the taxpayer filed its return. However, a department regulation states that “[a] return filed before the due date of the return will be presumed filed on the last day of the filing period.” 316 Neb. Admin. Code, ch. 33, § 005.01B(3) (1983).

We must decide if this regulatory presumption applies when a taxpayer, after receiving an extension for filing its return, files before the extended deadline. If the presumption applies, the 3-year period for claiming a refund begins on the date of the extended deadline. If it does not apply, the period begins on the date the taxpayer actually filed its return. The Tax Commissioner determined that the period begins when a return is actually filed and denied the refunds claimed by Utelcom, Inc.; U.S. Telecom, Inc.; and Ucom, Inc. (collectively the taxpayers). The district court agreed, and the taxpayers appealed. We reverse, and remand with directions.

I. FACTUAL BACKGROUND

The facts are not in dispute. The taxpayers were each required to file an income tax return for the 1995 tax year. March 15, 1996, was the taxpayers’ original deadline for filing their returns. See, Neb. Rev. Stat. § 77-2768 (Reissue 1996); 316 Neb. Admin. Code, ch. 24, § 006.01 (1998). Each taxpayer, however, was granted a 7-month automatic extension, extending the deadline for filing their 1995 income tax returns to October 15, 1996. The forms granting the extensions to the taxpayers refer to October 15 as being the “Due Date of Return.”

Utelcom filed its return on September 19, 1996, and Ucom and U.S. Telcom filed their returns on October 10, 1996. For this appeal, the difference in dates is not relevant. The key fact is that each taxpayer filed its income tax return *before* October 15, 1996. On October 15, 1999—exactly 3 years from the extended deadline for filing their original returns, but more than 3 years from the time they actually filed their original returns—the taxpayers filed amended income tax returns claiming refunds in the collective amount of \$568,986 for the 1995 tax year. The Tax Commissioner denied the refunds, stating that the amended tax

returns were not filed within the 3-year period for claiming a refund. The district court agreed with the Tax Commissioner, and the taxpayers appealed.

II. ASSIGNMENT OF ERROR

The taxpayers assign that the district court erred in finding that their amended tax returns claiming a refund were not filed within the 3-year limitation period established by § 77-2793(1).

III. STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review under the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *American Bus. Info. v. Egr*, ante p. 574, 650 N.W.2d 251 (2002); *Capitol City Telephone v. Nebraska Dept. of Rev.*, ante p. 515, 650 N.W.2d 467 (2002).

[2] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Capitol City Telephone v. Nebraska Dept. of Rev.*, *supra*.

[3] An appellate court, in reviewing a district court judgment for errors appearing on the record, under the Administrative Procedure Act, will not substitute its factual findings for those of the district court when competent evidence supports those findings. *Id.*

[4] To the extent the interpretation of statutes and regulations is involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Capitol City Telephone v. Nebraska Dept. of Rev.*, *supra*; *Inner Harbour Hospitals v. State*, 251 Neb 793, 559 N.W.2d 487 (1997).

IV. ANALYSIS

1. STATUTORY AND REGULATORY BACKGROUND

Section 77-2793(1) sets out the time period for claiming an income tax refund. It provides that "[a] claim for credit or refund

of an overpayment of any income tax imposed . . . *shall be filed by the taxpayer within three years from the time the return was filed* or two years from the time the tax was paid, whichever of such periods expires later.” (Emphasis supplied.) Absent any regulatory gloss, applying § 77-2793(1) is relatively straightforward. Regardless of any “due date,” the taxpayer would have 3 years from the date it filed its return to file a claim for a refund. The taxpayer’s deadline for filing, original or extended, would be irrelevant. Thus, if a corporate taxpayer filed its return on March 10, 2000, it would have until March 10, 2003, to claim a refund. That its original filing deadline was March 15, 2000, would be irrelevant. Likewise, if under an extension, the taxpayer filed its return on October 10, 2000, it would have until October 10, 2003, to claim a refund.

This straightforward application of § 77-2793(1), however, is inconsistent with the Internal Revenue Code (I.R.C.), resulting in a potential trap for the unwary taxpayer. See *Hamacher v. Director of Revenue*, 779 S.W.2d 565 (Mo. 1989). Like § 77-2793(1), I.R.C. § 6511(a) (2000) provides:

Claim for credit or refund of an overpayment of any tax . . . in respect of which tax the taxpayer is required to file a return *shall be filed by the taxpayer within 3 years from the time the return was filed* or 2 years from the time the tax was paid, whichever of such periods expires the later

(Emphasis supplied.) But unlike the Nebraska income tax statutes, I.R.C. § 6513(a) (2000) explicitly sets up a presumed filing date: “[A]ny return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day.” Thus, under the I.R.C., if the taxpayer filed on March 10, 2000, the taxpayer would have a presumed filing date of 3 years from March 15, 2000. As a result, under the I.R.C., the taxpayer would have until March 15, 2003, to claim a federal refund. In contrast, under a straightforward application of § 77-2793(1), the same taxpayer would have only until March 10, 2003, to claim a Nebraska refund.

The regulation at issue—316 Neb. Admin. Code, ch. 33, § 005.01B(3)—was adopted by the Nebraska Department of Revenue (the Department) apparently to ensure that the discrepancy between § 77-2793(1) and I.R.C. would not arise. It

provides that “[a] return filed before the due date of the return will be presumed filed on the last day of the filing period.” Unfortunately, the language of § 005.01B(3) is not precise. The regulation fails to specify what is meant by “due date” or by “the last day of the filing period,” and it does not explain how an extension affects the presumption it sets out.

Here, the dispute stems from this imprecision. The parties agree that if a taxpayer files its return before the original deadline for filing, § 005.01B(3) applies, and it is presumed that the taxpayer filed on the original deadline. The parties disagree whether the same analysis applies when a taxpayer is granted an extension for filing its return and files before the extended deadline. The taxpayers argue that § 005.01B(3) applies when a taxpayer files before an extended deadline, just as it does when a taxpayer files before its original deadline. Under this view, the taxpayers’ amended tax returns were timely because they filed them within 3 years of the October 15, 1996, extended deadline. The Department argues that § 005.01B(3) applies only when a taxpayer files its return before the original deadline. Under this view, the taxpayers’ amended returns were untimely because they were filed more than 3 years after the taxpayers actually filed their original 1995 returns.

The court found the Department’s interpretation of § 005.01B(3) to be more persuasive. The court concluded that the regulatory presumption in § 005.01B(3) applies only if the taxpayer filed before its “due date.” Thus, the key question for the court was the meaning of “due date.” Noting that the concept of a “due date” is only introduced in the Department’s regulations, the court looked to other regulations and determined that the regulatory scheme draws a distinction between due date and the expiration of the period of an extension. The court concluded that “due date” as used in § 005.01B(3) most clearly referred to March 15, 1996, and that October 15, 1996, was not a “due date,” but the expiration of an extension period. Because we conclude that the court incorrectly construed § 005.01B(3), we reverse, and remand with directions.

2. INTERPRETATION OF § 005.01B(3)

[5-7] For purposes of construction, a rule or order of an administrative agency is treated like a statute. *Stratbucker Children’s*

Trust v. Zoning Bd. of Appeals, 243 Neb. 68, 497 N.W.2d 671 (1993); *Dozler v. Conrad*, 3 Neb. App. 735, 532 N.W.2d 42 (1995). Absent anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning. *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 623 N.W.2d 672 (2001). A regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998).

Section 005.01B(3) does not clarify what effect an extension has on the presumption it sets out. It uses the term "due date," but within the context of the regulation, that term could reasonably be construed to mean only the original deadline for filing a return or to include the extended deadline for filing a return. Accord *Conoco v. Dept. of Revenue & Finance*, 477 N.W.2d 377 (Iowa 1991) (holding that "due date" could reasonably be construed as meaning original filing date or date to which extension is granted). Moreover, it is unclear if "the last day of the filing period" or "due date" is the term that controls the answer to this case. In fact, the regulation reads as if the two terms have the same meaning. Thus, § 005.01B(3) is ambiguous and open for construction.

(a) Deference to Be Given to
Department's Interpretation

As an initial matter, we must determine what level of deference to give to the Department's interpretation of § 005.01B(3). Generally, we give deference to an agency's interpretation of its own regulations. See *Capitol City Telephone v. Nebraska Dept. of Rev.*, ante p. 515, 650 N.W.2d 467 (2002). We do not give an agency deference, however, if the interpretation it has given to its regulation is plainly erroneous or inconsistent. *Id.*

[8] Here, the Department is proposing an interpretation of § 005.01B(3) that is inconsistent with how it has previously advised taxpayers. When the taxpayers in this case requested their extensions, they were sent notices telling them the requests had been granted. The notices have a section labeled "Due Date of Return." The date on this section is October 15, 1996. This indicates that when it sent the notices to the taxpayers, the

Department did not draw the distinction it now does between a “due date” and additional time to file a return. When an agency offers an interpretation of a disputed regulation during litigation that is inconsistent with its prior statements and actions regarding the regulation, the interpretation is not entitled to deference. See *Drake v. F.A.A.*, 291 F.3d 59 (D.C. Cir. 2002). See, also, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987) (“[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view”). Accordingly, we give no deference to the Department’s interpretation of § 005.01B(3).

(b) Effect of Regulatory Scheme

[9] A court will construe statutes relating to the same subject matter together to maintain a consistent and sensible scheme. See *Gottsch Feeding Corp. v. State*, 261 Neb. 19, 621 N.W.2d 109 (2001). The same rule applies in interpreting regulations. The court found the remainder of the regulatory scheme supported the Department’s interpretations. We disagree and conclude that the regulatory scheme supports the taxpayers’ interpretation of § 005.01B(3).

In determining the meaning of “due date,” the district court relied primarily on 316 Neb. Admin. Code, ch. 24, §§ 006.01 and 007.02C (1998). The first sentence of § 006.01 provides that “[t]he due date for Nebraska Corporation Income Tax Return, Form 1120N, is the 15th day of March following the close of the calendar year.” This language appears to support the Department’s argument that the “due date” referred to in § 005.01B(3) is a taxpayer’s original deadline for filing its return. The first sentence of § 007.02C provides that “[i]f an extension of time for payment of a tax is granted, the tax shall be paid on or before the expiration of the period of the extension” While § 007.02C does not involve the filing of a tax return, it does, as noted by the district court, suggest that “the expiration of the period of the extension” and a “due date” are different.

However, another regulation suggests that March 15 is not the only possible “due date.” The procedure for filing a corporate

extension is set out in 316 Neb. Admin. Code, ch. 24, § 007.01 (1998), which provides:

A corporate taxpayer may obtain an automatic extension of seven months for filing its return, provided that Form 7004N is filed on or before the prescribed due date for the return and provided that the amount of tentatively computed tax liability is paid on or before *the original due date for filing the corporation income tax return*.

(Emphasis supplied.) Presumably, the original deadline for filing an income tax return is the “original due date,” and the use of that term suggests not only that other types of due dates exist, but that the Department knows how to draw a distinction between the “original due date” and other types of “due dates.”

Moreover, § 006.01 (the same section that states the due date for filing is March 15) provides that “[t]he corporate taxpayer shall pay the entire amount of tax on or before the prescribed due date, *without regard to any extension granted for filing the return*.” (Emphasis supplied.) Similarly, the second sentence of § 007.02C (the same regulation that suggests a distinction between a “due date” and the “expiration of the period of the extension”) provides that “[i]nterest will be due on the tax payment from the original date prescribed for payment until the date the payment was actually made, *regardless of any extension of time*.” (Emphasis supplied.) The italicized language in both of these regulations suggests the Department knew how to use language that would limit the effect of an extension.

The Department used this limiting language in other regulations—that an extension would have no effect—but did not do so in § 005.01B(3), which shows that the Department intended the presumption in § 005.01B(3) to include extended deadlines. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). In *Creighton St. Joseph Hosp.*, we were asked to decide whether the filing fee for an appeal from a county board of equalization to the Nebraska Tax Equalization and Review Commission was a jurisdictional requirement. We noted that in other appeal statutes, the Legislature had used explicit and clear language to establish that a filing fee was jurisdictional, but that in the statute in question, the Legislature had not used the same or similar language. We

concluded that the other statutes demonstrated that the Legislature knew how to make a filing fee jurisdictional and that its failure to include similar language demonstrated its intent not to make the filing fee a jurisdictional requirement.

If the Department did not want § 005.01B(3) to apply to extended deadlines, it could have adopted the term "original due date" from § 007.01 and used it in § 005.01B(3) instead of just "due date." In the alternative, it could have adopted the language in § 007.02C and clarified that the "due date of the return" and "the last day of the filing period" as used in § 005.01B(3) would be determined without "regard to any extension of time." Just as in *Creighton St. Joseph Hosp.*, the absence of this language in § 005.01B(3) indicates that the Department did not intend to exclude extended deadlines from the regulation's scope.

(c) Department's Counterarguments

The Department makes two arguments in support of its interpretation of § 005.01B(3). First, the Department argues that we should construe § 005.01B(3) so that it is consistent with federal law. In construing the income tax statutes, the Legislature has instructed us that any terms used "shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required." Neb. Rev. Stat. § 77-2714 (Reissue 1996). By analogy, the Department argues that we should construe the terms in its regulations relating to income tax so that they are consistent with terms used in the I.R.C. Regardless of whether this is a correct rule of regulatory interpretation, it does not benefit the Department in this case.

[10] As noted above, I.R.C. § 6513(a), like § 005.01B(3), presumes that "any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day." Unlike § 005.01B(3), however, I.R.C. § 6513(a) explicitly clarifies that "the last day prescribed for filing the return . . . shall be determined without regard to any extension of time granted the taxpayer." Thus, under the I.R.C., "a claim for refund must be filed within three years of either the due date (without regard to any extension of time) or the filing date, whichever is later." *Foster v. United States*, 221 F. Supp. 291, 296 (S.D.N.Y. 1963),

affirmed 329 F.2d 717 (2d Cir. 1964). This is the interpretation that the Department now urges us to give to § 005.01B(3). But it is not within the province of the courts to read a meaning into a regulation that is not there. See *Shaul v. Lang*, 263 Neb. 499, 640 N.W.2d 668 (2002). If the Department wanted the federal rule, I.R.C. § 6513(a) provided it with a clear and unambiguous model for adopting the rule. Instead of tracking the federal language, the Department chose to use the language it did, which shows that it did not intend for § 005.01B(3) to have the same meaning as the I.R.C.

Second, the Department argues that the taxpayers' interpretation of § 005.01B(3) would make the regulation invalid because it would lengthen the time for claiming a refund beyond the 3-year limitation imposed by § 77-2793(1). This argument is inconsistent with the Department's position that § 005.01B(3) applies when a taxpayer files before its original deadline for filing. In effect, the Department claims that it cannot adopt a regulation that would presume a taxpayer filed on its extended deadline, *because that would allow the taxpayer to claim a refund more than 3 years after it actually filed*. But at the same time, it suggests that it can adopt a regulation that would presume a taxpayer filed on its original deadline, *even though that would allow the taxpayer to claim a refund more than 3 years after it actually filed*. The distinction is nonsensical. If the statutory language allows the Department to do the former, nothing bars it from doing the latter.

V. CONCLUSION

[11] We hold that under § 005.01B(3), when a corporate taxpayer is granted an automatic extension for filing its tax return, the 3-year limitation period for claiming a refund begins to run on the date of the extended deadline for filing the return, rather than on the date the taxpayer actually filed its return. As a result, the taxpayers had until October 15, 1999, to claim their refunds for the 1995 tax year. The taxpayers met this deadline, and the district court erred in affirming the decision of the Tax Commissioner. Accordingly, we reverse, and remand with directions that the district court enter a judgment reversing the decision of the Tax Commissioner.

REVERSED AND REMANDED WITH DIRECTIONS.

**LLOYD SOUKOP, DOING BUSINESS AS LLOYD'S USED CARS,
APPELLANT, v. CONAGRA, INC., A NEBRASKA CORPORATION, AND
ITS SUBSIDIARY, PEAVEY GRAIN COMPANY, INC., APPELLEES.**

653 N.W.2d 655

Filed December 6, 2002. No. S-01-910.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Statutes: Legislature: Intent: Time.** In noncriminal cases, substantive statutes are generally not given retroactive effect unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded for further proceedings.

Galen E. Stehlik, of Lauritsen, Brownell, Brostrom, Stehlik, Thayer & Myers, for appellant.

Kristopher J. Covi, of McGrath, North, Mullin & Kratz, P.C., for appellees.

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

MCCORMACK, J.

NATURE OF CASE

In 1998, Neb. Rev. Stat. § 2-4403 (Reissue 1997) was amended to provide to a "public grain warehouse or public grain warehouse operation" the same protection from public or private nuisance lawsuits already afforded to a "farm or farm operation." See § 2-4403 (Cum. Supp. 2002). The issue raised in this case is whether the 1998 amendment applies retroactively to a private nuisance action instituted against a grain elevator in 1997.

BACKGROUND

On March 14, 1997, Lloyd Soukop, doing business as Lloyd's Used Cars (Soukop), filed a private nuisance action against ConAgra, Inc., and Peavey Grain Company, Inc. (collectively Peavey), in the district court for Hall County. Soukop is the owner

of a used car business in Grand Island. Approximately one block from Soukop's business is a grain elevator operated by Peavey. Soukop alleged that Peavey's grain elevator discharged grain dust, chaff, and other materials into the air and that these materials settled onto his used car inventory. As a result, Soukop alleged that he incurred expenses to keep his used cars clean and suffered from a loss of sales and diminished profits. He sought damages and injunctive relief. In its answer, Peavey denied that its activities constituted a private nuisance and also asserted several affirmative defenses.

On June 4, 2001, Peavey filed a motion for summary judgment, arguing that it was entitled to judgment as a matter of law under the Nebraska Right to Farm Act, Neb. Rev. Stat. §§ 2-4401 to 2-4404 (Reissue 1997 & Cum. Supp. 2002). On July 10, the district court granted Peavey's motion. In its order, the district court determined that § 2-4403 (Cum. Supp. 2002), as amended by L.B. 1193 in 1998, governed the dispute. The court found that the grain elevator was built in 1936 and that Peavey had never been the defendant in a nuisance action or received a written complaint since it assumed control of the elevator in 1975. The court found that Soukop had been a landowner in the vicinity of the elevator since 1967, but did not begin his used car business at his present location until 1981. The court also found that there was no evidence to suggest that the grain elevator's activities constituted a nuisance prior to a change in the use of Soukop's land in 1981. Thus, the district court concluded that Peavey was entitled to judgment as a matter of law under § 2-4403 of the Nebraska Right to Farm Act. Soukop appealed the district court's decision, and we moved the case to our docket on our own motion.

ASSIGNMENTS OF ERROR

Soukop maintains, rephrased and consolidated, that the district court erred in applying § 2-4403 retroactively.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts

and that the moving party is entitled to judgment as a matter of law. *American Fam. Mut. Ins. Co. v. Hadley*, ante p. 435, 648 N.W.2d 769 (2002).

ANALYSIS

The Nebraska Right to Farm Act was enacted by the Legislature in 1982. In 1998, the Legislature passed L.B. 1193, which amended § 2-4403 of the act. As a result of this amendment, § 2-4403 currently states the following, with the language added by L.B. 1193 underlined:

A farm or farm operation or a public grain warehouse or public grain warehouse operation shall not be found to be a public or private nuisance if the farm or farm operation or public grain warehouse or public grain warehouse operation existed before a change in the land use or occupancy of land in and about the locality of such farm or farm operation or public grain warehouse or public grain warehouse operation and before such change in land use or occupancy of land the farm or farm operation or public grain warehouse or public grain warehouse operation would not have been a nuisance.

The amendment to § 2-4403 became effective July 15, 1998, more than 1 year after Soukop filed his action against Peavey. The district court nonetheless concluded that the amended version of § 2-4403 applied to Soukop's case and barred Soukop from proceeding with his nuisance action against Peavey. Soukop argues that his action is instead governed by the pre-1998 version of § 2-4403, which shields only a "farm or farm operation" from a nuisance action. Therefore, Soukop contends that Peavey's grain elevator is not protected from being found to be a nuisance, and the district court erred in granting summary judgment in Peavey's favor. There is no dispute that Peavey's grain elevator is a "public grain warehouse or public grain warehouse operation" and is not a "farm or farm operation" as those terms are defined in § 2-4402.

[2] In noncriminal cases, substantive statutes are generally not given retroactive effect unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively. *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). See, also, *Abboud v. Papio-Missouri*

River NRD, 253 Neb. 514, 571 N.W.2d 302 (1997) (legislative act operates only prospectively and not retrospectively unless legislative intent and purpose that it should operate retrospectively is clearly disclosed); *Vervaecke v. State*, 247 Neb. 707, 529 N.W.2d 779 (1995) (Wright, J., dissenting), quoting *State v. City of Kearney*, 49 Neb. 337, 70 N.W. 255 (1897) (law will not be given retrospective operation, unless that intention has been manifested by most clear and unequivocal expression). Thus, the 1998 amendment to § 2-4403 does not govern the action filed by Soukop in 1997 unless the Legislature clearly disclosed its intent that it should operate retroactively.

In *Abboud v. Papio-Missouri River NRD*, *supra*, we considered whether an amended statute applied retroactively. Without referring to the legislative history, we found express language in the amended statute indicating the Legislature's intent that the amended statute apply retroactively. Conversely, in *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992), and *In re Interest of J.M.N.*, 237 Neb. 116, 464 N.W.2d 811 (1991), we declined to give retroactive application to amended statutes because no language in the amended statutes clearly evidenced such intent on the part of the Legislature. See, also, *Vervaecke v. State*, *supra*; *Wheelock & Manning OO Ranches, Inc. v. Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978) (legislative acts given retroactive application because of language in acts disclosing such intent); *State v. Von Dorn*, 234 Neb. 93, 449 N.W.2d 530 (1989); *Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys.*, 199 Neb. 507, 260 N.W.2d 472 (1977); *Dell v. City of Lincoln*, 170 Neb. 176, 102 N.W.2d 62 (1960); *State ex rel. City of Grand Island v. Union Pacific R. R. Co.*, 152 Neb. 772, 42 N.W.2d 867 (1950); *School District of Omaha v. Adams*, 151 Neb. 741, 39 N.W.2d 550 (1949) (legislative acts contained no language indicating retroactive application was intended; therefore, acts applied prospectively only).

The common thread of each of the above-cited cases is that an inquiry as to whether the Legislature intended retroactive application of a statute began and ended with an examination of the words on the face of the statute. The reviewing courts in the above-cited cases declined to give the statutes retroactive effect absent any express language in the statute or related provisions

to the contrary. A similar analysis of § 2-4403, as amended in 1998, leads us to conclude that the Legislature did not clearly disclose an intent to apply the amended statute retroactively. L.B. 1193 merely inserted the language "public grain warehouse or public grain warehouse operation" within the statute. Had the Legislature intended to apply the statute retroactively, it could have included language in the legislative bill stating that the statute applied to nuisance lawsuits against public grain warehouses arising prior to its enactment. The Legislature did not do so. Thus, we conclude that the district court erred in finding that the amended version of § 2-4403 governed Soukop's action. Under the pre-1998 version of § 2-4403, nothing precludes Soukop from maintaining his action against Peavey and the district court erred in granting judgment in favor of Peavey as a matter of law.

CONCLUSION

A legislative act operates only prospectively and not retroactively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. L.B. 1193, which amended § 2-4403 in 1998, contains no language evidencing an intent that it should be applied retrospectively. Thus, Soukop's action is governed by the version of § 2-4403 in effect at the time he filed his action. Under that statute, Peavey was not entitled to judgment as a matter of law. The judgment of the district court is reversed, and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

JOANN BRANDON, PERSONAL REPRESENTATIVE OF THE ESTATE
OF TEENA BRANDON, DECEASED, APPELLANT, v. THE COUNTY
OF RICHARDSON, NEBRASKA, AND CHARLES B. LAUX,
RICHARDSON COUNTY SHERIFF, APPELLEES.

653 N.W.2d 829

Filed December 6, 2002. No. S-01-1158.

1. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
2. **Political Subdivisions Tort Claims Act: Judgments: Appeal and Error.** In an action brought pursuant to the Political Subdivisions Tort Claims Act, or in a bench trial of an action at law, the factual findings by the trial court will not be disturbed on appeal unless they are clearly wrong.
3. **Wrongful Death: Damages.** In an action for wrongful death of a child, recoverable damages include parental loss of the child's society, comfort, and companionship.
4. **Wrongful Death: Damages: Words and Phrases.** The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection.
5. **Wrongful Death: Damages.** When a child is wrongfully killed, a parent's investment in that child of money, affection, guidance, security, and love is destroyed.
6. ____: _____. Parental loss is not limited to or necessarily dependent upon deprivation of the child's monetary contribution toward parental well-being.
7. ____: _____. Damages for loss of society must be determined upon a consideration of the facts of each case.
8. ____: _____. There is no exact fiscal formula for determination of damages recoverable for loss of society, comfort, and companionship, a loss which is not subject to some strict accounting method based on monetary contributions, past or prospective.
9. ____: _____. Because it is impossible to generalize the extent to which persons enjoy each other's companionship and society, the value of such highly personal relationships must be decided on a case-by-case basis.
10. **Wrongful Death: Parent and Child: Damages.** Because the parent-child relationship has intrinsic value, once a parent-child relationship is proved to exist, destruction of that relationship through the wrongful death of the child entitles the parent, who is the surviving next-of-kin, to damages. Evidence regarding the quality and extent of the parent-child relationship may then be utilized in determining the amount of those damages.
11. **Wrongful Death: Damages.** Damages for loss of society are not necessarily dependent on the personal qualities of the child.
12. **Damages: Appeal and Error.** An award of damages may be set aside as inadequate when, and not unless, it is so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.

13. **Damages.** If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record.
14. **Damages: Appeal and Error.** On appeal, the fact finder's determination of damages is given great deference.
15. **Damages: Mental Distress.** In awarding damages for mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident; the credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the discretion of the fact finder.
16. **Damages: Mental Distress: Appeal and Error.** An appellate court is reluctant to interfere with the judgment of the fact finder in awarding damages for mental anguish, where the law provides no precise measurement.

Appeal from the District Court for Richardson County:
ORVILLE L. COADY, Judge. Affirmed.

Herbert J. Friedman, of Friedman Law Offices, David S. Buckel, of Lambda Legal Defense and Education Fund, Inc., and John Stevens Berry, of Berry, Kelley & Reiman, for appellant.

Richard L. Boucher and Kim K. Sturzenegger, of Boucher Law Firm, for appellees.

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

GERRARD, J.

NATURE OF CASE

JoAnn Brandon (JoAnn) appeals from the judgment of the district court awarding damages in the amount of \$98,223.20 for negligence, wrongful death, and intentional infliction of emotional distress in connection with the murder of JoAnn's daughter Teena Brandon (Brandon) and the events leading up to Brandon's death. JoAnn contends that the damages awarded by the district court are insufficient and constitute clear error.

BACKGROUND

On December 31, 1993, Brandon, Lisa Lambert, and Phillip Devine were found murdered in Lambert's rural Humboldt farmhouse in Richardson County, Nebraska. John L. Lotter and Thomas M. Nissen, also known as Marvin T. Nissen, were convicted of the murders. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), and *State v. Nissen*, 252 Neb. 51, 560

N.W.2d 157 (1997). JoAnn brought an action against Richardson County and Sheriff Charles B. Laux for negligence, wrongful death, and intentional infliction of emotional distress in connection with Brandon's murder and the events leading up to her death. JoAnn also brought a civil rights action against Lotter, Nissen, and Laux in federal court; the federal court dismissed the claims against Laux. See *Brandon v. Lotter*, 976 F. Supp. 872 (D. Neb. 1997), *affirmed* 157 F.3d 537 (8th Cir. 1998).

In the state court case, the district court dismissed JoAnn's second amended petition based on the defendants' demurrer alleging that the petition did not state a cause of action. We reversed that determination. See *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997) (*Brandon I*). The case proceeded to trial. See *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001) (*Brandon II*). The evidence adduced at the trial is summarized in *Brandon II* and will not be repeated here. The district court found the county negligent and awarded economic damages (funeral expenses) of \$6,223.20 and noneconomic damages of \$80,000. However, the district court reduced the damage award on the negligence claim by 85 percent for the intentional torts of Lotter and Nissen, and by 1 percent for the negligence of Brandon. The district court denied recovery on the intentional infliction of emotional distress claim and awarded "nominal damages" for loss of society, comfort, and companionship. See *id.* JoAnn appealed. We reversed the judgment of the district court and remanded the cause, stating as follows:

We affirm the district court's determination that the county had a duty to protect Brandon, its finding that the county was negligent in failing to discharge that duty, and its finding that Brandon suffered predeath pain and suffering damages in the amount of \$80,000.

We reverse the district court's allocation of 85 percent of the predeath pain and suffering damages to the intentional torts of Lotter and Nissen as Nebraska's comparative negligence law does not allow for allocation of damages to the acts of intentional tort-feasors. We also reverse the district court's determination that Laux's conduct during the December 25, 1993, interview was not extreme and outrageous. We further reverse the district court's award of

“nominal damages” for loss of society, comfort, and companionship and its finding that Brandon was 1 percent contributorily negligent.

We therefore remand this cause to the district court (1) for a determination of whether JoAnn has proved that Brandon suffered emotional distress so severe that no reasonable person should be expected to endure it and, if so, whether Laux’s conduct was a proximate cause of any such distress; (2) to award damages for intentional infliction of emotional distress if JoAnn has proved both that Brandon suffered severe emotional distress and that Laux’s conduct was a proximate cause of that distress; and (3) for a determination of the amount of damages for loss of society.

Upon remand, the district court shall not reduce the award of \$80,000 for Brandon’s predeath pain and suffering or reduce any additional amounts that may be awarded for loss of society or intentional infliction of emotional distress by allocating a percentage of the damage to intentional acts on the part of Lotter and Nissen. Further, as there is no evidence to support a finding of negligence on the part of Brandon, the district court shall not reduce any damages awarded to JoAnn due to any acts of Brandon.

Brandon II, 261 Neb. at 670-71, 624 N.W.2d at 629.

After remand, the district court made additional factual findings based upon the record from the previous trial. The district court found damages for JoAnn in the amount of \$7,000 on the claim of intentional infliction of emotional distress. The district court examined the evidence regarding loss of society and determined, in essence, that the testimony offered by Brandon’s family regarding their relationship with her was not consistent with their conduct during the undisputed sequence of events that preceded Brandon’s death. The district court awarded damages for loss of society in the amount of \$5,000. The district court added these awards to the damages awarded at the previous trial and entered judgment in the amount of \$98,223.20. JoAnn appeals.

ASSIGNMENTS OF ERROR

JoAnn assigns that the district court erred in finding (1) on the wrongful death claim, that JoAnn’s loss of society, comfort,

and companionship amounted to \$5,000 in damages and (2) on the intentional infliction of emotional distress claim, that the severe emotional distress caused by Laux's extreme and outrageous conduct amounted to \$7,000 in damages.

STANDARD OF REVIEW

[1,2] The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001). In an action brought pursuant to the Political Subdivisions Tort Claims Act, or in a bench trial of an action at law, the factual findings by the trial court will not be disturbed on appeal unless they are clearly wrong. *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001).

ANALYSIS

LOSS OF SOCIETY

We turn first to JoAnn's argument that the award of \$5,000 on the wrongful death claim, as damages for loss of society, was clearly wrong.

[3-6] This court has consistently recognized that in an action for wrongful death of a child, recoverable damages include parental loss of the child's society, comfort, and companionship. *Brandon II*, citing *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998). The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection. *Brandon II*. When a child is wrongfully killed, a parent's investment in that child of money, affection, guidance, security, and love is destroyed. *Id.*, citing *Reiser, supra*. Destruction of such value is recognized whether the child is a minor or an adult. *Id.* Parental loss is not limited to or necessarily dependent upon deprivation of the child's monetary contribution toward parental well-being. *Id.*

[7-9] Damages for loss of society must be determined upon a consideration of the facts of each case. *Id.* There is no exact fiscal formula for determination of damages recoverable for loss of

society, comfort, and companionship, a loss which is not subject to some strict accounting method based on monetary contributions, past or prospective. *Id.* Because it is impossible to generalize the extent to which persons enjoy each other's companionship and society, the value of such highly personal relationships must be decided on a case-by-case basis. *Brandon II.*

[10] Because the parent-child relationship has intrinsic value, once a parent-child relationship is proved to exist, destruction of that relationship through the wrongful death of the child entitles the parent, who is the surviving next-of-kin, to damages. *Id.*, citing *Reiser, supra*. Evidence regarding the quality and extent of the parent-child relationship may then be utilized in determining the amount of those damages. *Id.*

[11] In reversing the district court's first award of "nominal damages," we stated in *Brandon II*, 261 Neb. at 665-66, 624 N.W.2d at 626:

JoAnn testified that she had a close relationship with Brandon. [Brandon's sister, Tammy] Schweitzer testified that she and Brandon had a close relationship with JoAnn because "we had nobody but each other." Brayman, Brandon's aunt, testified that Brandon "loved her mom dearly and she let her mother know that she loved her." Brandon spent every Christmas with her family.

Although JoAnn often "didn't know what to say" when Brandon began experiencing her sexual identity crisis, JoAnn and Brandon did discuss the issue. JoAnn also attended counseling with Brandon. Even after Brandon began presenting herself as a man, Brandon would call JoAnn, stop by to see her, or leave a rose in the door for her. Brandon spoke to JoAnn nearly every day on the telephone after the rapes occurred. Brandon was interested in becoming a commercial artist, and Brandon told JoAnn that she wanted to come back to Lincoln and "get her life back."

The record in the present case shows that a relationship between JoAnn and Brandon did indeed exist. The county does not assert that there was no relationship between JoAnn and Brandon. The county asserts that the award of "nominal damages" was reasonable because JoAnn's relationship with Brandon was "strained and undeveloped"

due to Brandon's legal troubles and gender identity disorder. Brief for appellee at 23. However, Brandon's personal problems are relevant only to the extent that they impacted her relationship with JoAnn. Damages for loss of society are not necessarily dependent on the personal qualities of the child. We have previously recognized that "[w]e will not enter into a discussion in which we compare the relative accomplishments of deceased children in wrongful death actions." *Caradori v. Fitch*, 200 Neb. 186, 194, 263 N.W.2d 649, 655 (1978). See, also, *Brahatcek v. Millard School District*, 202 Neb. 86, 273 N.W.2d 680 (1979).

The county's argument addresses the extent and quality of the relationship between JoAnn and Brandon, not whether such relationship existed. Contrary to the county's assertion, the parent-child relationship has intrinsic value, even if that relationship is less than perfect. A parent-child relationship may exist in spite of any personal problems the child might have, as the record in this case demonstrates. In recognizing the "intrinsic value of the relationship between parent and child," as we did in *Reiser v. Coburn*, 255 Neb. 655, 664, 587 N.W.2d 336, 342 (1998), we conclude that an award of \$0 for the loss of Brandon's society, comfort, and companionship sustained by JoAnn as a result of Brandon's death bears no reasonable relationship to the evidence and shocks the conscience. The award of \$0 on JoAnn's loss of society claim is therefore inadequate as a matter of law.

After remand, the district court attempted to calculate the intrinsic value of Brandon's relationship with her family. The district court acknowledged the facts set forth above and our holding in *Brandon II*. The district court relied on evidence that, according to the district court, demonstrated that while a parent-child relationship might have existed, "[n]o real society existed and there is no evidence or reason to believe in its future development."

The district court noted testimony indicating that Brandon had been sexually abused by an uncle starting when Brandon was about 6 or 7 years of age and continuing until Brandon was 14. The district court also noted that JoAnn later became aware of the sexual abuse, but nonetheless testified that Brandon had a

“happy” childhood. The district court contrasted Schweitzer’s testimony that she and Brandon were “open with [their] mother” and “[t]here was always honesty and trust between the three of us,” with Schweitzer’s admission that she had been sexually abused by the same uncle and that she had witnessed Brandon being sexually abused, but that Schweitzer and Brandon agreed not to say anything about it.

The district court also noted that while Brandon was afraid of Nissen and Lotter, “[t]here is plenty of evidence that [Brandon] chose not to go home in the face of her fear and danger.” Brandon thought it would be safer to stay with Lambert than to return home. The district court observed that although Brandon had been raped on Christmas Eve, Brandon did not go to her family on Christmas Day, nor did any members of Brandon’s family go to her. The district court generally found that prior to the rape, the relationship between Brandon and the members of her family had become strained and distrustful and that Brandon had isolated herself from her family.

[12-14] Given our standard of review and the record with which we are presented, further recitation of which would serve no useful purpose, we cannot say the district court’s determination of damages for loss of society was clearly wrong. An award of damages may be set aside as inadequate when, and not unless, it is so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. See *Holden v. Wal-Mart Stores*, 259 Neb. 78, 608 N.W.2d 187 (2000). If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record. *Id.* On appeal, we give the fact finder’s determination of damages great deference. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

While the district court concluded, as it was required to do, that the parent-child relationship in this case had intrinsic value, the district court examined the record and concluded that the objective evidence of ““love, affection, care, attention, companionship, comfort, and protection”” in that relationship did not necessarily match the testimony in that regard. See *Reiser v. Coburn*, 255 Neb. 655, 662, 587 N.W.2d 336, 341 (1998). While

this does not mean that there is no relationship for which compensation can be awarded, see *Brandon II*, it is certainly relevant to the amount of damages to be awarded, particularly given the lack of an “ ‘exact fiscal formula for determination of damages recoverable for loss of society, comfort, and companionship.’ ” *Reiser*, 255 Neb. at 663, 587 N.W.2d at 341. After a thorough review of the record, we conclude that the trier of fact in this case made a determination that is supported by competent evidence and is not clearly wrong.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The district court awarded \$7,000 for Brandon's damages resulting from Laux's liability for intentional infliction of emotional distress. JoAnn alleges that these damages are insufficient and clearly wrong.

The district court acknowledged that Laux's conduct was intentional and so outrageous and extreme that it was intolerable and that Laux's conduct was itself “very strong” evidence of Brandon's mental suffering. See *Brandon II*. However, the district court relied on witnesses who saw or spoke to Brandon after her interview with Laux and testified regarding Brandon's apparent emotional state. Lana Tisdell testified that when Brandon came out of the room where Laux had interviewed Brandon, Brandon described Laux as a “fuckin' asshole” and was “[p]retty upset.” Linda Gutierrez testified that Brandon returned to Gutierrez' house after the interview and generally described Brandon as being as upset and scared as Brandon had been before the interview. JoAnn spoke to Brandon on the telephone after the interview and testified, generally, that Brandon was scared of Laux and did not want to talk to him again, but that Brandon's fears were focused primarily on Lotter and Nissen.

In other words, the district court found that although Brandon was upset and afraid during the time between her interview with Laux and her death, Brandon's emotions were affected primarily by Nissen and Lotter and the mental anguish resulting from the rape and threat to her life. Laux's conduct, considered discretely by the district court, was not found to have caused substantial emotional distress.

[15,16] In awarding damages for mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident; the credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the discretion of the fact finder. See *Woitalewicz v. Wyatt*, 229 Neb. 626, 428 N.W.2d 216 (1988). This court is reluctant to interfere with the judgment of the fact finder in awarding damages for mental anguish, where the law provides no precise measurement. See *Bishop v. Bockoven, Inc.*, 199 Neb. 613, 260 N.W.2d 488 (1977). In this case, the district court's award of damages bears a reasonable relation to the evidence and is not clearly wrong. Given the great deference that the fact finder's determination of damages is given on appeal, see *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000), JoAnn's assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we conclude that the district court's determination of damages is supported by competent evidence and is not clearly wrong. The district court judgment, in the amount of \$98,223.20, is affirmed.

AFFIRMED.

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