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THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

MAY 23, 2003 and NOVEMBER 20, 2003

IN THE

Supreme Court of Nebraska

VOLUME CCLXVI

PEGGY POLACEK

OFFICIAL REPORTER

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By Peggy Polacek, Reporter of the Supreme Court
and the Court of Appeals

For the benefit of the State of Nebraska

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JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

JOHN F. IRWIN, Chief Judge
EDWARD E. HANNON, Associate Judge
RICHARD D. SIEVERS, Associate Judge
EVERETT O. INBODY, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge

PEGGY POLACEK ..... Reporter
LANET ASMUSSEN ..... Clerk
JOSEPH C. STEELE .....State Court Administrator

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund	Beatrice
		Daniel Bryan, Jr.	Auburn
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
Third	Lancaster	Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
Fourth	Douglas	Robert V. Burkhard	Omaha
		J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Richard J. Spethman	Omaha
		Gerald E. Moran	Omaha
		Gary B. Randall	Omaha
		Patricia A. Lamberty	Omaha
		J. Michael Coffey	Omaha
		Sandra L. Dougherty	Omaha
		W. Mark Ashford	Omaha
		Peter C. Bataillon	Omaha
		Gregory M. Schatz	Omaha
		J. Russell Derr	Omaha
		James T. Gleason	Omaha
		Thomas A. Otepka	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke	Columbus
		Alan G. Gless	Seward
		Michael Owens	Aurora
		Mary C. Gilbride	Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Darvid D. Quist	Blair
		Maurice Redmond	Dakota City
		John E. Samson	Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Robert B. Ensz	Wayne
		Patrick G. Rogers	Norfolk
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	William B. Cassel	Ainsworth
		Ronald D. Olberding	Burwell
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James Livingston	Grand Island
		Teresa K. Luther	Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Stephen Illingworth	Hastings
		Terri Harder	Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell	McCook
		John P. Murphy	North Platte
		Donald E. Rowlands II	North Platte
		James E. Doyle IV	Lexington
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson	Chadron
		Robert O. Hippe	Gering
		Brian Silverman	Alliance
		Randall L. Lippstreu	Gering
		Kristine R. Cecava	Sidney

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven Bruce Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Larry F. Fugit	Papillion
		Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd Hutton	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Jack B. Lindner	Lincoln
		Mary L. Doyle	Lincoln
		Laurie J. Yardley	Lincoln
		Jean A. Lovell	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		Edna R. Atkins	Omaha
		Lawrence Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
		Jeffrey Marcuzzo	Omaha
Fifth	Boone, Butler, Colfax, Dodge, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Gary F. Hatfield	Central City
		Patrick R. McDermott	David City
		Marvin V. Miller	Wahoo

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Daniel J. Beckwith	Fremont
		C. Matthew Samuelson	Blair
		Kurt Rager	Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Philip R. Riley	Creighton
		Richard W. Krepela	Madison
		Donna F. Taylor	Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	August F. Schuman	Ainsworth
		Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
Ninth	Buffalo and Hall	David A. Bush	Grand Island
		Philip M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Jack Robert Ott	Hastings
		Robert A. Ide	Holdrege
		Michael Offner	Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent E. Florom	North Platte
		Cloyd Clark	McCook
		Kent D. Turnbull	North Platte
		Carlton E. Clark	Lexington
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		James L. Macken	Gering
		G. Glenn Camerer	Gering
		Thomas H. Dorwart	Sidney
		C.G. Wallace	Kimball

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth G. Crnkovich	Omaha
	Wadie Thomas, Jr.	Omaha
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
	Linda S. Porter	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Ronald L. Brown	Lincoln
James M. Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln

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JERROD GREGG
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No. S-01-1285: **Ambrose v. Vatnsdal**. Affirmed as modified. Wright, J.

No. S-01-1325: **Arthur v. Microsoft Corp**. Affirmed. Per Curiam.

No. S-02-363: **Flamme v. Flamme Brothers, Inc**. Affirmed. Connolly, J.

No. S-02-662: **Zeleny v. Zeleny**. Affirmed as modified. Wright, J.

No. S-02-724: **Thomas v. Thomas**. Affirmed. Miller-Lerman, J.

No. S-02-760: **Fisher v. Dawes Cty. Bd. of Equal**. Vacated and remanded for further proceedings. Stephan, J.

No. S-02-790: **Paul Davis Sys. v. Williams**. Affirmed in part, and in part dismissed as moot. Appellee's motion for award of attorney fees denied. Stephan, J.

No. S-02-1331: **In re Interest of Marcus N**. Appeal dismissed. McCormack, J.

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No. S-01-409: **State ex rel. Counsel for Dis. v. Shapiro**. Respondent reinstated to the practice of law in the State of Nebraska.

No. S-01-1325: **Arthur v. Microsoft Corp**. Motion of appellant for rehearing sustained.

No. S-02-496: **Dillow v. Schultz**. Affirmed. See, *Rice v. Adam*, 254 Neb. 219, 575 N.W.2d 399 (1998); Neb. Ct. R. of Prac. 7A(1) (rev. 2000).

No. S-02-665: **Widtfeldt S.P., Inc. v. Holt Cty. Bd. of Equal**. Motion considered; appeal dismissed.

No. S-02-716: **Anderson v. County of Sarpy**. Stipulation allowed; appeal dismissed.

No. S-02-822: **Holstien v. Madonna Rehabilitation Hospital**. Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice; each party to pay own costs.

No. S-02-823: **County of Sherman v. Evans**. Motion of appellant to dismiss appeal for mootness sustained; appeal dismissed.

No. S-02-865: **State ex rel. Stuck v. County of Sarpy**. Stipulation allowed; appeal dismissed at cost of appellee.

No. S-02-1038: **State v. Frickel**. By order of the court, appeal dismissed for failure to file briefs.

Nos. S-02-1120, S-02-1121: **City of York v. York Cty. Bd. of Equal**. The decisions of the Tax Equalization and Review Commission are vacated. The causes are remanded to the Tax Equalization and Review Commission, with directions to instruct the York County Board of Equalization to grant the requested exemptions on each of the subject properties, as stipulated by the parties.

No. S-02-1199: **State ex rel. Counsel for Dis. v. Lopez-Wilson**. Motion of relator to dismiss formal charges, amended formal charges, and additional formal charges sustained; charges dismissed.

No. S-02-1256: **Knopik v. Nance Cty. Bd. of Supervisors.** Motion of appellee for summary affirmance sustained; judgment affirmed. See *Niewohner v. Antelope Cty. Bd. of Adjustment*, 12 Neb. App. 132, 668 N.W.2d 258 (2003).

No. S-02-1258: **In re Interest of Pierre W.** Stipulation allowed; appeal dismissed.

No. S-02-1439: **Leif v. Henke.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. S-03-036, S-03-128: **Glass v. Kenney.** Appeal dismissed pursuant to rule 7A(2), and cause remanded to the district court for further proceedings.

Nos. S-03-036, S-03-128: **Glass v. Kenney.** Motion of appellant for rehearing sustained. Order of September 10, 2003, vacated.

No. S-03-151: **State v. Davlin.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-03-283: **State v. Carter.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. S-03-323, S-03-534: **State ex rel. Counsel for Dis. v. Rasmussen.** Dismissed without prejudice.

No. S-03-337: **In re Estate of Linn.** Stipulation allowed; appeal dismissed.

No. S-03-364: **State v. Carlson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-03-397: **State v. Caddy.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-03-427: **State v. Nguyen.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-03-594: **State v. Sandoval.** Appeal dismissed. See, rule 7A(2); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000).

No. S-03-819: **Richmond v. Case.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-03-926: **State v. Buckman.** Appeal dismissed. See rule 7A(2).

No. S-03-929: **State v. Bao.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2002).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-01-036: **D & S Realty v. Cutler**. Petition of appellant for further review overruled on June 11, 2003.

No. A-01-036: **D & S Realty v. Cutler**. Petition of appellee for further review overruled on June 11, 2003.

Nos. S-01-168, S-01-469: **Trimble v. Wescom**. Petitions of appellant for further review sustained on July 16, 2003.

No. A-01-313: **Alderman v. County of Antelope**, 11 Neb. App. 412 (2002). Petition of appellant for further review overruled on June 11, 2003.

No. S-01-664: **Hughes v. Poykko-Post**. Petition of appellee for further review sustained on May 15, 2003.

No. A-01-668: **Jerry Palmer Homes v. Allender**. Petition of appellant for further review overruled on August 27, 2003.

No. A-01-674: **Baxter v. Nebraska Dept. of Corr. Servs.**, 11 Neb. App. 842 (2003). Petition of appellant for further review overruled on July 16, 2003.

No. A-01-712: **Grosshans v. Grosshans**. Petition of appellant for further review overruled on August 27, 2003.

No. S-01-770: **Finney v. Finney**. Petition of appellant for further review sustained on July 2, 2003.

No. A-01-799: **Cole v. Clarke**. Petition of appellant for further review overruled on August 27, 2003.

No. A-01-833: **Nieveen v. County of Saunders**. Petition of appellant for further review overruled on July 16, 2003.

No. A-01-836: **State v. Harris**. Petition of appellant for further review overruled on May 29, 2003.

No. A-01-861: **Jacob v. Hill**. Petition of appellant for further review overruled on September 17, 2003.

No. A-01-878: **Pearson v. Good Samaritan Outreach Servs.** Petition of appellee for further review overruled on July 16, 2003.

No. A-01-905: **Thomas v. State**. Petition of appellant for further review overruled on August 27, 2003.

No. A-01-906: **Ebert v. Nebraska Dept. of Corr. Servs.**, 11 Neb. App. 553 (2003). Petition of appellant for further review overruled on June 11, 2003.

No. A-01-957: **U.S. Bank Nat. Assn. v. Empire Park Joint Venture**. Petition of appellant for further review overruled on October 16, 2003.

Nos. A-01-995, A-01-996: **Bochart v. Glinsmann**. Petitions of appellee for further review overruled on May 23, 2003.

Nos. A-01-995, A-01-996: **Bochart v. Glinsmann**. Petitions of appellee for further review overruled on September 17, 2003.

No. S-01-1042: **Tafoya v. Chapin**. Petition of appellee for further review sustained on May 21, 2003.

No. S-01-1042: **Tafoya v. Chapin**. Petition of appellee for further review dismissed on October 16, 2003, as having been improvidently granted.

No. A-01-1045: **Keating v. J.C. Penney Life Ins. Co.**, 11 Neb. App. 757 (2003). Petition of appellant for further review overruled on June 11, 2003.

No. A-01-1160: **Zeck v. Mumford**. Petition of appellant for further review overruled on June 18, 2003.

Nos. A-01-1164, A-01-1166, A-01-1168: **State v. Louis**. Petitions of appellant for further review overruled on September 17, 2003.

No. A-01-1177: **Stevens v. Harvey**. Petition of appellee for further review overruled on June 18, 2003.

No. A-01-1187: **Zaleski v. Collection Bureau of Grand Island**, 12 Neb. App. 1 (2003). Petition of appellee Collection Bureau of Grand Island for further review overruled on September 10, 2003.

No. S-01-1188: **DeBose v. State**. Petition of appellant for further review sustained on September 10, 2003.

No. S-01-1195: **In re Estate of Reed**, 11 Neb. App. 915 (2003). Petition of appellee for further review sustained on August 27, 2003.

No. S-01-1203: **Quality Pork Internat. v. Rupari Food Servs**. Petition of appellee for further review sustained on August 27, 2003.

No. A-01-1243: **Willmann v. Nebraska Dept. of Corr. Servs.** Petition of appellee for further review overruled on August 27, 2003.

No. A-01-1245: **McManus v. Alderson.** Petition of appellant for further review overruled on June 18, 2003.

No. A-01-1250: **In re Application of Goodwill Med. Transp. v. R & F Hobbies, Inc.** Petition of appellant for further review overruled on June 25, 2003.

No. A-01-1342: **Quiroz v. Fife.** Petition of appellant for further review overruled on August 27, 2003.

No. A-01-1359: **Maxwell v. Cantwell.** Petition of appellant for further review overruled on May 15, 2003.

No. A-01-1374: **Wilke v. McDermott.** Petition of appellant for further review overruled on June 11, 2003.

No. A-01-1383: **In re Interest of Heather G. et al.**, 12 Neb. App. 13 (2003). Petition of appellee for further review overruled on August 27, 2003.

Nos. A-01-1384, A-01-1385: **In re Estate of Jefferson.** Petitions of appellant for further review overruled on October 29, 2003.

No. A-01-1416: **Federle v. Willis.** Petition of appellant for further review overruled on October 16, 2003.

No. S-02-131: **State v. Feldhacker**, 11 Neb. App. 608 (2003). Petition of appellant for further review sustained on August 27, 2003.

No. S-02-131: **State v. Feldhacker**, 11 Neb. App. 608 (2003). Petition of appellee for further review sustained on August 27, 2003.

No. A-02-175: **Markmann v. Metropolitan Utilities Dist.** Petition of appellant for further review overruled on July 2, 2003.

No. S-02-200: **Ludwick v. TriWest Healthcare Alliance.** Petition of appellant for further review sustained on July 16, 2003.

No. A-02-203: **Dohrman v. School Dist. No. 0025.** Petition of appellee for further review overruled on October 16, 2003.

No. A-02-209: **State v. Bartos.** Petition of appellant for further review overruled on September 10, 2003.

Nos. S-02-252, S-02-512: **Nelson v. Nelson**. Petitions of appellees for further review sustained on May 29, 2003.

No. A-02-272: **Davenport v. Thayer Agency, Inc**. Petition of appellant for further review overruled on August 27, 2003.

No. S-02-292: **Strong v. Neth**. Petition of appellant for further review sustained on September 17, 2003.

No. A-02-295: **Tyler v. Warden, Nebraska State Prison**. Petition of appellant for further review overruled on August 27, 2003.

No. A-02-327: **State on behalf of Combs v. O'Neal**, 11 Neb. App. 890 (2003). Petition of appellant for further review overruled on September 10, 2003.

No. A-02-338: **State v. Witmer**. Petition of appellant for further review overruled on August 27, 2003.

No. A-02-362: **Llanes v. Countryside of Hastings, Inc**. Petition of appellant for further review overruled on May 29, 2003.

No. A-02-479: **State v. Roundtree**, 11 Neb. App. 628 (2003). Petition of appellant for further review overruled on July 2, 2003.

No. A-02-524: **In re Interest of Adrian B.**, 11 Neb. App. 656 (2003). Petition of appellant for further review overruled on May 15, 2003.

No. A-02-555: **Schuelke v. Walker**. Petition of appellant for further review overruled on May 15, 2003.

No. A-02-586: **State v. Jenson**. Petition of appellant for further review overruled on August 27, 2003.

No. A-02-607: **State v. Roth**. Petition of appellant for further review overruled on May 29, 2003.

No. A-02-653: **State v. Campbell**. Petition of appellant for further review overruled on August 27, 2003.

No. A-02-676: **State v. VanWinkle**. Petition of appellee for further review overruled on May 21, 2003.

No. A-02-679: **State v. Mason**. Petition of appellant for further review overruled on May 29, 2003.

No. S-02-695: **In re Interest of Jedidiah P.** Petition of appellant for further review sustained on September 24, 2003.

No. A-02-707: **Knoefler v. Wojtalewicz**. Petition of appellant for further review overruled on September 24, 2003.

No. A-02-718: **State v. Schaeffer**. Petition of appellant for further review overruled on June 25, 2003.

No. A-02-728: **State v. Silva**. Petition of appellant for further review overruled on May 29, 2003.

Nos. A-02-730, A-02-963: **In re Guardianship & Conservatorship of Brandon P.** Petitions of appellant for further review overruled on August 27, 2003.

No. A-02-743: **State v. Hill**. Petition of appellant for further review overruled on August 27, 2003.

No. A-02-758: **Brummer v. Vickers, Inc.**, 11 Neb. App. 691 (2003). Petition of appellant for further review overruled on June 18, 2003.

No. A-02-769: **Noordam v. Vickers, Inc.**, 11 Neb. App. 739 (2003). Petition of appellant for further review overruled on May 15, 2003.

Nos. A-02-779, A-02-1247: **In re Interest of Cortisha A. et al.** Petitions of intervenors-appellees for further review overruled on September 10, 2003.

No. A-02-809: **Anderson v. Anderson**. Petition of appellee for further review overruled on August 27, 2003.

No. A-02-811: **Hansen v. Melia**. Petition of appellant for further review overruled on August 27, 2003.

No. A-02-818: **In re Interest of Michael R.**, 11 Neb. App. 903 (2003). Petition of appellant for further review overruled on August 27, 2003.

No. A-02-824: **In re Interest of Shannon M. & Michaela M.** Petition of appellee Donna M. for further review overruled on October 1, 2003.

No. A-02-828: **State v. Taylor**, 12 Neb. App. 58 (2003). Appellee's motion to dismiss petition for further review sustained. Petition of appellant for further review dismissed on September 17, 2003. See rule 2F(1).

No. A-02-843: **State v. Goree**, 11 Neb. App. 685 (2003). Petition of appellant for further review overruled on May 21, 2003.

No. A-02-848: **Cox v. Fisk**. Petition of appellant for further review overruled on October 29, 2003.

No. A-02-849: **In re Interest of Antone C. et al.**, 12 Neb. App. 152 (2003). Petition of appellant for further review overruled on October 29, 2003.

No. A-02-888: **State v. Hayes**. Petition of appellee for further review overruled on September 10, 2003.

No. A-02-890: **Roland v. Snell Services**. Petition of appellant for further review overruled on May 15, 2003.

No. A-02-901: **Mabile v. Drivers Mgmt., Inc.**, 11 Neb. App. 765 (2003). Petition of appellee for further review overruled on June 10, 2003.

Nos. A-02-905, A-02-906: **In re Interest of Phoebe S. & Rebekah S.**, 11 Neb. App. 919 (2003). Petitions of appellee for further review overruled on September 24, 2003.

Nos. S-02-941, S-02-942: **In re Interest of Steven K.**, 11 Neb. App. 828 (2003). Petitions of appellee for further review sustained on July 2, 2003.

No. A-02-949: **State v. Low**. Petition of appellant for further review overruled on October 29, 2003.

No. A-02-973: **Belitz v. Belitz**. Petition of appellant for further review overruled on September 10, 2003.

No. A-02-1001: **Henson v. Henson**. Petition of appellee for further review overruled on October 29, 2003.

No. A-02-1036: **Walsh v. City of Omaha**, 11 Neb. App. 747 (2003). Petition of appellee for further review overruled on July 16, 2003.

Nos. A-02-1059, A-02-1060: **State v. Williams**. Petitions of appellant for further review overruled on November 10, 2003.

No. A-02-1066: **Lorenz v. Yancey**. Petition of appellant for further review overruled on July 7, 2003.

No. A-02-1088: **Moore v. Clarke**. Petition of appellant for further review overruled on May 29, 2003.

No. A-02-1098: **State v. Terry**. Petition of appellant for further review overruled on May 15, 2003.

No. A-02-1104: **Waite v. Davison**. Petition of appellant for further review overruled on May 15, 2003.

No. A-02-1125: **United Nebraska Bank, O'Neill v. Troshynski**. Petition of appellant for further review overruled on July 2, 2003.

No. A-02-1129: **Propp v. Wilfarm L.L.C.** Petition of appellee for further review overruled on August 27, 2003.

No. A-02-1140: **Marvin v. City of West Point.** Petition of appellant for further review overruled on July 2, 2003.

No. A-02-1149: **State v. Payer.** Petition of appellant for further review overruled on July 2, 2003.

No. A-02-1173: **Martin v. Bonnevilla Homes.** Petition of appellant for further review overruled on August 27, 2003.

No. A-02-1177: **State v. Garcia.** Petition of appellant for further review overruled on June 25, 2003.

No. A-02-1178: **State v. Garcia.** Petition of appellant for further review overruled on June 25, 2003.

No. A-02-1183: **Cramer v. Hoover Material Handling Group.** Petition of appellant for further review overruled on July 16, 2003.

No. A-02-1186: **Gaspar v. IBP, inc.** Petition of appellee for further review overruled on September 10, 2003.

No. A-02-1195: **State v. Garrelts.** Petition of appellant for further review overruled on July 9, 2003.

Nos. A-02-1196 through A-02-1198: **In re Interest of Michael B. et al.** Petitions of appellant for further review overruled on September 10, 2003.

No. A-02-1211: **State v. Santee.** Petition of appellant for further review overruled on June 18, 2003.

No. A-02-1222: **State v. Harper.** Petition of appellant for further review overruled on August 27, 2003.

No. A-02-1230: **In re Interest of Duff.** Petition of appellant for further review overruled on August 27, 2003.

No. A-02-1245: **In re Interest of Misty M.** Petition of appellant for further review overruled on September 17, 2003.

No. A-02-1252: **State v. Wingard.** Petition of appellant for further review overruled on June 18, 2003.

No. A-02-1289: **In re Interest of Oberuch.** Petition of appellant for further review overruled on September 17, 2003.

No. A-02-1290: **State v. Troyer.** Petition of appellant for further review overruled on September 10, 2003.

No. A-02-1325: **King v. Neth.** Petition of appellant for further review overruled on September 10, 2003.

No. A-02-1343: **State v. Gratto**. Petition of appellant for further review overruled on September 10, 2003.

No. A-02-1345: **State v. Calderon**. Petition of appellant for further review overruled on September 2, 2003.

No. A-02-1387: **State v. Peterson**. Petition of appellant for further review dismissed on October 21, 2003, as filed out of time.

No. A-02-1393: **State v. Larkin**. Petition of appellant for further review overruled on June 11, 2003.

No. A-02-1426: **State v. Marquez**. Petition of appellant for further review overruled on June 18, 2003.

No. A-02-1434: **State v. Grove**. Petition of appellant for further review overruled on June 11, 2003.

No. A-02-1436: **State v. McDaniel**, 12 Neb. App. 76 (2003). Petition of appellee for further review overruled on September 24, 2003.

No. A-02-1438: **McKillip v. NCA Headstart**. Petition of appellant for further review overruled on September 24, 2003.

No. A-02-1449: **State v. Fulton**. Petition of appellant for further review overruled on July 2, 2003.

No. A-02-1494: **State v. Garcia**. Petition of appellant for further review overruled on May 29, 2003.

No. A-03-062: **State v. Sommers**. Petition of appellant for further review overruled on August 27, 2003.

No. A-03-063: **State v. Royer**. Petition of appellant for further review overruled on June 18, 2003.

No. A-03-064: **State v. Houlihan**. Petition of appellant for further review overruled on August 27, 2003.

No. A-03-080: **Martin v. Department of Corr. Servs.** Petitions of appellant for further review overruled on June 11, 2003.

No. A-03-156: **State v. Granger**. Petition of appellant for further review overruled on October 16, 2003.

No. A-03-180: **State v. Hernandez**. Petition of appellant for further review overruled on October 29, 2003.

No. A-03-191: **State v. Johnson**. Petition of appellant for further review overruled on September 10, 2003.

No. A-03-197: **Martin v. Williams**. Petitions of appellant for further review overruled on July 2, 2003.

No. A-03-253: **State ex rel. Mengedoht v. Samuelson.** Petition of appellant for further review overruled on October 16, 2003.

No. A-03-261: **State v. Haney**. Petition of appellant for further review overruled on September 24, 2003.

No. A-03-285: **Plymate v. Chapin**. Petition of appellant for further review overruled on September 10, 2003.

No. A-03-302: **State v. Kern**. Petition of appellant for further review overruled on September 10, 2003.

No. A-03-322: **State v. Threats**. Petition of appellant for further review overruled on September 10, 2003.

No. A-03-339: **Akins v. T.S.C.I. Unit Manager Curtis.** Petition of appellant for further review overruled on September 17, 2003.

No. A-03-349: **State v. Paez**. Petition of appellant for further review overruled on October 16, 2003.

No. A-03-350: **State v. Leisure**. Petition of appellant for further review overruled on September 24, 2003.

No. A-03-381: **Martin v. Board of Parole**. Petition of appellant for further review overruled on August 27, 2003.

No. A-03-605: **Martin v. Williams**. Petition of appellant for further review overruled on October 1, 2003.

No. A-03-663: **State v. Kitt**. Petition of appellant for further review overruled on August 27, 2003.

Nebraska Supreme Court

In Memoriam

Chief Justice Paul W. White

Nebraska Supreme Court Courtroom
State Capitol
Lincoln, Nebraska
October 21, 2003
2:02 p.m.

Proceedings before:
SUPREME COURT
Chief Justice John V. Hendry
Justice John F. Wright
Justice William M. Connolly
Justice John M. Gerrard
Justice Kenneth C. Stephan
Justice Michael McCormack



CHIEF JUSTICE PAUL W. WHITE

Proceedings

CHIEF JUSTICE HENDRY: Good afternoon. The Nebraska Supreme Court is meeting in special ceremonial session on this 21st day of October, 2003, to honor the life and memory of former Supreme Court Chief Justice Paul W. White and to note his many contributions to the legal profession.

I would like to take this opportunity to introduce to you my colleagues on the Supreme Court. Beginning on my far left is Justice Ken Stephan. Next to Justice Stephan is Justice William Connolly. To my far right is Justice Michael McCormack. Next to Justice McCormack is Justice John Gerrard. To my immediate right is Justice John Wright.

I would also like to acknowledge the presence of Court of Appeals Judges Edward Hannon and Everett Inbody who are also here to honor Chief Justice Paul White. The Court further acknowledges the presence of members of Chief Justice Paul White's family, other members of the judiciary, members of the bar and friends of former Chief Justice White.

At this time the Court recognizes former Nebraska Supreme Court Chief Justice Norman Krivosha, chairman of the Supreme Court memorial committee who will conduct these proceedings. Mr. Chief Justice, good afternoon.

JUDGE KRIVOSHA: Good afternoon, Your Honor. May it please the Court:

We have assembled here today in this courtroom to pay tribute to the memory of Chief Justice Paul W. White who departed this life on the 23rd day of August, 2002. Born in Mitchell, South Dakota on February 12, 1911, Chief Justice White lived a full and rich life. Graduating from the University of Nebraska with honors in 1930, and its law school in 1932, Chief Justice White practiced law in Lincoln, Nebraska from 1932 until 1953, except for 50 months service in the United States infantry. Twenty of those months were spent in the Pacific Theater where Chief Justice White served as a prosecutor at the Japanese war crimes trials.

Serving first as an Assistant County Attorney for the County of Lancaster, Nebraska, and then as an acting Municipal Judge for the City of Lincoln, Nebraska, Chief Justice White spent the next 10 years, from 1953 to 1963, as one of the District Judges for the Third Judicial District of Nebraska serving Lancaster County. He soon gained a reputation as a no nonsense, well-versed scholar of the law who expected the lawyers who appeared before him to be well prepared and ready to address the true issues involved in the case.

He was elected Chief Justice of Nebraska on November 6, 1962 and served until his retirement in August of 1978, having served as the last Chief Justice of Nebraska to be popularly elected to that office.

His reputation on this Court, as was his reputation on the District Court, was one of asking piercing questions and demanding correct answers. Often, because he was already far beyond the attorney presenting the argument, he appeared to some not to be paying attention when in fact he was already contemplating the next issue needed to be resolved in order to find the correct answer to the question presented by the appeal.

In addition to being an outstanding lawyer and judge, he was also father and husband. His wife, Carol, preceded him in death and they had one son, Mark White. There is much that can be said about the life of Paul White, but I shall leave that to those who shall in a moment follow me. I would like to share but one specific remembrance of Chief Justice White. On January 11, 1982, some four years after he retired from this Court, he returned to help pay tribute to Judge Edward F. Carter with whom he served. In his remarks concerning Judge Carter, Chief Justice White said, and I quote: "From time immemorial we have met to honor great judges when they have finished the terms of their commission and have passed from our midst. We meet to eulogize their personal and judicial qualities and to remember them with fond recollection. But, in a larger sense, each judge, and especially the great ones, carries the torch of our judicial sacraments: government under law, courage, independence, industry, devotion, patience, impartiality, and intellect, among others."

While Chief Justice White was at that moment speaking of Judge Carter, he could just as well have been speaking of himself,

for indeed he was a great judge and possessed those qualities, among a number of others.

I was honored to have been selected to succeed Chief Justice White as I am honored to be permitted today to say a few words in memory of him. He will not soon be forgotten.

And now, if it pleases the Court, at this time I would like to ask a few friends and colleagues of former Chief Justice White to address the Court.

CHIEF JUSTICE HENDRY: All right. Thank you.

JUDGE KRIVOSHA: I should first like to call upon former Chief Justice William Hastings who served with Chief Justice Paul White on the District Court bench. Judge Hastings.

CHIEF JUSTICE HENDRY: Thank you. Mr. Chief Justice, good afternoon.

JUDGE HASTINGS: Mr. Chief Justice, may it please the Court:

Paul W. White had a distinguished judicial career spanning the years 1949 to 1978. He served four years as acting Lincoln Municipal Court Judge and was elected to the district bench for Lancaster County in 1953. He served in that capacity until 1963 when he was elected Chief Justice of the Nebraska Supreme Court where he sat until his rather unexpected resignation or retirement in 1978.

Actually, according to a report contained in a news article written by Gerry Switzer for the Lincoln Journal-Star on October 7, 1978, his judicial experience began during the 50 months he served in the infantry during World War II when he acted as liaison officer in Panama between American and Puerto Rican troops. He served as trial judge advocate for Panama 11 months and later was assigned to war crimes. At the end of the war he was selected by the Army to serve as chief prosecutor of Japanese General Masharu Homma who conquered the Philippines and was responsible for the death march atrocities.

Paul has been called an eccentric genius, and that probably well describes him. The label eccentric may stem in part from the fact that on many occasions you might ask him a question and

seemingly he would pay no attention to you. Part of that was that he may have been in deep preoccupied thought, others times it was due to the fact that he really was hard of hearing.

As a testament to his genius, he graduated from high school at the age of 14 and finished law school at age 21, graduating with honors. He practiced law in Lincoln until 1953 when he was first elected to the bench. In spite of his 15 years as Chief Justice of the Nebraska Supreme Court, Paul White's first love was the trial bench and he was proud of his position as a District Judge. In that position he was in a great measure responsible for centralizing and strengthening the statewide probation system.

As Chief Justice he was instrumental in forming a committee which drafted the Nebraska standard jury instructions, a monumental accomplishment contributed to by many judges and lawyers who served under his supervision. That work was published as the Nebraska Jury Instructions and was and is a great aid to judges and lawyers in the trial of lawsuits.

He was a booster of the 1972 court reorganization plan which eliminated the justice of the peace system and required all county judges to be law trained. As a result of that plan Paul White organized the Court Administrator's Office and appointed its first director.

Paul White enjoyed life. He loved golf. He loved his friends. And he loved the law. His name will always be associated with the pursuit of justice. Thank you.

CHIEF JUSTICE HENDRY: Thank you, Judge Hastings.

JUDGE KRIVOSHA: I should now like to call upon Judge Leslie Boslaugh who served with Chief Justice Paul White on this Court.

CHIEF JUSTICE HENDRY: Thank you.

JUDGE BOSLAUGH: I am honored to speak with you today about Chief Justice Paul W. White. I served on the Supreme Court with Judge White during his entire tenure with the Court, which stretched from January, 1963 to September, 1978. This 15-year period saw 4,148 cases decided by the Supreme Court. Judge White wrote 545 opinions and 97 dissents during that time period.

Many of us remember Justice White's colorful personality. He was known to be a serious competitor when playing bridge and handball. He genuinely enjoyed being in the presence of other lawyers and judges in both professional and social settings. He loved to tell stories. And he loved his cigars.

In addition, we also remember his strong qualifications as a talented lawyer, his sense of responsibility to the State and his guiding philosophy that the Supreme Court should represent leadership and be accountable to the citizens of the State.

Chief Justice White directly followed Chief Justice Robert Simmons, who, through his long and dignified career, exemplary personal integrity and judicial demeanor, seemed to some to personify the law itself. Judge White earned the task of filling these large footsteps by winning the last judicial election held in Nebraska in November 1962.

During Judge White's term Nebraska adopted the unified court system, which considerably increased the administrative responsibilities of the Chief Justice. The Nebraska Supreme Court also saw a rapid increase in the number of cases docketed, such that the rate of filings approximately doubled during Judge White's tenure on the Court. Having served previously as a Deputy County Attorney and District Judge, Justice White was no stranger to public service, and it was up to him to respond to these arduous and sometimes frustrating challenges in the best tradition of a public servant.

Chief Justice White wrote succinct, yet meaningful opinions. In Iske v. Metropolitan Utilities District he laid down a new rule concerning evidence in eminent domain cases. He held that land having value in terms of a reasonable prospective use for recreational and subdivision purposes must not have that value separated from the land's market value. This decision broke new ground and led to significant growth of lakeside recreational home sites redeveloped from sand and gravel pits in Nebraska.

Chief Justice White reaffirmed the constitutionality of the Nebraska Juvenile Court statute by holding that a juvenile hearing is a civil proceeding and that under the doctrine of parens patriae the constitutional guarantees of a jury trial and the incidents thereto are not applicable to juvenile proceedings. His opinion in

McMullen v. Geiger came despite strong dissents from four members of the Court.

It was Chief Justice White who initiated the "state of the judiciary" addresses to the Nebraska Bar Association in the 1970's, perhaps emblematic of his philosophy of the court system being accountable to the citizens.

In closing, with respect and warm affection, I offer these words that Judge White himself might say on an occasion such as this: "There are a multitude of others, besides the distinguished gathering here, who are of the same attitude and disposition."

I thank you for the opportunity to speak at this proceeding. Thank you.

CHIEF JUSTICE HENDRY: Judge Boslaugh, thank you very much. I'm wondering if you could be so kind as to perhaps leave a copy of your words for the court reporter?

JUDGE BOSLAUGH: Yes, I will.

CHIEF JUSTICE HENDRY: Thank you very much.

JUDGE BOSLAUGH: Yes. Thank you.

JUDGE KRIVOSHA: Now, Your Honors, I should like to call upon former Attorney General Paul Douglas, who was County Attorney of Lancaster County during much of the time that Chief Justice Paul White was on the District Court bench and was Attorney General of Nebraska during part of the time that Chief Justice Paul White was here.

CHIEF JUSTICE HENDRY: Good afternoon, Mr. Douglas.

MR. DOUGLAS: Good afternoon, Your Honor. May it please the Court:

I would like to take my allotted time to give you what I consider some insight and I think very interesting and unusual experiences that I had with this man. You've heard from others and you will continue to hear when he was born, when he died and the high offices that he held.

I first met him in 1949, when I was a freshman in law school and he was a practicing attorney and an acting Municipal Court

Judge, at a luncheon. He gave a speech to encourage us to join a particular law fraternity. He had introduced himself as P. Wellington White. And after I joined the fraternity and met him often at other fraternal functions, he would always refer to me as Brother Paul.

I was impressed that he remembered my name and after a couple of years I bothered to tell him that I was impressed that he would remember a freshman in law school and call him by name. He then explained to me his secret in how he remembered my name. He told me that he always remembered everyone whose first name was Paul, that his middle name was not Wellington, but it was just the name that someone had hung on him and he had fun using it when he wanted to have a good time.

Our paths crossed often. First when we both worked in the courthouse and then when we both worked at the state capitol. At the courthouse we formed a bowling league and both the judge and I joined the league. He had never bowled before, and had an awful approach, an awful style, and he must have thought that the object of the game was to have a low score.

Every day, once he found out that the object was to have a high score, he would drag someone, anyone, down to the bowling alley, which was only two or three blocks away, and have a round of bowling so he could become better. He wanted to become better and he certainly did become better.

Soon we would be laughing at his style and then be pleasantly surprised at his results. He did become a good bowler only because that's what he wanted to do. I understand that his golf was similar. He enjoyed it. It was the same there, bad in orthodox style, but equally good results.

When he ran for Chief Justice of the Nebraska Supreme Court he ran against the former popular Attorney General who had been on the ballot for approximately 14 years and successfully running every two years. And that former Attorney General was then a District Court Judge in the western part of the state. Also on the ballot was a Lancaster County District Court Judge who was well known throughout the state through his Masonic connections and through his various religious organizations. He ran a different campaign, one which everyone knew would not be successful, except he knew it would be successful.

On election night at about midnight he was in third place and at that time I decided I would go visit with him to try to encourage him and hope that his spirits were not too low. His wife greeted me at the door, knew who I was, and told me that he was not seeing anyone, he did not want to talk to anyone, he didn't want any phone calls, but I insisted. And for once I was able to get my way.

She led me into the darkened room, made me promise that I would only stay a short period of time and he and I began talking. I made a flippant comment like, well, I'm glad you're going to stick around and be on the bench because I enjoy you there. He pooh-poohed that argument by telling me he didn't run for Chief Justice of the Nebraska Supreme Court to remain as a District Court Judge.

It was obvious that he had been crying, and he told me that he wanted to become a member of the Nebraska Supreme Court more than anything else in his life. He spoke of changes he wanted and what he wanted to get done. He was disappointed, not only for himself, but he was disappointed that he wasn't going to have an opportunity to change the judicial system and to do something about the salaries for the judges.

The following days when absentee ballots started coming in and when the western part of the state votes were being counted he rose to the second position. There he knew that he was going to win. He knew he was going to win because he told me he was going to work harder and do everything he could to become successful. His unorthodox way of campaigning and his energy made him the success in this endeavor again.

One time when we were both working at the courthouse and had gone to lunch we got into an argument that he took very seriously. He became oblivious to everything around him and to prove his point he slammed his car door, but forgot to remove his thumb. There he stood with his thumb in the door, bleeding, still arguing.

His bailiff came along, saw what was going on, went over and opened the door and the end of his thumb fell off. That didn't stop him, he kept on arguing, holding his thumb up, not wanting to go to the hospital. And we encouraged him to go to the hospital. He finally agreed and the bailiff was to take him to the hospital, but

the bailiff got sick at the sight. So he put the bailiff in the backseat, got him comfortable, got behind the wheel, stuck his hand out of the door, yelled instructions at me at what I was supposed to do with the jury that he had out, and drove to the hospital.

When he got back to the courthouse he called me to come up to his office. When I got up there he told me there was three things he wanted to do, he wanted to finish the argument, to convince me that I was wrong, blamed me for deforming his, as he quoted, beautiful body, and explained that he had a high threshold of pain. The latter argument I had been convinced that he had demonstrated that very well.

That story and another story about an incident that occurred in Omaha at a state bar association I will never forget. At a particular restaurant several lawyers decided to see if they could get a reaction out of him. Because he was talking when he entered the vehicle to go back to the hotel, he didn't notice that a blind lawyer was sitting behind the steering wheel. And when the lawyer started the car up, the judge jumped out and said, I don't care that he's blind, but he's drunk.

He then started citing cases about assuming negligence in case of an accident by going with a drunk driver. He was put to the test and confessed that he was unable to think of any case where the same was true in being a passenger with a blind driver. He didn't forget the incident, and every time I made an argument that he didn't like he either called it ipso dictus Douglas or he would tell me it was my blind driver argument.

He was a most unusual and interesting person who had several of us amazed when he invited us to his home to listen to classical music. I didn't know that he liked classical music until I got to his home. Once we got there he acted as if classical music had just been invented and he was the first one to discover it. He was clapping, out of rhythm, to the classics and asking us, didn't we like it, didn't we like it? When we told him we didn't like it he asked us now was the time to go back to work.

I tell you these stories for the record to show that indeed he was a liked man and liked by many and that he enjoyed the many faces of life. He liked to have fun and made it interesting for all those around him. Yes, an interesting man who will be remembered by those of us who knew him by many such stories that I've not told.

However, he will always be remembered by everyone for his interest in the law, his devotion to his chosen profession, and his strong desire to succeed in accomplishing the right result.

In closing, I appreciate the opportunity to be here at this memorial service. And for once I don't have to worry about that light or any questions that the Court might have. Thank you very much.

CHIEF JUSTICE HENDRY: Thank you, Mr. Douglas.

JUDGE KRIVOSHA: And for our last speaker I should like now to call upon former Deputy Attorney General Ralph Gillan, who perhaps knew Chief Justice White as well or better than anyone in that they were brothers-in-law.

CHIEF JUSTICE HENDRY: Thank you. Good afternoon, Mr. Gillan.

MR. GILLAN: May it please the Court: I think most people who knew Paul White would agree on two things: he was very intelligent, and he was a character.

I first became acquainted with him in 1938 when he was a 27-year old lawyer practicing in Lincoln and I was just entering law school. He graduated from Nebraska law school in 1932 at the age of 21 with BA and LLD degrees.

He practiced in Lincoln until 1942 when he went into the Army, the last few years officing with Ralph Slocum. He went in the Army in the spring of 1942 and after basic training went to officer's training school in Fort Benning, Georgia. He received his commission in early fall, at which time he married my sister Carol.

When he received his commission he was retained by the infantry school at Fort Benning as an instructor in machine guns and he remained there until about the end of the war in 1945. He was then sent to the Philippines to join a team of lawyers prosecuting General Homma, the Japanese general responsible for the Bataan death march, for war crimes. Homma was convicted and hanged.

Paul returned to Lincoln as a captain in the spring of 1946 and resumed the practice of law, again officing with Ralph Slocum. In 1952 he ran for and was elected District Judge and he served

until 1962 when he ran for and was elected Chief Justice of the Nebraska Supreme Court.

His most important case as a practicing attorney was the case of Ebke versus Board of Educational Lands and Funds decided in 1951. I see many youngsters in the room under the age of 75 who probably don't remember the Ebke case so I will give you a little background.

When Nebraska was admitted to the union it was given title to two sections of land in each township to be held in trust for the benefit of the public schools of the state. The land was administered by the Board of Educational Lands and Funds and was leased to private individuals under a set formula based on appraised valuation.

Since the title was in the State there were no property taxes and the rents were usually less than the property taxes would have been. So it was often more profitable to have a school lease than to own the land in fee simple. The Legislature passed a bill providing that upon the expiration of a lease the leaseholder could get a renewal of the lease, if he wanted it, without competitive bidding.

Paul brought the Ebke case as a class action to have that statute declared unconstitutional on the ground that it required the board to violate its duty to the beneficiaries of the trust, the public schools, to obtain the best terms possible for the lease.

In 1951 the Supreme Court agreed and declared the statute unconstitutional and required the board, upon the expiration of a lease, to hold the public auction for the new lease. Since there were 5200 tracts involved and many bidders eager to lease them this has, of course, meant many millions of additional money for the schools over the years.

Upon remand to the District Court the judge ordered Paul to be paid a fee of $60,000 but the Supreme Court vacated that order on the ground that there was no fund from which it could be paid. It's hard for us in 2003 to remember what $60,000 was in 1951. I checked and found that in 1951 the Legislature set the salary of District Judges at $7400. So $60,000 was a little over eight times the annual salary of a District Judge. I saw Paul the day after the Supreme Court order on the fee and mentioned it,

but he just gave me a wry smile and shrugged his shoulders. I never heard him mention it again.

I did not have any direct experience with him either as a District Judge or as Chief Justice as he recused himself from any case in which I was involved. But it's my understanding that during the 10 years he served as District Judge not one of his cases was reversed on appeal. One of the Supreme Court Judges, Judge Carter, I believe, told him during his campaign for Chief Justice that he was the best District Judge in the state and wondered why he wanted to trade an interesting job like that for a less interesting job on the Supreme Court.

He retired in 1978 and, until physical problems forced him to stop, spent most of the rest of his time in the great love of his life, golf. Almost anyone who knew him could relate instances of his eccentricities. And I could spend the rest of the afternoon telling my experiences in that regard. I will tell only a few to illustrate the nature.

For years he drove the most awful wrecks of cars. He had owned a car before the war and he let his younger brother drive it while he was gone. It was absolutely a refugee from the junk yard, but he always said that the motor was fine, and he drove it until at least 1950. I was reminded very forcibly of the character in Tobacco Road whose car was beat up from encounters with trees, posts and other stationary objects who always insisted: but it don't hurt the run of it none.

In later years after he was a judge, and I think after he was Chief Justice, he drove a secondhand old beater whose fenders and doors were very badly rusted. It was known throughout Hillcrest as Old Rusty. And people used to come into the locker room of Hillcrest saying, well, I see White is here, I see saw Old Rusty out in the parking lot.

One time while he was Chief Justice we had a party at my house at which we had many more guests than we had chairs. Most of the guests were standing around talking, with drinks in their hands. A particularly good friend of mine had luckily obtained one of the chairs when Carol and Paul arrived. I took Paul over to introduce him to my friend who stood up to shake hands. Paul sat down in his chair.

I told that story recently to Judges Hastings and Blue. Judge Hastings promptly topped me. Judge Hastings, a number of years ago, was attending a conference of judges. At the dinner one evening Judge Hastings was sitting at a table with a number of other judges. Just after they brought the food to the table one of the judges was called to the telephone. While he was gone Paul came in, sat down in the judge's chair and started to eat his dinner.

One time Paul saw me in the hall at the statehouse. He called, come over here, I want to ask you something. I went over, and he asked his question. I opened my mouth to reply but had not said a word when he turned around and walked away.

He had to be watched carefully because he could never bother his head about mundane matters such as whether his cigarette was going to fall out of an ashtray on to someone's carpet or whether his glass would leave a ring on someone's end table. The bailiff of the Supreme Court told me this. Paul had two desks in his office and he used to work at one with the other behind him. He used to light his cigars while working at one and toss the 24 matches back over his shoulder to the other. Twice, I was told, he started fires in the papers on the second desk.

This even extended to matters involving his own safety and well being. I will not repeat the business about cutting off the end of his thumb which Paul has already talked about. When playing golf he often would tee off, put his club in his bag and take off down the side of the fairway while the other three members of his foursome were waiting to tee off.

There are many, many more stories of his eccentricities and some people who didn't know him well no doubt thought he was a fool. But he was not. There was nothing vicious or pompous about him. And most of those who knew him well may have laughed at his foibles, but regarded him with affection and respect. I've heard of worse brothers-in-law. Thank you.

CHIEF JUSTICE HENDRY: Thank you, Mr. Gillan.

JUDGE KRIVOSHA: Your Honors, that concludes all of the members that I've asked today to appear before the Court. I would now move the Court that the foregoing remarks be memo-

rialized in the permanent records of this Court and that a copy of that record be presented to the family of Chief Justice Paul W. White.

CHIEF JUSTICE HENDRY: All right. Thank you. That motion will be sustained.

I would like the record of these proceedings to recognize several other members of this Court who are here today with us. I see Former Justice Harry Spencer, Tom White and Nick Caporale. Thank you for coming. And I see Federal District Court Judge Warren Urbom. Judge Urbom, thank you for coming. Also Judge William Rist is here with us today; thank you. I also see County Court Judge C. G. Wallace. You do honor to Judge White by your presence, and all of you do, and thank you for coming.

I will take this opportunity to note for those present that this entire proceeding has been memorialized by the court reporter. That after these proceedings have been transcribed by the court reporter copies will be distributed to family members and those of you who have spoken on behalf of Chief Justice White. We will also forward a copy of the transcription to West Publishing for inclusion in its Northwestern Reporter.

On behalf of the Nebraska Supreme Court, I extend its appreciation to former Chief Justice Norman Krivosha, who chaired the Court's memorial committee and who, with the assistance of Janet Hammer of the Court Administrator's Office, was primarily responsible for organizing this ceremonial session.

This concludes the special ceremonial session of the Nebraska Supreme Court. The Court would encourage any of the participants, family members and friends of Judge Paul White to remain in the courtroom for a moment to greet each other on this occasion. Again, thank you all for your participation in being here. And we are adjourned. Thank you.

(Proceedings adjourned.)

IN RE R.B. PLUMMER MEMORIAL LOAN FUND TRUST. UNIVERSITY OF NEBRASKA FOUNDATION, APPELLANT, V. STATE OF NEBRASKA, APPELLEE. IN RE KARL RICHARD WIESE STUDENT LOAN FUND TRUST. UNIVERSITY OF NEBRASKA FOUNDATION, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

661 N.W.2d 307

Filed May 23, 2003. Nos. S-02-463, S-02-464.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that when 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. **Trusts: Equity: Appeal and Error.** Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.
4. **Trusts: Charities: Appeal and Error.** When the issue is whether a trial court should apply the doctrines of cy pres or deviation, an appellate court reviews the issue de novo on the record.
5. **Trusts: Charities: Equity: Courts.** Courts will preserve and enforce charitable trusts if possible under the rules of law.
6. **Trusts: Charities: Equity: Intent.** Where a definite charitable trust is created, the failure of the particular mode by which its dominant purpose is to be effected will not defeat the charity, but under such circumstances a court of equity will, under the judicial cy pres doctrine, substitute another mode if it may be done within the scope of the donor's dominant purpose.
7. **Trusts: Charities: Intent.** The doctrine of cy pres is a principle of construction based on a judicial finding of the donor's intention as applied to new conditions.
8. ____: ____: ____. The doctrine of cy pres will not be applied if the donor indicates the gift shall be used for a narrow specific purpose because that would defeat the purpose of the donor.
9. **Trusts: Charities: Wills: Intent.** Where the specific purpose recited in a trust cannot be accomplished because of changed conditions, and a more general charitable

purpose is shown by the will, the cy pres doctrine may be resorted to, not to defeat the donor's intention, but to effectuate it.

10. ____: ____: ____: ____. Cy pres does not apply until it clearly appears that the will or wish of the donor cannot be given effect.

11. ____: ____: ____: ____. The deviation doctrine is applicable to make changes in how a charitable trust is administered, while cy pres is used where a change of the settlor's specific charitable purpose is involved.

Appeals from the County Court for Lancaster County: MARY L. DOYLE, Judge. Affirmed.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Don Stenberg, Attorney General, Leslie Levy, and, on brief, Christine Vanderford, for appellee.

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

CONNOLLY, J.

The University of Nebraska Foundation (Foundation) appeals from orders of the county court denying its requests to revise the intent of two testamentary charitable trusts of two decedents. The trusts require income to be used for loans to students. The Foundation contends that there is inadequate student interest for loans from the trusts and argues that the doctrines of cy pres or deviation can be applied to allow income from the trusts to be distributed as scholarships.

We determine that cy pres does not apply because the purposes of the trusts have not become impractical to carry out. Also, deviation does not apply because the Foundation seeks to change the ultimate purposes of the trusts and because it is unnecessary to change the administration of the trusts to meet their purposes. We affirm.

BACKGROUND

This action involves two testamentary trusts: (1) the Karl Richard Wiese Student Loan Fund Trust (Wiese Trust), created by the will of C.R. Wiese, and (2) the R.B. Plummer Memorial Loan Fund Trust (Plummer Trust), created by the will of Ralph Ballard Plummer. Wiese's last will and testament, dated in 1967,

bequeaths the residue of his estate to the Foundation to be held in trust and provides in part:

> The net income of this trust shall be expended annually by the Foundation for student loans to meritorious and worthy . . . students regularly enrolled in any college or school of the University of Nebraska. . . . These loans shall be recommended to the Foundation by the General Student Loan Committee of the University of Nebraska. These loans shall be made upon such terms and conditions as the Foundation shall determine advisable, but the same shall be in accordance with the usual practice, then in effect, with respect to such loans of the Board of Regents of the University of Nebraska. If during the year there be no students as described heretofore to whom, in the discretion of the Foundation, such loans should be made, income for such period of time or any part thereof shall be added to the principal of the trust.

Plummer's last will and testament, dated in 1947, bequeaths property and the residue of his estate to the Foundation:

> To create, and keep invested in safe and first class securities, with which to create a fund, which fund is to be loaned to needy students, attending the Agricultural College of Nebraska, to assist them in their education and to be later returned and again become a part of said foundation fund and again to be re-loaned to other students for the same purpose.

In 2001, the Foundation filed petitions alleging that because of changes in the financial aid arena, students are reluctant to pursue loans from multiple sources because federal loans are available at competitive rates. As a result, portions of the income from the trusts are left unused each year. The Foundation asked that the doctrines of cy pres or deviation be applied to allow it to give the annual unused income from the funds to students in the form of scholarships.

The record shows that at the end of fiscal year 2001, the Wiese Trust had a market value of $2,629,687, had an income balance of $249,443 that was not used for loans, and had distributed $10,630 in new loans. At the end of fiscal year 2001, the Plummer Trust had a market value of $848,134, had an income

balance of $633,196 that was not used for loans, and had distributed $13,650 in new loans.

At trial, Jack Schinstock, an associate dean of the College of Agricultural Sciences and Natural Resources at the University of Nebraska-Lincoln, testified about the Plummer Trust. The Plummer loan funds are available to students year round. Flyers about loans through the Plummer Trust have been distributed to students, and academic advisors have been made aware of the existence of the fund.

About 15 to 20 students request loan funds from the Plummer Trust each year. Schinstock uses the Foundation's system to determine if a student's financial needs qualify the student for a loan from the Plummer Trust. He also requires applicants to check with the scholarship and financial aid office to be sure that a loan will not put the student's federal financial aid at risk. Schinstock's college established a loan limit of $3,000, but would consider providing more in a compelling case. A loan from the Plummer Trust is interest free while the student is in school and until 6 months after graduation. After that, the interest rate is 6 percent. Some federal student loans are interest free while the student is in college, and others are not. The loans generally have interest rates between 6 and 9 percent.

Schinstock admitted that he could not state what changes occurred in the area of financial assistance that made the Plummer Trust loans less desirable to students. He also admitted that an interest-free loan would allow students to pay off the loan faster than a federal loan.

David O'Doherty, associate general counsel of the Foundation, testified that the Foundation discourages donors to set up loan funds because it cannot use them efficiently. Some donors insist on loan funds because they feel strongly that a student should pay for college, but O'Doherty did not know whether that was a belief held by either Plummer or Wiese. According to O'Doherty, Wiese's will authorized a committee to choose how to administer the fund. The committee chose to use the fund for short-term loans that have to be paid back within 6 months with a 6-percent interest rate. According to O'Doherty, the Foundation has more long-term loan funds available than it has need for. He also stated

that he believed that the Foundation had a fiduciary duty to charge interest on the loans.

The record is unclear about how the availability of loans from the Wiese Trust is advertised to students or whether they are advertised to upper class students.

According to O'Doherty, there has been a trend over the past 10 years resulting in a 50- to 60-percent decrease in the number of loans students seek from loan funds.

On cross-examination, O'Doherty admitted that he was not familiar with changes in the way the federal government administers student loan programs which would affect the use of the trust funds for student loans. But he stated that in cases involving the medical college, students prefer to get all their loans from the same creditor. He admitted that there was nothing in the trust documents that would prevent the Foundation from providing some students all of their loans from the trusts. He also admitted that the committee could charge interest that would make loans from the trusts more attractive to students than federal loans.

The court found that the wills did not restrict the size of loans or the amount of interest that could be charged. The court further found that the Foundation failed to establish the existence of changes in the financial aid arena which have substantially defeated or impeded the attainment of the original charitable intent to use the trusts for loans. The court determined that the continued use of the trusts for loans was neither impossible nor impracticable and denied the Foundation's requests to revise the trusts to allow them to distribute scholarships. We consolidated the cases for appeal.

ASSIGNMENT OF ERROR

The Foundation assigns, rephrased, that the county court erred by denying its request to modify the trusts.

STANDARD OF REVIEW

[1,2] We have said that in the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002). In an appeal of an equitable action, an appellate court tries factual questions

de novo on the record, provided that when 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. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003).

[3,4] Here, the issue is whether these actions are appeals of probate matters or appeals of equity questions. We have also said that appeals involving the administration of a trust are equity matters and are reviewable in this court de novo on the record. *In re Zoellner Trust*, 212 Neb. 674, 325 N.W.2d 138 (1982). The doctrines of cy pres and deviation are equitable doctrines used to adjust the manner in which a trust is administrated. Accordingly, we determine that when the issue is whether a trial court should apply cy pres or deviation, we review the issue de novo on the record.

ANALYSIS

The Foundation contends that cy pres should apply to allow funds from the trusts to be used as scholarships. It argues that the purpose of the trusts would remain intact because scholarships would be given only after all possible loans from the trusts had been disbursed. The parties do not dispute that the trusts are charitable in nature.

[5,6] Courts will preserve and enforce charitable trusts if possible under the rules of law. See *Garwood v. Drake University*, 188 Neb. 605, 198 N.W.2d 336 (1972). Where a definite charitable trust is created, the failure of the particular mode by which its dominant purpose is to be effected will not defeat the charity, but under such circumstances a court of equity will, under the judicial cy pres doctrine, substitute another mode if it may be done within the scope of the donor's dominant purpose. *First Trust Co. v. Thompson*, 147 Neb. 366, 23 N.W.2d 339 (1946).

We have adopted the doctrine of cy pres using the following language from the Restatement (Second) of Trusts § 399 at 297 (1959):

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or

> impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

[7-10] The doctrine of cy pres is a principle of construction based on a judicial finding of the donor's intention as applied to new conditions. *School District v. Wood*, 144 Neb. 241, 13 N.W.2d 153 (1944). The doctrine will not be applied if the donor indicates the gift shall be used for a narrow specific purpose because that would defeat the purpose of the donor. *Id.* But where the specific purpose recited cannot be accomplished because of changed conditions, and a more general charitable purpose is shown by the will, the cy pres doctrine may be resorted to, not to defeat the donor's intention, but to effectuate it. *Id.* Cy pres does not apply, however, until it clearly appears that the will or wish of the donor cannot be given effect. *In re Estate of Harrington*, 151 Neb. 81, 36 N.W.2d 577 (1949).

Here, the record does not clearly show that the purpose of the trusts cannot be given effect. The trusts' purposes are not impossible to carry out, nor are they illegal; the record does not support a conclusion that their purposes have been made impracticable. The Foundation pled that because of changes in the financial aid arena, students are reluctant to pursue loans from multiple sources because federal loans are available at competitive rates. But witnesses for the Foundation admitted that they were unaware of specific changes that caused fewer students to seek loans from the trusts. The record also shows that the Foundation can change the loan terms to make them more desirable. Thus, if students are seeking federal loans because of more favorable terms, the Foundation has the power to change the trusts' loan terms that will make them more desirable than the federal loans. As one court has noted:

> There may well be a greater need for scholarship funds than for loans. Perhaps greater social good can be accomplished by using these funds for direct grants to students, but it is not for this or any court to determine the relative wisdom of a bequest and to substitute its judgment for that

> of the testator. The function of the court is to probate wills and not to write them.

Estate of Berry, 29 Wis. 2d 506, 517, 139 N.W.2d 72, 78 (1966). Because the ultimate purpose of the trusts have not become impossible, impracticable, or illegal, the doctrine of cy pres does not apply.

[11] Relying in part on *Sendak v. Trustees of Purdue Univ.*, 151 Ind. App. 372, 279 N.E.2d 840 (1972), the Foundation argues that if cy pres does not apply, the doctrine of deviation should apply. We have recognized that deviation is another equitable principle applicable to charitable trusts. See, *Wood v. Lincoln General Hospital Assn.*, 205 Neb. 576, 288 N.W.2d 735 (1980); Restatement (Second) of Trusts § 381 (1959). The deviation doctrine is applicable to make changes in how a charitable trust is administered, while cy pres is used where a change of the settlor's specific charitable purpose is involved. *Wood v. Lincoln General Hospital Assn., supra.*

For example, in *Sendak*, the terms of a charitable trust provided for loans to students up to $500. The record contained evidence that when the trust was created, the restrictions on the loans were more lenient than the restrictions on loans provided by Purdue University. The record also contained evidence that the cost of education and the amount of assistance needed by students had risen dramatically since the time the trust was created and that the trust was accumulating unused assets. The court determined that the doctrine of cy pres was not applicable because the purpose of the trust had not become impossible, impractical, or illegal. But the court applied the deviation doctrine to

> permit the trustees to deviate from the mechanical means of administration of the trust where circumstances not known or foreseen by the testator have come about, and where such change in circumstances in combination with the administrative means provided in the trust would defeat or substantially impair the accomplishment of the intended trust purpose.

Sendak v. Trustees of Purdue Univ., 151 Ind. App. at 379-80, 279 N.E.2d at 845. Under the doctrine, the court removed restrictions on the amount of the loans and who they could be given to, but the ultimate purpose of the trust to provide loans was not changed.

Here, nothing in the wills indicates that the use of the trusts for loans is a matter of administration. Instead, the ultimate purposes of the trusts are to provide loans to students. The Foundation seeks to change the ultimate purposes of the trusts by allowing them to provide scholarships. Because this is an attempt to change the ultimate purposes of the trusts, the doctrine of deviation, which applies to trust administration, does not apply.

The Foundation contends that the trusts' purposes will not be changed because they will be used first for loans and scholarships will be given only after all loan funds are disbursed. But the record fails to show that all or more of the funds cannot be used for loans. As previously discussed, the Foundation may change the loan terms. We are unwilling to allow a change affecting the ultimate purposes of the trusts when those purposes might be carried out through changes in the terms of the loans. We conclude that under the application, the deviation doctrine is inappropriate.

We conclude that the doctrines of cy pres and deviation do not apply. Accordingly, we affirm.

AFFIRMED.

WRIGHT and STEPHAN, JJ., not participating.

KELLY MACKE, APPELLEE, V.
EDDIE PIERCE, APPELLANT.
661 N.W.2d 313

Filed May 23, 2003. No. S-02-983.

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. **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.
3. **Torts: Intent: Proof.** The elements of a cause of action for tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Reversed and remanded with direction.

William R. Settles, of Lamson, Dugan & Murray, L.L.P., for appellant.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

This is the second appearance of this case before this court. Kelly Macke sued Eddie Pierce, M.D., alleging that Pierce tortiously interfered with a business expectancy when Pierce disclosed to Burlington Northern Railroad Company (BNRR), Macke's prospective employer, findings Pierce made during a physical examination of Macke. After Pierce's disclosure, Macke's employment application with BNRR was disapproved. A jury returned a verdict in favor of Pierce. Prior to the entry of judgment on the jury verdict, Macke filed a motion for new trial, which was sustained by the district court. Pierce appealed. Because Macke's motion for new trial was premature, this court dismissed Pierce's appeal for lack of jurisdiction. See *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002). Thereafter, the district court entered a new order granting Macke's motion for new trial, from which Pierce now appeals. We reverse, and remand with the direction that the verdict and judgment entered thereon in favor of Pierce be reinstated.

STATEMENT OF FACTS

Macke applied for employment with BNRR on February 13, 1995. As part of the application process, Macke underwent a preemployment physical with Richard Byrd, M.D. Byrd completed the physical; medically approved Macke for employment; and, with Macke's permission, forwarded Macke's medical history, including her history of scoliosis, to BNRR.

BNRR hired Macke as a probationary employee on April 3, 1995. Her position was as a "Maintenance of Way Laborer." Her

employment status was "at-will." According to the BNRR employment procedure, Macke's application could be "disapproved" for 60 days following her hiring. Macke completed several days of job training, and on April 7, she was furloughed.

On April 25, 1995, Macke saw Pierce with a complaint of severe neck pain. Pierce treated Macke conservatively with medication and restricted her to sedentary work. He apparently expressed concern to Macke about her ability to perform her proposed duties with BNRR, given her prior medical history. Additionally, on April 25, Pierce contacted BNRR's medical department and related Macke's medical condition and her restriction to sedentary work to one of BNRR's physicians.

On May 4, 1995, BNRR called Macke and told her to report for active duty. A short time later, BNRR called Macke back and advised her that she had been restricted to sedentary work by Pierce. Macke called Pierce to resolve the job assignment situation. The record suggests that Macke thereafter underwent a functional capacity evaluation (FCE) with a physical therapist to determine whether she could perform as a maintenance of way laborer with BNRR and that based on the FCE, the physical therapist assigned Macke new work restrictions, superseding those assigned by Pierce. The record further suggests that due to these new restrictions, Macke's BNRR supervisor did not feel that Macke could safely perform work as a maintenance of way laborer. Thereafter, Macke's BNRR employment application was "disapproved."

In 1996, Macke sued BNRR in federal district court under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (2000). In an unpublished memorandum opinion and order filed May 11, 1998, the federal district court granted BNRR's motion for summary judgment, concluding that due to her restrictions, Macke did not possess the requisite skills and abilities for the position of a maintenance of way laborer. The U.S. Court of Appeals for the Eighth Circuit affirmed the federal district court's grant of summary judgment. *Macke v. Burlington Northern R. Co., Corp.*, No. 98-2409, 1999 WL 88931 (8th Cir. Feb. 19, 1999) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 175 F.3d 1024 (8th Cir. 1999)).

While the federal suit was pending, on April 18, 1997, Macke filed suit against Pierce in state district court, alleging, inter alia,

that Pierce had breached his duty of physician-patient confidentiality. Macke failed to serve Pierce with process within 6 months, and the suit was dismissed.

On February 25, 1999, Macke filed the present action against Pierce, based on the theory that Pierce had tortiously interfered with Macke's valid business expectancy of employment with BNRR. Pierce filed two summary judgment motions. The first alleged that Macke's new lawsuit was governed by the 2-year professional negligence statute of limitations and was time barred, and the second alleged that because Macke could not perform the essential functions of the maintenance of way laborer position, as determined by the federal district court, Macke did not have a valid business expectancy as a matter of law. Both of these motions were denied by the district court. The district court granted, however, Macke's motions in limine, thereby ruling that evidence regarding her unsuccessful federal court litigation and her FCE were inadmissible during trial.

The case was tried to a jury commencing August 7, 2000, and on August 9, the jury returned a unanimous verdict in favor of Pierce. On August 11, Macke filed a motion for new trial, which the district court granted. Pierce appealed the district court's order. In *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002), we dismissed Pierce's appeal, due to the lack of an entry of judgment on the jury verdict prior to the filing of Macke's motion for new trial.

Following remand after appeal, the district court entered judgment on the jury verdict on July 8, 2002. On July 12, Macke renewed her motion for new trial on the sole ground that the jury's verdict was not sustained by sufficient evidence. On August 16, the district court granted Macke's motion for new trial. Pierce appeals.

ASSIGNMENTS OF ERROR

On appeal, Pierce assigns five errors. Pierce claims, renumbered, that the district court erred (1) in sustaining Macke's motion for new trial; (2) in determining that Macke's present cause of action was not governed by the professional negligence 2-year statute of limitations; (3) in overruling Pierce's motion for summary judgment based upon the determination that Macke

could not perform the essential functions of the job as determined by the federal courts; (4) in excluding any evidence, failing to take judicial notice, and failing to instruct the jury regarding the determinations of the federal courts that Macke could not perform the essential functions of the job; and (5) in excluding evidence during trial relating to Macke's FCE.

Because we find merit in Pierce's claim that the district court erred by sustaining Macke's motion for new trial, we do not discuss the four remaining assignments of error.

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. *Bowley v. W.S.A., Inc.*, 264 Neb. 6, 645 N.W.2d 512 (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. *Erica J. v. Dewitt*, 265 Neb. 728, 659 N.W.2d 315 (2003).

ANALYSIS

Tortious Interference With Business Expectancy: Unjustified Interference.

For his first assignment of error, Pierce claims that the district court erred in granting Macke's motion for new trial. We agree.

As an initial matter, we note that there is some question as to the propriety of Macke's cause of action against Pierce based on tortious interference with a business expectancy. Specifically, Pierce argued at trial and again on appeal that Macke's claim against him sounds exclusively in professional negligence and that as a consequence, this case is barred by the professional negligence 2-year statute of limitations. See Neb. Rev. Stat. § 25-222 (Reissue 1995). Given our resolution of this appeal, we need not analyze this argument. See *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002) (stating appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it). Therefore, for purposes of this opinion, we

analyze the appeal based on principles surrounding tortious interference with a business expectancy.

[3] In determining whether the district court abused its discretion in granting Macke's motion for new trial, it is important to set forth the elements of a cause of action for tortious interference with a business relationship or expectancy. In *Huff v. Swartz*, 258 Neb. 820, 825, 606 N.W.2d 461, 466 (2000), we identified those elements as follows:

> " '(1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.' "

(Quoting *Koster v. P & P Enters.*, 248 Neb. 759, 539 N.W.2d 274 (1995).) In *Huff*, we observed that the Restatement (Second) of Torts § 766 (1979) describes a cause of action similar to that which we have recognized for tortious interference with a business relationship or expectancy. Under the Restatement, *supra* at 7, liability may be imposed upon one who "intentionally and improperly interferes with the performance of a contract." We further noted that the Restatement, *supra*, § 767 at 26-27, lists the following seven factors to consider in determining whether interference with a business relationship is "improper":

> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.

In *Huff*, we concluded that these seven factors should be used for determining whether interference is " 'unjustified' " under our law. See 258 Neb. at 829, 606 N.W.2d at 468. We also quoted with approval the Restatement, *supra*, § 767, comment *b.*, which provides:

> "The issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation. This Section states the important factors to be weighed against each other and balanced in arriving at a judgment; but it does not exhaust the list of possible factors."

Huff, 258 Neb. at 829, 606 N.W.2d at 468.

In summary, whether an act amounts to tortious interference under Nebraska law depends, in part, on whether that act was "unjustified." To determine if an act was unjustified, we have adopted the seven factors set forth in the Restatement, *supra*, § 767, which include the actor's motive and the interests sought to be advanced by the actor. In this connection, as noted above, we have recognized that whether a particular action is "unjustified" depends upon a " 'choice of values' " and a determination as to whether " 'the conduct should be permitted without liability, despite its effect of harm to another.' " *Huff v. Swartz*, 258 Neb. 820, 829, 606 N.W.2d 461, 468 (2000). We analyze this appeal by reference to the factors outlined in *Huff*.

Evidence of Alleged "Unjustified" Interference and Jury's Verdict in Favor of Pierce.

Following a jury verdict in favor of Pierce, Macke filed a motion for new trial based upon Neb. Rev. Stat. § 25-1142(6) (Cum. Supp. 2002), which provides that a verdict "shall be vacated and a new trial granted on the application of the party aggrieved for any of the following causes affecting materially the substantial rights of such party: . . . (6) that the verdict . . . is not sustained by sufficient evidence or is contrary to law." The district court sustained the motion. For reasons explained below, this ruling was in error and requires reversal.

During the trial, the district court instructed the jury in language which closely follows our opinion in *Huff*. With respect to the jury's evaluation of the evidence as to whether "an act of interference [was] unjustified," in instruction No. 11, the court identified the following factors:

> 1. The nature of [Pierce's] conduct;
> 2. [Pierce's] motive;
> 3. The interests of [Macke] with which [Pierce's] conduct interferes;
> 4. The social interests in protecting the freedom of action of [Pierce] and the contractual interests of [Macke];
> 5. The proximity or remoteness of [Pierce's] conduct to the interference; and
> 6. The relations between the parties.

With regard to the application of these factors, the district court instructed the jury in instruction No. 11 as follows:

> The determination of whether an interference is unjustified depends upon a comprehensive appraisal of these factors. And the decision is whether it was unjustified under the circumstances - that is under the particular facts of the individual case, not in terms of rules of law or generalizations.
>
> The issue in each case is whether the interference is unjustified or not under the circumstances; whether, upon a consideration of the relative significance of the factors involved the conduct should be permitted without liability, despite its effect of harm to another.

Neither party objected to or challenged this instruction on appeal.

In support of her claim that Pierce's "interference" was "unjustified," and therefore the jury's verdict was in error and required a new trial, Macke relies upon the following trial testimony from Pierce:

> Q There was, Doctor, no medical duty that justified what you did, that justified contacting Burlington Northern; isn't that right?
>
> [Pierce:] Once again, I can just state that my train of thought was that I was concerned about her going out and injuring herself on the heavy manual labor job since she had neck pain.
>
> Q There was no medical duty that would have justified violating physician/patient confidentiality; isn't that right?
>
> A No. In retrospect, I should not have violated that physician/patient confidentiality rule.

In her brief, Macke also relies on Pierce's testimony in which she claims Pierce "agree[d] with the American Medical Association's statement on physician-patient confidentiality . . . which prohibits disclosure of patient information under all but a very few discrete circumstances . . . none of which applied to [Macke's] visit." Brief for appellee at 37. Macke claims that "[b]ased on this ***uncontroverted*** evidence, [Macke] met her burden of proof on this element . . . ." (Emphasis in original.) *Id.*

We disagree with Macke's characterization of the significance of Pierce's testimony and further disagree that the evidence was uncontroverted that Pierce's actions were "unjustified." Although Pierce does not challenge that his disclosure of Macke's medical condition to BNRR violated the duty to maintain physician-patient confidentiality, such breach standing alone does not establish liability under Macke's theory that Pierce tortiously interfered with a business expectancy.

The record shows that Pierce testified as follows:

> Q Well, did you ever think that what you were doing might cause [Macke] to lose her job?
>
> [Pierce:] That was not my intention at all.
>
> Q Did you ever think that what you were doing might cause her to lose her job, Doctor?
>
> A I did not think that at the time, no.
>
> . . . .
>
> Q Doctor, what was you[r] motive in calling [BNRR's physician]?
>
> A My thinking at the time was that I didn't want her to have a further cervical neck injury, further injury on the job.
>
> Q Did you want her to have a period of time to heal before she had to go to work on the track?
>
> A If someone presents with severe neck pain, she needed time to heal, yes.
>
> Q Did you have any interest at all in seeing Ms. Macke disqualified from her job?
>
> A No.
>
> Q Did you have any interest at all in making sure that [BNRR] disqualified her from employment?
>
> A No.

. . . .

Q And it's your position that that's why you called, you didn't want her to get hurt; is that right?

A Yes.

Our review of the trial record leads us to conclude that there was ample evidence which supported the jury's verdict. As such, the jury's verdict in favor of Pierce was sustained by sufficient evidence. See *Jones v. Meyer*, 256 Neb. 947, 594 N.W.2d 610 (1999). In evaluating the evidence, there was sufficient evidence for the jury to have found Pierce's action in contacting BNRR was motivated by protecting his patient from harm, and therefore, his communication with BNRR was not "unjustified." Consistent with the jury instruction, there was sufficient evidence by which the jury could have found that Pierce's telephone call to BNRR relating Macke's medical condition and her restriction to sedentary work was in the "nature" of ensuring that Macke avoided subsequent injury, rather than an intentional act to deprive Macke of employment.

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. *Bowley v. W.S.A., Inc.*, 264 Neb. 6, 645 N.W.2d 512 (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. *Erica J. v. Dewitt*, 265 Neb. 728, 659 N.W.2d 315 (2003). While our scope of review of a trial judge's decision granting a motion for new trial is limited to an abuse of discretion standard, we have stated that a trial judge does not have "unbridled discretion" to grant a new trial on a verdict with which he or she disagrees. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 115, 629 N.W.2d 511, 525 (2001). Given the record in this case, we conclude that there was sufficient evidence to support the jury's verdict and that the district court abused its discretion by depriving Pierce of the jury verdict in his favor when it sustained Macke's motion for new trial. Such abuse of discretion requires reversal.

CONCLUSION

The district court's order granting Macke's motion for new trial is reversed, and the cause is remanded to the district court with directions to reinstate the jury verdict and the July 8, 2002, judgment in favor of Pierce.

REVERSED AND REMANDED WITH DIRECTION.

STEPHAN, J., not participating.

NORWEST BANK NEBRASKA, N.A., PERSONAL REPRESENTATIVE OF THE ESTATE OF RALPH C. KATZBERG, ET AL., APPELLANTS, V. LOUISE C. KATZBERG, APPELLEE.

661 N.W.2d 701

Filed May 30, 2003. No. S-02-523.

1. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that when 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.
2. **Wills: Joint Tenancy.** Property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other and does not pass by virtue of the provisions of the will of the first joint tenant to die.
3. **Bonds: Joint Tenancy: Intent.** In order to find a joint tenancy in the ownership of bonds, a court must find a clear expression of an intent to create a joint tenancy.

Appeal from the District Court for Adams County: TERRI HARDER, Judge. Affirmed.

Roger Holthaus and Diana J. Vogt, of Holthaus Law Offices, P.C., L.L.O., for appellants.

Mark A. Beck, of Beck Law Office, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Norwest Bank Nebraska, N.A., personal representative of the estate of Ralph C. Katzberg; Carol Bentz; Ann R. McGrath; and Sue Ward (collectively the appellants) brought this equitable

action against Ralph's widow, Louise C. Katzberg, in the district court for Adams County seeking a judgment against Louise in the amount of an investment account that the appellants asserted was the property of the estate. At issue is whether the investment account with a brokerage house, consisting of municipal bonds and titled as the joint property of Ralph and Louise, became the sole property of Louise on Ralph's death or whether it was part of Ralph's estate. The district court concluded that the investment account was a joint account with rights of survivorship held by Ralph and Louise and that by operation of law, the balance of the account became the property of Louise on Ralph's death. The district court therefore dismissed the appellants' petition. The appellants filed this appeal. We affirm.

STATEMENT OF FACTS

Ralph and Louise were married on August 21, 1985. On that same day, Ralph and Louise entered into a prenuptial agreement. The prenuptial agreement contained the following provision:

> During the marriage, the parties agree to pool their social security, civil service and farm incomes and to deposit them into joint bank accounts and to use these funds for their combined living expenses. Any interest income shall remain the separate property of each. Any income not used for day to day living expenses shall be invested in jointly owned investments which shall pass to the surviving joint tenant at time of death of first joint tenant.

Elsewhere in the prenuptial agreement, it was stated that "it is mutually desired by the parties that the property and estate of each shall remain separate and be subject only to the control of its respective owner." Lists of Ralph's and Louise's assets were attached as exhibits to the prenuptial agreement. Ralph's assets included, inter alia, "IM-IT Bonds" totaling $25,000; "Savings Accounts & C.D.'s" totaling $22,000; "Government Bonds — E & H" with a face value totaling $382,500; and "Municipal Bonds — Non-Taxable" with a face value totaling $25,000.

On July 22, 1993, Ralph opened an investment account at Edward Jones (account 2818). Account 2818 was titled to Louise and Ralph and was designated as a joint account with rights of survivorship.

On November 3, 1993, Ralph executed a will which acknowledged that Louise was his wife; that he had no children; and that he had three nieces, Bentz, McGrath, and Ward. The will contained the following specific bequest:

> I give and devise to my nieces, Ann R. McGrath, Sue Ward, and Carol Bentz, equally share and share alike, the sum of Thirty Thousand Dollars ($30,000.00), to be funded by the Coupon Bonds and other accounts that may be in joint tenancy with my wife, but are set forth in my Pre-Nuptial Agreement. It was not my intent to have these accounts pass to my wife upon my death, but was done for the convenience of accounting and filing of tax returns.

The will designated Louise as residuary beneficiary, and Bentz, McGrath, and Ward as residuary beneficiaries in the event that Louise did not survive Ralph for 30 days.

Ralph died on August 8, 1996. Norwest Bank Nebraska was appointed as personal representative of Ralph's estate, and the November 3, 1993, will was filed for probate on September 27, 1996. The appellants subsequently initiated the present action and filed the operative amended petition on February 8, 1999. The appellants alleged in the amended petition that account 2818 was created by Ralph when he transferred funds from an Edward Jones account that was owned solely by him. The appellants alleged that Ralph did not intend to create a right of survivorship in favor of Louise in account 2818 and that the prenuptial agreement and the will were evidence of such intent. The appellants sought a judgment against Louise in the amount of Ralph's interest in account 2818, which they asserted was the property of his estate.

The appellants and Louise each filed motions for summary judgment, which motions were overruled on June 8, 2001. Trial in the matter was held February 28, 2002. At trial, Rebecca Maddox, an account representative with Edward Jones, testified that she assisted Ralph in opening account 2818. She informed Ralph of the consequences of designating an investment account as being jointly owned with rights of survivorship and explained that on his death, the property would become the sole property of the joint owner. Maddox testified that, being so informed, Ralph indicated that he nevertheless wanted account 2818 to be

titled as jointly owned by him and Louise with rights of survivorship. Maddox testified that account 2818 was used to hold investments that were mainly municipal bonds.

The attorney who prepared Ralph's will also testified. The attorney testified that he advised Ralph that the language in the will attempting to avoid the legal consequences of a joint tenant account would likely not be effective. It is undisputed that Ralph took no steps to retitle account 2818 in his name alone or otherwise.

On April 17, 2002, the district court entered an order dismissing the appellants' petition. The court found that the prenuptial agreement clearly anticipated the creation of joint accounts and the investing of Ralph and Louise's joint funds. The court concluded that account 2818 was a joint tenant account with rights of survivorship, that account 2818 became the sole property of Louise upon Ralph's death, and that the designation of account 2818 as joint property had not been overcome by Ralph's will or any other evidence presented by the appellants. The appellants filed this appeal of the district court's order.

ASSIGNMENTS OF ERROR

The appellants assert generally that the district court erred in determining that they failed to establish that Ralph did not intend account 2818 to be held with Louise as joint property with rights of survivorship. They assert specifically that the district court erred in (1) failing to enforce the terms of the prenuptial agreement between Ralph and Louise, (2) finding that the prenuptial agreement could not overcome the designation of account 2818 as a joint account with rights of survivorship, (3) declaring Louise the sole owner of account 2818, and (4) failing to consider proof of Ralph's intent that the transfer of certain property to account 2818 did not affect such property's status as his sole property. The discussion of all assignments of error is combined in our analysis below.

STANDARD OF REVIEW

[1] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that when 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. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003).

ANALYSIS

At issue in this case is whether account 2818 was property held in joint tenancy by Ralph and Louise with rights of survivorship which became Louise's sole property on Ralph's death or whether it was property which should have been included in Ralph's estate.

Referring to the evidence, Louise argues that the order of the district court should be affirmed. Louise notes that account 2818 was held in joint tenancy with rights of survivorship and points specifically to evidence that account 2818 was so titled and to testimony by Maddox that Ralph knowingly indicated his intent that account 2818 be so titled. Louise also points to the testimony of Ralph's attorney to the effect that he advised Ralph that Ralph's will would not likely defeat the legal consequences of the account titled joint tenants with rights of survivorship.

The appellants argue that the district court's order is in error. The appellants claim that the evidence presented by Louise is contradicted by the terms of the prenuptial agreement and by Ralph's will which they assert indicate that Ralph did not intend account 2818 to become Louise's property on his death, but instead indicate that account 2818 was to be part of his estate from which the specific bequest of $30,000 to Bentz, McGrath, and Ward could be satisfied.

In their briefs, the parties refer to Neb. Rev. Stat. § 30-2723(a) (Reissue 1995), which provides in part that "on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties," and to Neb. Rev. Stat. § 30-2724(b) (Reissue 1995), which provides that "[a] right of survivorship arising from the express terms of the account . . . may not be altered by will." We note that Neb. Rev. Stat. § 30-2716 (Reissue 1995), taken from the Uniform Probate Code, provides definitions applicable to, inter alia, §§ 30-2723 and 30-2724. Section 30-2716(1) defines "[a]ccount" as "a contract of deposit between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, and share

account." Section 30-2716(4) defines "[f]inancial institution" as "an organization authorized to do business under state or federal laws relating to financial institutions, and includes a bank, trust company, savings bank, building and loan association, savings and loan company or association, and credit union." Although not urged by either party, we note that comparable definitions included in the Uniform Probate Code and adopted in other states have been found to be inapplicable to investment accounts held by brokerage firms. See, *Berg v. D.D.M.*, 603 N.W.2d 361 (Minn. App. 1999) (investment account with stock brokerage firm not "account" under definition similar to that in § 30-2716(1)); *In re Estate of Bogert*, 96 Idaho 522, 531 P.2d 1167 (1975) (securities held in stock account with brokerage firm not "account" within meaning of similar provision derived from Uniform Probate Code). But see *Deutsch, Larrimore & Farnish v. Johnson*, 791 A.2d 350 (Pa. Super. 2002) (statutory section with definition of "account" similar to that in § 30-2716(1) held applicable to brokerage account with investment company).

[2,3] The evidence in this case indicates that account 2818 was an investment account titled as a joint account with rights of survivorship and maintained with the Edward Jones brokerage firm and that the account held municipal bonds. We have long observed that property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other and does not pass by virtue of the provisions of the will of the first joint tenant to die. *Heinold v. Siecke*, 257 Neb. 413, 598 N.W.2d 58 (1999). We have previously stated that in order to find a joint tenancy in the ownership of bonds, a court must find a clear expression of an intent to create a joint tenancy. *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985).

Whether ownership of account 2818 is determined pursuant to an analysis under Neb. Rev. Stat. §§ 30-2716 to 30-2733 (Reissue 1995) or an analysis under the common law as expressed in cases like *In re Estate of Steppuhn, supra*, the record amply demonstrates that account 2818 was owned by Ralph and Louise as joint tenants with rights of survivorship and therefore passed upon Ralph's death to Louise. The statements for account 2818 entered into evidence were titled to both Ralph and Louise with the designation "JTWROS," indicating a joint tenancy with rights of

survivorship. Maddox testified that she had explained to Ralph that titling accounts as a joint tenancy with rights of survivorship meant that the account would become the sole property of Louise upon his death and that Ralph expressed his intent that account 2818 be titled as a joint account with rights of survivorship. Ralph's attorney indicated that he advised Ralph that provisions in Ralph's will would likely not alter the treatment of a joint account upon his death.

The appellants argue that the terms of the prenuptial agreement contradict and override the title of account 2818. On the contrary, the title of account 2818 is consistent with the provision of the prenuptial agreement which provides that "[a]ny income not used for day to day living expenses shall be invested in jointly owned investments which shall pass to the surviving joint tenant at time of death of first joint tenant." Account 2818, which was opened in 1993, almost 8 years after execution of the prenuptial agreement, appears to be in the category of "jointly owned investments" contemplated by the prenuptial agreement. By virtue of such joint tenancy with rights of survivorship, account 2818 became Louise's property upon Ralph's death, and the district court's decision was correct.

CONCLUSION

Account 2818 was owned in joint tenancy by Ralph and Louise with rights of survivorship, and ownership of account 2818 therefore passed to Louise upon Ralph's death and did not pass through Ralph's estate. The district court did not err in concluding that account 2818 became the property of Louise at the time of Ralph's death, and it therefore did not err in dismissing the appellants' petition.

AFFIRMED.

MELVIN R. CERNY ET AL., APPELLANTS, V.
MICHAEL LONGLEY, M.D., ET AL., APPELLEES.
661 N.W.2d 696

Filed May 30, 2003. No. S-02-633.

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. **Jurisdiction: Final Orders: Dismissal and Nonsuit: Appeal and Error.** In the absence of a judgment or a valid order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.
3. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is not a final order and therefore is not appealable.
4. ____: ____: ____. Whether a partial summary judgment is a final, appealable order depends upon its effect.
5. ____: ____: ____. An order granting partial summary judgment is final for the purpose of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on a summary application in an action after judgment is rendered.
6. **Summary Judgment.** A partial summary judgment proceeding is not a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Order vacated, appeal dismissed, and cause remanded for further proceedings.

James D. Sherrets and Theodore R. Boecker, Jr., of Sherrets & Boecker, L.L.C., for appellants.

Mark E. Novotny and William M. Lamson, of Lamson, Dugan & Murray, L.L.P., for appellee Immanuel Medical Center, doing business as Alegent Health Immanuel Medical Center.

P. Shawn McCann, of Sodoro, Daly & Sodoro, and, on brief, Patrick W. Meyer for appellees Michael Longley, M.D.; Eric Phillips, M.D.; Nebraska Spine Surgeons, P.C.; Nebraska Spine Center, L.L.C.; and Nebraska Spine Center, L.L.P.

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

STEPHAN, J.

This is an appeal from an order of the district court for Douglas County granting a motion for new trial and entering summary

judgment in favor of the defendants in a civil action after the court had previously denied, in part, a motion for summary judgment filed by the defendants. We conclude that because there was no final judgment which could be the subject of a motion for new trial, the appeal must be dismissed for lack of jurisdiction and the cause remanded for further proceedings.

BACKGROUND

Melvin R. Cerny, one of the plaintiffs below, alleges in this action that various health care providers were negligent in treating him for an injury to his spine sustained in a motor vehicle accident. The named defendants included Michael Longley, M.D.; Eric Phillips, M.D.; Nebraska Spine Surgeons, P.C.; Nebraska Spine Center, L.L.C.; and Nebraska Spine Center, L.L.P. (collectively the surgeons) as well as Immanuel Medical Center, doing business as Alegent Health Immanuel Medical Center (the hospital). The operative amended petition alleged that the surgeons were negligent in various aspects of Cerny's care, including failing to obtain his informed consent to a surgical procedure performed on September 2, 2000. The amended petition also alleged that the hospital was liable for its own negligence and vicariously liable for the alleged negligence of the surgeons. Additional plaintiffs included Cerny's wife, Linda Cerny, who asserted a claim for loss of consortium, and Cerny's employer, Geotechnical Services, Inc., joined for the purpose of workers' compensation subrogation pursuant to Neb. Rev. Stat. § 48-118 (Cum. Supp. 2002).

After filing separate answers in which they denied liability, the surgeons and the hospital filed separate motions for summary judgment. Both motions were heard by the court at a single hearing on March 7, 2002, during which each of the parties offered evidence. In an order dated March 28, 2002, the district court granted the motions for summary judgment as to some claims but denied the motions as to others. Specifically, the court determined that there was no evidence to rebut the surgeons' showing that they exercised reasonable care in stabilizing Cerny's spine and performing the surgery. However, the court determined that the surgeons failed to make a prima facie showing in support of their motion with respect to the informed consent allegations because

the affidavits of their experts did not demonstrate a familiarity with the applicable standard of care in Omaha, Nebraska. The court therefore denied the surgeons' motion with respect to the informed consent claim. With respect to the hospital, the court determined that the plaintiffs had presented no evidence to rebut the showing that the surgeons were not agents of the hospital and determined that the hospital had no independent duty to obtain informed consent. Although the court concluded that the hospital was entitled to summary judgment with respect to those claims, it determined that the hospital had failed to make a prima facie showing that it was entitled to summary judgment on the claim that it failed to "stabilize" Cerny, and the court therefore denied the hospital's motion with respect to that issue. Thus, the court directed that the case should "proceed as to the liability of the surgeons to the Plaintiffs on the issue of informed consent, and the hospital's liability to the Plaintiffs as to their allegations that the hospital failed to 'properly stabilize' . . . Cerny's condition under the circumstances."

On April 2 and April 4, 2002, the surgeons and the hospital filed separate motions for new trial pursuant to Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002), asserting "[a]ccident or surprise, which ordinary prudence could not have guarded against," and asserting that "the decision of the Court [was] not sustained by sufficient evidence and is contrary to law." Although the surgeons' motion for new trial refers to submission of additional affidavits of their experts "outlining in more detail the fact that the standard of care for informed consent for the surgery undergone by [Cerny and] performed by the [surgeons] is the same in any locality throughout the United States," no such affidavits were filed with that motion for new trial.

A hearing on both motions for new trial was held on April 22, 2002. When the surgeons offered additional evidence, the plaintiffs objected on several grounds, including an argument that a motion for new trial under § 25-1142 was inappropriate in the procedural posture of the case. The objection was overruled, and the evidence was received. Additional evidence offered by the hospital was also received over the objection of the plaintiffs. After receiving evidence from the prior hearing which was reoffered by the plaintiffs, the court continued the hearing to May

2 in order to allow the surgeons to offer further additional evidence. The court stated that the plaintiffs would also be permitted to offer additional evidence at the continued hearing.

At the continuation of the hearing, held on May 2, 2002, the court received, over the plaintiffs' objection, additional evidence offered by the surgeons "in support of their motion for new trial." In an order filed on May 7, the court concluded that the surgeons

> were entitled to a "new trial", in view of the Court's order of March 28, 2002, and are entitled to have the Court consider additional evidence, which the Court received as Exhibits No. 19 and 21. By that evidence, the surgeons offered prima facie evidence that they were entitled to summary judgment on the issue of informed consent. . . . The Plaintiffs offered no evidence that the surgeons were required by a standard of care to give any warnings to . . . Cerny before the surgery in question, or what those warnings should have been. Therefore, the surgeons' motion for summary judgment as to informed consent should be granted.

After making a similar finding with respect to the hospital, the court concluded, "Based on the foregoing, and the Court's findings set out in its order of March 28, 2002, the motions for summary judgment of the Defendants are granted in their entirety, and Plaintiffs' Amended Petition should be dismissed, at Plaintiffs' cost."

The plaintiffs perfected a timely appeal from this order, which appeal 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). Prior to oral argument, the appeal with respect to the claims against the hospital was dismissed by agreement of the parties pursuant to Neb. Ct. R. of Prac. 8E (rev. 2000). Accordingly, we address only those issues raised on appeal with respect to the claims against the surgeons.

ASSIGNMENT OF ERROR

Although the plaintiffs assert several assignments of error, the issue upon which we base our disposition relates to their contention that the district court erred in granting the surgeons' motion for new trial.

ANALYSIS

The order which we review in this case is unusual in that it simultaneously grants the surgeons' motion for new trial and enters summary judgment in their favor. However, the only motion on behalf of the surgeons which was pending before the court at the time of the order was their motion for new trial. Accordingly, we treat the order as a ruling on that motion for the purpose of appellate review.

A motion for new trial in a civil action is governed by § 25-1142, which defines a "new trial" as a "reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court." The words "trial and" were inserted before the word "decision" in the last phrase of this sentence by an amendment enacted in 2000. See 2000 Neb. Laws, L.B. 921. The same legislation authorized a "motion to alter or amend a judgment" which, like a motion for new trial, must be filed no later than 10 days after the entry of the judgment and operates to terminate the running time for filing a notice of appeal. *Id.*, codified at Neb. Rev. Stat. §§ 25-1329 and 25-1912(3) (Cum. Supp. 2002) respectively. See Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2002).

The plaintiffs argue that a motion for new trial was procedurally improper in this case because there was never a "verdict by a jury," a "report of a referee," or a "trial and decision by the court." We agree that the 2000 amendment to § 25-1142 raises a legitimate question of whether a motion for new trial can ever be utilized as a means of seeking review by the trial court of a summary judgment or other final disposition which is not the result of a trial. We note that § 25-1329, which authorizes a motion to alter and amend a judgment, does not contain a similar reference to a "trial." However, we need not resolve this issue here because of a related but distinct jurisdictional deficiency.

[1,2] 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. *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002); *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002). In the absence of a judgment or a valid order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. *Macke v.*

Pierce, supra. See, also, *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002).

The jurisdictional issue presented in this case is whether there was ever a final order which could be the subject of a motion for new trial, assuming without deciding that such a motion was otherwise procedurally correct. Section 25-1144.01 requires that "[a] motion for a new trial shall be filed no later than ten days after the entry of the judgment." In *Macke v. Pierce, supra*, we construed § 25-1144.01 as requiring an entry of judgment, as defined in Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002), as a prerequisite to the filing of a motion for new trial. The motion for new trial in *Macke* was filed in response to a jury verdict on which judgment had not been entered. We held that because the verdict, standing alone, did not constitute a final judgment, the premature motion for new trial "was a nullity, as was the district court's ruling on the motion for new trial." *Id.* at 872, 643 N.W.2d at 677. We wrote that "[w]hile generally a district court's order ruling on a party's motion for new trial constitutes a final order, a district court's ruling on a motion for new trial is not a valid final order where, as here, both the premature motion and the ruling thereon are nullities." *Id.* We therefore vacated the order and dismissed the appeal. See, also, *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994) (holding that motion for new trial directed to nonfinal order is nullity, as is any ruling on such motion).

[3-6] In the instant case, the surgeons' motion for new trial was specifically directed to the order entered by the district court on March 28, 2002, which granted in part and in part overruled the surgeons' motion for summary judgment. A denial of a motion for summary judgment is not a final order and therefore is not appealable. *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003); *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000). Whether a partial summary judgment is a final, appealable order depends upon its effect. *City of Omaha v. Morello*, 257 Neb. 869, 602 N.W.2d 1 (1999); *Larsen v. Ralston Bank*, 236 Neb. 880, 464 N.W.2d 329 (1991). An order granting partial summary judgment is final for the purpose of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on a summary application in an action

after judgment is rendered. *City of Omaha, supra*; Neb. Rev. Stat. § 25-1902 (Reissue 1995). A partial summary judgment proceeding is not a special proceeding within the meaning of § 25-1902. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001); *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). The partial summary judgment in this case was not entered subsequently to the rendition of another judgment. Thus, the partial summary judgment entered in favor of the surgeons could not be a final order under § 25-1902 unless it determined the action and prevented a judgment, which it clearly did not. The district court's order of March 28 precluded the plaintiffs from proceeding on certain theories of recovery but permitted the action to proceed on the theory that the surgeons did not obtain Cerny's informed consent. Thus, the March 28 order was not a final order or judgment, but, rather, an interlocutory order which could not be the subject of a motion for new trial. Applying *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002), we conclude that the surgeons' motion for new trial and the order entered pursuant to the motion were nullities and that no final, appealable order appears of record.

CONCLUSION

Because the surgeons' motion for new trial and the order granting it were nullities, we vacate the order of May 7, 2002, with respect to the surgeons, dismiss the appeal, and remand the cause for further proceedings.

ORDER VACATED, APPEAL DISMISSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., not participating.

KAREN M. FOSTER, NOW KNOWN AS KAREN M. CAMPISI, APPELLANT, V. TERRY D. FOSTER, APPELLEE.

662 N.W.2d 191

Filed May 30, 2003. No. S-02-880.

1. **Divorce: Appeal and Error.** Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record.

2. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed.
3. **Records: Pleadings: Appeal and Error.** When a transcript, containing the pleadings and order in question, is sufficient to present the issue for appellate disposition, a bill of exceptions is unnecessary to preserve an alleged error of law regarding the proceedings under review.
4. **Child Support: Taxation.** A tax dependency exemption is nearly identical in nature to an award of child support.
5. **Courts: Jurisdiction: Property Settlement Agreements.** A district court retains jurisdiction to enforce all the terms of approved property settlement agreements, including agreements made to support children of the marriage past the age of majority.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Stephanie Weber Milone for appellant.

Michael B. Lustgarten, of Lustgarten & Roberts, P.C., for appellee.

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

MCCORMACK, J.

BACKGROUND

On November 24, 1999, the district court entered a decree dissolving the marriage of Karen M. Foster and Terry D. Foster. The decree incorporated terms of a property settlement agreement which was prepared and submitted by Karen's attorney and approved by Terry's attorney. The decree ordered, among other things, that Terry

> shall be allowed to claim the income tax dependency exemption for the parties' minor son Dustin Foster *provided* [Terry] is current in the payment of his child support obligation for the calendar year for which such exemption is being claimed. The parties shall execute any documentation, including tax forms, as are necessary to the claiming of the income tax dependency exemptions as specified herein.

(Emphasis in original.)

On April 8, 2002, Terry filed a motion to compel Karen to release any claim to an exemption for Dustin for the 2001 tax year by executing an Internal Revenue Service Form 8332

(Form 8332). Dustin, born October 28, 1982, reached the age of majority on October 28, 2001. See Neb. Rev. Stat. § 43-2101 (Reissue 1998).

Terry's motion came on for a hearing before a district court referee, where evidence was apparently offered and received. The referee found that Terry was current in his child support obligations and that although Dustin reached the age of majority on October 28, 2001, it was reasonable to infer an intent to allow Terry to claim Dustin as an exemption in 2001. The referee recommended that Karen be required to provide Terry with a completed Form 8332 within 2 weeks.

Karen took exception to the referee's findings and recommendation. The district court affirmed the recommendation of the referee and ordered that Karen execute "forthwith" Form 8332 for the 2001 tax year. Karen filed an appeal, and 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).

ASSIGNMENT OF ERROR

Karen assigns that the district court erred in ordering her to execute Form 8332.

STANDARD OF REVIEW

[1] Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record. *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002).

ANALYSIS

[2] Before reaching the merits of Karen's appeal, we must consider whether we have a sufficient record before us. Karen did not request that a bill of exceptions be prepared from either the district court referee's hearing or the district court hearing, and no bill of exceptions is part of the record on appeal. Terry argues that this omission requires us to affirm the district court's decision. See *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995) (it is incumbent upon party appealing to present record which supports errors

assigned; absent such record, decision of lower court will generally be affirmed).

[3] However, when a transcript, containing the pleadings and order in question, is sufficient to present the issue for appellate disposition, a bill of exceptions is unnecessary to preserve an alleged error of law regarding the proceedings under review. *Murphy v. Murphy*, 237 Neb. 406, 466 N.W.2d 87 (1991). Karen generally argues on appeal that the district court has no authority to order her to waive her claim to the dependency exemption for "the parties' minor son Dustin" after Dustin has reached the age of majority. In light of her argument, the only material fact in this case is Dustin's date of birth. That fact is established by the pleadings included in the transcript, namely, Karen's petition for dissolution of marriage, in which she alleges that Dustin was born on October 28, 1982, and Terry's responsive pleading, in which he admits that fact. The transcript on appeal is sufficient to present the issue for our disposition, and we turn to that issue now.

The divorce decree awarded Terry the dependency exemption for "the parties' minor son Dustin Foster *provided* [Terry] is current in the payment of his child support obligation for the calendar year for which such exemption is being claimed." (Emphasis in original.) The decree also ordered the parties to execute the necessary document to claim the exemptions.

[4] Karen argues that the district court has no jurisdiction to compel a dependency exemption waiver from one divorced parent to the other for a child who has reached the age of majority. It is clear that the marriage dissolution statutes do not empower district courts to order a parent to contribute to the support of children beyond their majority. See, *Zetterman v. Zetterman*, 245 Neb. 255, 512 N.W.2d 622 (1994); *Kimbrough v. Kimbrough*, 228 Neb. 358, 422 N.W.2d 556 (1988); *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986); Neb. Rev. Stat. § 42-351 (Reissue 1998). We have previously stated that a tax dependency exemption is nearly identical in nature to an award of child support. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991). See, also, *Babka v. Babka*, 234 Neb. 674, 677, 452 N.W.2d 286, 288 (1990) ("dependency exemption for income tax returns is an economic benefit").

[5] While Karen is correct in asserting that a district court cannot order an award of support beyond a child's majority, we have also held that a district court retains jurisdiction to enforce all the terms of approved property settlement agreements, including agreements made to support children of the marriage past the age of majority. *Zetterman v. Zetterman, supra.* In *Zetterman*, a husband and wife divorced, and their decree of dissolution included the approval of a property settlement agreement between them. The decree ordered that the husband would pay child support " 'for each child until age 19 or until said child becomes self-supporting, and as long thereafter as said child remains a full-time student in college, not to exceed, however, four years of college for each child.' " *Id.* at 256, 512 N.W.2d at 622. This court said that

> [t]he sole question which we must answer is whether a district court has jurisdiction to enforce child support provisions in a property settlement agreement in a dissolution of marriage case, which provisions are also set out in the court's order, where the child support provisions provide for support, on certain conditions, beyond a child's age of majority.

Id. at 259, 512 N.W.2d at 624. The husband in *Zetterman*, like Karen in this case, relied on authority which held that marriage dissolution statutes do not empower district courts to order a parent to contribute to the support of children beyond their majority. While we agreed with that statement, we also said that that was not the situation presented because of the mutual agreement of the parties as represented by the property settlement agreement. We held that a district court retains jurisdiction to enforce all the terms of approved property settlement agreements, including agreements made to support children of the marriage past the age of majority. *Zetterman v. Zetterman, supra.* The terms of Karen and Terry's divorce decree, including the allocation of the dependency exemptions, were part of a property settlement agreement. Therefore, the district court retained jurisdiction to enforce that agreement, even if the dependency exemption award encompassed a year during which Dustin reached the age of majority.

Karen argues that the language of the decree limits the district court's jurisdiction. She contends that because the decree reads

"the parties' *minor son* Dustin" (emphasis supplied), the court does not have jurisdiction once Dustin turns 19 years of age. Simply put, Karen reads the words "minor son" as words of limitation. On the other hand, Terry reads those same words as words of description, because at the time the decree was entered, Dustin was 17 years old. In our de novo review, we determine that the words "minor son" are descriptive only, and not words of limitation.

The decree provided that Terry be awarded the exemption for Dustin on the condition that he "is current in the payment of his child support obligation *for the calendar year for which such exemption is being claimed.*" (Emphasis supplied.) The district court referee found, and Karen concedes, that Terry was current in his child support obligation for 2001. Without any other specific limitation, we conclude in our de novo review that Terry was entitled to claim the dependency exemption for Dustin for the 2001 tax year.

CONCLUSION

Because the terms of the decree, including the terms awarding Terry the tax exemption, were part of a property settlement agreement, the district court retained jurisdiction to enforce those terms. The decree did not limit the award of the dependency exemption to the period of Dustin's minority. Accordingly, the decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
VICTOR B. PUTZ, APPELLANT.
662 N.W.2d 606

Filed June 6, 2003. No. S-01-777.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.

3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Due Process: Convictions: Proof.** The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged.
5. **Constitutional Law: Jury Instructions: Proof.** As long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the U.S. Constitution does not require that any particular form of words be used in advising the jury of the prosecution's burden of proof.
6. **Jury Instructions.** In construing an individual jury instruction, the instruction may not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole.
7. ____. Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.
8. **Lesser-Included Offenses.** In order to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
9. ____. To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Sarpy County, WILLIAM B. ZASTERA, Judge. Judgment of Court of Appeals affirmed.

James Martin Davis, of Davis & Finley Law Offices, for appellant.

Don Stenberg, Attorney General, Martin W. Swanson, and Kevin J. Slimp for appellee.

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

PER CURIAM.

I. NATURE OF CASE

Victor B. Putz was convicted in the district court for Sarpy County of one count of first degree sexual assault and one count of sexual assault of a child. Putz was sentenced to 2 to 6 years' imprisonment on the first count and 1 to 2 years' imprisonment on the second count, with the sentences to run concurrently. Both counts involved the same victim. Putz appealed his convictions to

the Nebraska Court of Appeals, and the Court of Appeals affirmed. *State v. Putz*, 11 Neb. App. 332, 650 N.W.2d 486 (2002). We granted Putz' petition for further review. We affirm.

II. STATEMENT OF FACTS

On June 12, 2000, the State filed an information charging Putz with first degree sexual assault, a Class II felony in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995), and with sexual assault of a child, a Class IIIA felony in violation of Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 2002). A jury trial on these charges was held beginning April 24, 2001.

The main witness at trial was M.M., who testified that Putz sexually assaulted her in the summer of 1998. Evidence admitted at trial shows that in the summer of 1998, M.M. was 12 years old and Putz was 56 years old. M.M. was a member of a horse riding club run by Putz. In addition to horse riding, the club would take part in other activities, including water-skiing.

M.M. testified that on the day of the incident, the club had been water-skiing. After the other children left, M.M. was alone with Putz at his home, and she was dressed in a swimsuit and shorts. M.M. testified that Putz removed her swimsuit and thereafter fondled and kissed her breast and her vagina. He also penetrated her vagina with his fingers. The incident ended when Putz' wife returned home. Putz then took M.M. home and told her to keep the incident a secret. She did not disclose the incident until April 27, 2000, when she told a therapist, Kimberly Plummer, about it. In addition to M.M.'s testimony, the State presented formal proof of the ages of Putz and M.M. and the testimony of Plummer, who testified regarding common reactions of minors who are victims of sexual assault.

After the State rested, Putz moved for a dismissal of the charges on the ground that the State had failed to prove a prima facie case. Specifically with regard to the charge of sexual assault of a child, Putz argued that there was no proof of separate acts of sexual contact and of penetration, but, rather, one continuous act. The court denied the motion.

In his defense, Putz presented the testimony of several children and parents who were familiar with the operation of Putz' riding club. The import of the testimony appeared to be that it

demonstrated Putz' legitimate interest in and kindness to children, his routines which apparently did not present him with opportunities to be alone with the children, and the children's and parents' continued association with Putz after the incident with M.M. was reported. The testimony also disclosed some minor differences between M.M.'s testimony and the recollection of the other children regarding collateral events.

Plummer was recalled during Putz' case. She testified regarding her therapy sessions with M.M. and her family and M.M.'s disclosure to Plummer on April 27, 2000, regarding the incident with Putz. During Plummer's testimony, Putz unsuccessfully attempted to enter certain other evidence which if admitted would have gone to M.M.'s credibility. Putz also called a child interview specialist associated with a child protection center as an adverse witness. She testified that she had interviewed M.M. for the State and that M.M. told her essentially the same version of events as M.M. had testified to at trial, with some variations. Finally, a doctor testified that he had treated M.M. on September 13, 2000, and that according to his dictated office notes, M.M. told him that the molestation occurred 6 months prior to July 2000.

The defense renewed its motion to dismiss both counts based on the State's purported failure to make a prima facie case and argued that the sexual assault of a child charge was a lesser-included offense of the first degree sexual assault charge. The district court overruled the motion to dismiss and concluded, based on the elements of the two offenses, that sexual assault of a child was not a lesser-included offense of first degree sexual assault.

At the jury instruction conference, Putz' counsel objected to the court's proposed instruction defining reasonable doubt. The court overruled Putz' objection and gave the following instruction:

> The State has the burden of proving the Defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not true, but, in criminal cases, the State's proof must be more powerful than that. It must beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty,

> and, in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find the Defendant guilty. If, on the other hand, you think there is a real possibility that the defendant is not guilty, you must give the Defendant the benefit of the doubt and find the Defendant not guilty.

The court also gave other instructions bearing a reasonable doubt, which we recite in the analysis section of this opinion.

On April 27, 2001, the jury returned a verdict finding Putz guilty of both counts. On July 6, the district court sentenced Putz to concurrent terms of imprisonment of 2 to 6 years for first degree sexual assault and 1 to 2 years for sexual assault of a child. Putz' motion for new trial was denied, and Putz appealed.

On appeal to the Court of Appeals, Putz asserted that the district court erred in (1) convicting him for both an offense and a lesser-included offense based upon the same alleged act; (2) overruling his motion to dismiss, at the close of the State's case, as to the charge of sexual assault of a child by contact; (3) excluding testimony regarding prior statements and recantations made by M.M.; and (4) submitting, over his counsel's objection, a jury instruction which (a) lowered the State's burden of proof from proving each element beyond a reasonable doubt to allowing a conviction if the jury is "firmly convinced" of the defendant's guilt and (b) shifted the burden of proof to the defendant to prove there was a "real possibility" of his innocence.

The Court of Appeals rejected Putz' assignments of error and affirmed the convictions. *State v. Putz*, 11 Neb. App. 332, 650 N.W.2d 486 (2002). We granted Putz' petition for further review of the decision of the Court of Appeals.

III. ASSIGNMENTS OF ERROR

Putz asserts, restated and combined, that the Court of Appeals erred in (1) concluding that the reasonable doubt instruction given by the district court was without error and (2) affirming his convictions for both first degree sexual assault and sexual assault of a child because, on the facts alleged in this case, sexual assault of a child is a lesser-included offense of first degree sexual assault.

IV. STANDARD OF REVIEW

[1,2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Haltom*, 263 Neb. 767, 642 N.W.2d 807 (2002). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id.*

[3] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.*

V. ANALYSIS

1. Reasonable Doubt Instruction

In his first assignment of error on further review, Putz asserts that the Court of Appeals erred in concluding that the reasonable doubt instruction given by the district court was without error. Putz argues that the instruction is defective in two respects: (1) the "firmly convinced" language lowers the State's burden of proof and (2) the "real possibility" language shifts the burden of proof to the defendant to prove a real possibility that the defendant is not guilty. We conclude that although criticism of the challenged instruction is valid, the instructions taken as a whole correctly state the burden of proof, and that the giving of the reasonable doubt instruction was not reversible error.

We note first that a pattern instruction on reasonable doubt, NJI2d Crim. 2.0, has been suggested for use by Nebraska courts. NJI2d Crim. 2.0 provides as follows:

> A reasonable doubt is one based upon reason and common sense after careful and impartial consideration of all the evidence. Proof beyond a reasonable doubt is proof so convincing that you would rely and act upon it without hesitation in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

In *State v. Garza*, 241 Neb. 934, 960, 492 N.W.2d 32, 50 (1992), this court approved an instruction substantially similar to the pattern instruction, finding that it "accurately defines the requisite standard of proof without minimizing the due process rights of"

the defendant. Instead of using the Nebraska pattern instruction, the district court in this case used the instruction quoted in the "Statement of Facts" section of this opinion. Although we conclude that the instruction given in the present case does not result in reversible error, we do find the instruction to have its faults, and we take this opportunity to note that trial courts which do not follow NJI2d Crim. 2.0 risk the possibility that the instruction will be found to be erroneous and prejudicial.

(a) Jurisprudential Support for Instruction Given in This Case

In affirming the use of the reasonable doubt instruction given in this case, the Court of Appeals noted that instruction No. 21 from the Federal Judicial Center's pattern criminal jury instructions includes an instruction identical in substance to that given by the district court and that in a concurring opinion in *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994), Justice Ginsburg endorsed the pattern instruction. See Pattern Criminal Jury Instructions: Report of the Subcommittee on Pattern Jury Instructions (Comm. on the Oper. of the Jury Sys., Jud. Conf. of the United States, Fed. Jud. Ctr. 1987). Due in large measure to the Federal Judicial Center's recommendation and Justice Ginsburg's approval of the instruction, the language at issue in this appeal has been used by trial courts in several jurisdictions, which has in turn led to challenges on appeal under the Due Process Clause.

Federal courts have consistently rejected the claim that the "real possibility" language, criticized by Putz, constitutes reversible error. See, e.g., *U.S. v. Rodriguez*, 162 F.3d 135 (1st Cir. 1998); *U.S. v. Artero*, 121 F.3d 1256 (9th Cir. 1997); *U.S. v. Conway*, 73 F.3d 975 (10th Cir. 1995); *U.S. v. Williams*, 20 F.3d 125 (5th Cir. 1994); *U.S. v. Taylor*, 997 F.2d 1551 (D.C. Cir. 1993); *U.S. v. Porter*, 821 F.2d 968 (4th Cir. 1987); *United States v. McBride*, 786 F.2d 45 (2d Cir. 1986). Various state courts have also rejected challenges to instructions with the "real possibility" language. See, *Williams v. State*, 724 N.E.2d 1093 (Ind. 2000); *Merzbacher v. State*, 346 Md. 391, 697 A.2d 432 (1997); *State v. Darby*, 324 S.C. 114, 477 S.E.2d 710 (1996); *Smith v. U.S.*, 687 A.2d 1356 (D.C. 1996), *adhered to on rehearing* 709 A.2d 78

(D.C. 1998); *Scott v. Class*, 532 N.W.2d 399 (S.D. 1995); *State v. Castle*, 86 Wash. App. 48, 935 P.2d 656 (1997).

Similarly, courts have almost unanimously rejected the claim that the "firmly convinced" language, challenged by Putz at trial and on appeal, is reversible error. See, e.g., *Harris v. Bowersox*, 184 F.3d 744 (8th Cir. 1999); *U.S. v. Brand*, 80 F.3d 560 (1st Cir. 1996); *Conway, supra*; *Williams, supra*; *Taylor, supra*; *U.S. v. Velasquez*, 980 F.2d 1275 (9th Cir. 1992); *U.S. v. Velazquez*, 847 F.2d 140 (4th Cir. 1988); *State v. Ferguson*, 260 Conn. 339, 796 A.2d 1118 (2002); *Merzbacher, supra*; *Smith, supra*; *State v. Van Gundy*, 64 Ohio St. 3d 230, 594 N.E.2d 604 (1992); *State v. Merwin*, 131 Idaho 642, 962 P.2d 1026 (1998); *State v. Antwine*, 743 S.W.2d 51 (Mo. 1987) (en banc); *Castle, supra*; *People v. Matthews*, 221 A.D.2d 802, 634 N.Y.S.2d 235 (1995).

Finally, we note that the Arizona Supreme Court has ordered that an instruction substantially similar to that given in the present case be given in all criminal cases. *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995) (en banc).

(b) Jurisprudential Criticism of Language in Reasonable Doubt Instruction

Despite the fact that courts have consistently concluded that the giving of a reasonable doubt instruction with language similar to the instruction in this case does not constitute reversible error, there has been significant criticism of both the "firmly convinced" and the "real possibility" language. Such criticism has come in cases both where courts find that the giving of the instruction is not reversible error but caution against use of the language and, in at least one case, where the court found the giving of the instruction to constitute reversible error.

With regard to the "real possibility" language, courts have cautioned that the language may be perceived as shifting the burden of proof to the defendant. The Court of Appeals for the Second Circuit did not find use of the "real possibility" language to constitute reversible error in *United States v. McBride*, 786 F.2d at 52, but the court suggested "caution in the use of such language as it may provide a basis for confusion and may be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense." The Court of Appeals for the Second Circuit stated that

the " 'hesitate to act' " language suggested in other pattern instructions on reasonable doubt would be preferable to the "real possibility" language. *Id.* We note that the Nebraska pattern jury instruction on reasonable doubt, NJI2d Crim. 2.0, recited above, contains "hesitation" language similar to that found preferable by the Court of Appeals for the Second Circuit.

In *United States v. Porter*, 821 F.2d 968, 973 (4th Cir. 1987), the Court of Appeals for the Fourth Circuit made the following observations regarding the confusion engendered by defining reasonable doubt in terms of a "real possibility" that the accused is not guilty:

> The [trial] court did not explain the difference that it perceived between a "possibility" and a "real possibility." It failed to tell the jury that the accused did not have the burden of showing a "real possibility" of innocence. Implying the evidence must show a real possibility of innocence to justify acquittal trenches on the principle that a defendant is presumed to be innocent. If the court believed that the jury could understand its concept of a "real possibility" and allocate the burden of proof on this issue, there was no reason for it to question the jury's ability to understand the prosecution's obligation to prove the charges beyond a reasonable doubt.

Despite these concerns, the Court of Appeals for the Fourth Circuit concluded that the instructions taken as a whole properly described the prosecution's burden and that the impropriety in using the "real possibility" language as well as the "firmly convinced" language did not affect the substantial rights of the accused.

The Hawaii Court of Appeals has held that an instruction similar to the one given in this case violated the due process clause of the Hawaii Constitution. *State v. Perez*, 90 Haw. 113, 976 P.2d 427 (Haw. App. 1998) (affirmed with respect to reasonable doubt instruction, reversed in part on other grounds by 90 Haw. 65, 976 P.2d 379 (1999)). While the Hawaii court indicated that the "real possibility" and certain other language of the instruction was problematic, it determined that the "firmly convinced" language was the most compelling deficiency in the instruction. Noting that "it is possible to be firmly convinced of a fact, yet still retain

a reasonable doubt," the Hawaii court determined that use of the "firmly convinced" language reduced the reasonable doubt standard "to one akin to the standard applied where the burden of proof required is that of clear and convincing evidence." *Id.* at 128, 976 P.2d at 442. The Hawaii court noted that its pattern instruction defined "clear and convincing evidence" as evidence which " 'produces a firm belief about the truth of the allegations which the parties have presented' " and noted that clear and convincing is a lower standard of proof than proof beyond a reasonable doubt. (Emphasis omitted.) *Id.* The Hawaii court stated that the term " 'firmly convinced' " was so similar to the term " 'firm belief of conviction' " that use of the phrase "firmly convinced" lowered the standard of proof from beyond a reasonable doubt to the lesser standard of clear and convincing evidence and that therefore the language in such instruction failed to correctly convey the concept of reasonable doubt to the jury. *Id.* at 129, 976 P.2d at 443.

With reference to the Hawaii court's analysis, we note that Nebraska's civil pattern jury instruction, NJI2d Civ. 2.12B, provides, "Clear and convincing evidence means evidence that produces a firm belief or conviction about the fact to be proved." See, also, *Fales v. Norine*, 263 Neb. 932, 942, 644 N.W.2d 513, 521 (2002) ("clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved"); *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001). The Nebraska civil pattern jury instruction NJI2d Civ. 2.12B also states that clear and convincing evidence means less than proof beyond a reasonable doubt.

Finally, we note that the Court of Appeals for the Seventh Circuit warned of the dangers in attempting to define "reasonable doubt" in *United States v. Lawson*, 507 F.2d 433 (7th Cir. 1974), *cert. denied* 420 U.S. 1004, 95 S. Ct. 1446, 43 L. Ed. 2d 762 (1975), *and overruled on other grounds, United States v. Hollinger*, 553 F.2d 535 (7th Cir. 1977). The Court of Appeals for the Seventh Circuit noted that the words "reasonable doubt" were "ordinary English words of common acceptance" and stated that "[b]ecause of the very commonness of the words, the straining for making the clear more clear has the trap

of producing complexity and consequent confusion." *Lawson*, 553 F.2d at 442.

(c) Evaluation of Instructions Taken as Whole

[4,5] Despite what we find to be valid criticism of the language of the reasonable doubt instruction given in this case, we conclude that Putz' rights, including his due process rights, were not violated by the giving of the instruction. The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged. *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), *disapproved on other grounds, Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). However, as long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the U.S. Constitution does not require that any particular form of words be used in advising the jury of the prosecution's burden of proof. *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). The U.S. Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. *Id.* We have held that the due process requirements of Nebraska's Constitution are similar to those of the federal Constitution. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[6] In addition to the foregoing, we note that the U.S. Supreme Court has repeatedly emphasized that in construing an individual jury instruction, the instruction may not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole. See, e.g., *Victor, supra*; *Cage, supra*; *Cupp v. Naughten*, 414 U.S. 141, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973). See, also, e.g., *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002) (all jury instructions must be read together, and if, taken as whole, they correctly state law, are not misleading, and adequately cover issues supported by pleadings and evidence, there is no prejudicial error necessitating reversal).

Evaluating the instructions given in this case as a whole, we note that in instruction No. 2, the jury was instructed that Putz

"is presumed to be innocent" and that "you must find him not guilty unless you decide that the state has proved him guilty beyond a reasonable doubt." Instruction No. 3, which sets forth the elements of each of the two crimes with which Putz was charged, listed, for each crime, the "material elements which the State must prove by evidence beyond a reasonable doubt." Instruction No. 3 also instructed the jury that

> [t]he State has the burden of proving beyond a reasonable doubt each and every one of the material elements of a crime charged before the Defendant may be found guilty of that crime. If you find from the evidence beyond a reasonable doubt that each of the material elements of a charge is true, it is your duty to find the Defendant guilty of that charge. On the other hand, if you find the State has failed to prove one or more of the foregoing material elements beyond a reasonable doubt, on this count, you should find the Defendant not guilty of that charge.

Instruction No. 5 further provided that "[t]he burden of proof is *always on the State* to prove beyond a reasonable doubt all of the material elements of a crime charged *and this burden never shifts*." (Emphasis supplied.) Finally, even within the instruction challenged in this appeal, the jury was reminded that "[t]he State has the burden of proving the Defendant guilty beyond a reasonable doubt."

Viewed in the context of the overall charge to the jury considered as a whole, the jury could not have interpreted the "real possibility" language as shifting the burden of proof to Putz. The jury was instructed several times that the burden of proof rested on the State, and the jury was explicitly told that this burden never shifts. The challenged instruction does not shift the burden of showing a "real possibility" of innocence; indeed, it does not allocate a burden and does nothing to contradict the other instructions and repeated emphasis that the burden of proof is on the State and never shifts. See, *U.S. v. Litchfield*, 959 F.2d 1514 (10th Cir. 1992); *U.S. v. Porter*, 821 F.2d 968 (4th Cir. 1987); *United States v. Gibson*, 726 F.2d 869 (1st Cir. 1984); *Williams v. State*, 724 N.E.2d 1093 (Ind. 2000); *Smith v. U.S.*, 687 A.2d 1356 (D.C. 1996), *adhered to on rehearing* 709 A.2d 78 (D.C. 1998); *State v. Castle*, 86 Wash. App. 48, 935 P.2d 656 (1997).

Putz argues that the phrase "firmly convinced" connotes something less than the very high level of proof required by the Constitution in criminal cases. Putz' argument asks this court to judge the instruction in isolation. However, we are required to view the instructions as a whole to determine whether they adequately convey the concept of reasonable doubt. See, e.g., *Harris v. Bowersox*, 184 F.3d 744 (8th Cir. 1999). The instructions given in this case do not rely solely on the words "firmly convinced" to convey the meaning of reasonable doubt. See *id.* Viewed in the context of the entire charge, the "firmly convinced" language does not lessen the State's burden of proof in violation of due process. The instructions as a whole repeatedly emphasized the State's heavy burden of proof and explained how the State's proof must be "more powerful" than the burden of proof in civil cases. Taken as a whole, the instructions given in this case sufficiently set forth the State's burden of proving the material elements of each offense beyond a reasonable doubt. We agree with the Court of Appeals for the First Circuit which stated:

> Whether or not the "firmly convinced" definition alone would be constitutionally sufficient to convey the meaning of proof beyond a reasonable doubt, the court's further exposition here left no doubt that the jury's duty was to convict only upon reaching consensus as to guilt beyond a reasonable doubt. Nothing further is required.

U.S. v. Brand, 80 F.3d 560, 566 (1st Cir. 1996). Accord, e.g., *U.S. v. Williams*, 20 F.3d 125 (5th Cir. 1994); *State v. Ferguson*, 260 Conn. 339, 796 A.2d 1118 (2002); *State v. Antwine*, 743 S.W.2d 51 (Mo. 1987) (en banc).

In analyzing Putz' argument, "the proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." (Emphasis in original.) *Victor v. Nebraska*, 511 U.S. 1, 6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). The constitutional question, therefore, is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the standard of *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (holding, inter alia, that due process requires proof beyond reasonable doubt of each fact necessary to constitute crime). See

Victor, supra. Considering the instructions as a whole, there is not a reasonable likelihood that the jury understood the instructions to permit conviction of Putz based on proof insufficient to satisfy *In re Winship, supra*.

[7] As we noted earlier, it would have been better had the trial court in this case given the reasonable doubt instruction set forth in the Nebraska Jury Instructions and previously approved by this court. See, NJI2d Crim. 2.0; *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992). Adherence to a standard reasonable doubt instruction promotes uniformity and avoids the pitfalls of ad hoc interpretations and repetitive constitutional challenges. See *Smith v. U.S.*, 709 A.2d 78 (D.C. 1998). See, generally, Robert G. Nieland, Pattern Jury Instructions: A Critical Look at a Modern Movement to Improve the Jury System (1979). Furthermore, varying definitions " '[detract] from the goal of a uniform and equal system of justice.' " See *Smith*, 709 A.2d at 81, quoting *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995) (en banc). "In a matter central to the determination of guilt or innocence, as this is, the appearance of evenhandedness, like the actuality, is important. 'Use of a standard definition thus will eliminate confusion and foster fairness for defendants, the [government], and jurors alike.' " *Id.* For these reasons, we have indicated that whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case. See *State v. Dush*, 214 Neb. 51, 332 N.W.2d 679 (1983).

Notwithstanding the district court's deviation from the Nebraska Jury Instructions in this case, such deviation did not result in a constitutionally deficient instruction. The instructions given in this case, when considered as a whole, do not present a reasonable likelihood that the jury understood the instructions to allow conviction based on proof less than proof beyond a reasonable doubt. We therefore conclude that the Court of Appeals did not err in concluding that the reasonable doubt instruction given in this case did not give rise to reversible error.

2. Lesser-Included Offense

In his second assignment of error on further review, Putz asserts that the Court of Appeals erred in concluding that sexual

assault of a child was not a lesser-included offense of first degree sexual assault under the particular facts of this case. We note that Putz and the Court of Appeals have treated this issue as a lesser-included offense issue rather than a double jeopardy issue. We will therefore analyze this issue as it has been presented.

The Court of Appeals concluded that under Nebraska statutes, sexual assault of a child is not a lesser-included offense of first degree sexual assault. The Court of Appeals was correct. First degree sexual assault under § 28-319(1) is described as "subject[ing] another person to sexual penetration . . . (c) when the actor is nineteen years of age or older and the victim is less than sixteen years of age." Sexual assault of a child under § 28-320.01(1) is described as "subject[ing] another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older." The Court of Appeals noted that first degree sexual assault under § 28-319(1)(c) could be proved by showing the defendant was 19 years of age and the victim was 15 years of age, whereas sexual assault of a child under § 28-320.01 could not be proved unless the victim was 14 years of age or younger. The Court of Appeals also noted that § 28-319(1)(c) required proof of "sexual penetration" whereas § 28-320.01 required proof of "sexual contact" and that the definition of "sexual contact" in Neb. Rev. Stat. § 28-318(5) (Reissue 1995) requires that contact be "for the purpose of sexual arousal or gratification." We further note that the definition of "sexual penetration" in § 28-318(6) includes no intent element.

In petitioning for further review, Putz argues that because of the facts of the present case, sexual assault of a child was a lesser-included offense of first degree sexual assault because each charge was supported by the same set of facts and Putz was charged with two crimes based on the same actions. Putz' argument would require a court to look to the specific facts of his particular case in order to determine whether one crime is a lesser-included offense of the other. However, the test adopted by this court to determine whether one crime is a lesser-included offense of another is a statutory elements test in which a court looks to the statutory elements of each crime rather than the particular facts of a specific case.

[8,9] In *State v. Williams*, 243 Neb. 959, 965, 503 N.W.2d 561, 565 (1993), we adopted a statutory elements test to determine whether an offense is a lesser-included offense of another and held that in order "'"[t]o be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. . . ."'" We further stated that "in determining whether an offense is indeed a lesser-included one, a court initially does not look to the evidence in the particular case, but, rather, as the name of the statutory elements rule implies, looks only to the elements of the criminal offense." *Id.* " 'To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case.' " *State v. Smith*, 3 Neb. App. 564, 570, 529 N.W.2d 116, 121 (1995).

We find no error in the manner in which the Court of Appeals has applied the statutory elements test to the analysis of the statutes at issue in this case. Comparing the greater offense of first degree sexual assault, § 28-319(1)(c), to the lesser offense of sexual assault of a child, § 28-320.01, it is possible to commit the greater offense without at the same time having committed the lesser. Because the statutory elements test requires a court to look to the elements of the crimes and not to the facts of the case, we reject Putz' argument that we should initially examine the issue under the particular facts of this case. Putz argues that in so doing, we would be forced to conclude that sexual assault of a child is a lesser-included offense of first degree sexual assault under the facts of this case. Contrary to Putz' argument, we conclude that the Court of Appeals correctly applied the *Williams* statutory elements test when it looked to the elements of the two offenses rather than the particular facts of this case and concluded that sexual assault of a child is not a lesser-included offense of first degree sexual assault. We therefore find no merit in Putz' second assignment of error on further review.

VI. CONCLUSION

We conclude that the reasonable doubt instruction given by the district court in this case, while subject to valid criticism, did not give rise to reversible error because the instructions taken as a

whole adequately described the standard of proof beyond a reasonable doubt. However, we take this occasion to urge that trial courts use the Nebraska pattern instruction on reasonable doubt. We further conclude that the Court of Appeals did not err in its holding that sexual assault of a child is not a lesser-included offense of first degree sexual assault. We therefore affirm the decision of the Court of Appeals which in turn affirmed Putz' convictions and sentences.

AFFIRMED.

GARY S. WOLFE, APPELLANT, V. BECTON DICKINSON AND COMPANY, APPELLEE.

662 N.W.2d 599

Filed June 6, 2003. No. S-01-933.

1. **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.
2. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
3. **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 lower court.
4. **Statutes.** Statutory interpretation presents a question of law.
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. **Fair Employment Practices: Employer and Employee.** The unlawful practice whose opposition is protected by the Nebraska Fair Employment Practice Act is that of the employer and not that of fellow employees.
7. **Fair Employment Practices: Statutes.** The Nebraska Fair Employment Practice Act is not a general "bad acts" statute.
8. **Fair Employment Practices: Civil Rights: Employer and Employee.** An employee's opposition to any unlawful act of the employer—whether or not the employer pressures the employee to actively join in the illegal activity—is protected by the Nebraska Fair Employment Practice Act.
9. **Fair Employment Practices: Civil Rights: Proof.** A prima facie case of retaliatory discharge of an employee consists of a discharge following a protected activity of which the employer was aware.

10. **Fair Employment Practices: Civil Rights: Employer and Employee.** The Nebraska Fair Employment Practice Act protects an employee from employer retaliation for his or her opposition to an act of the employer only when the employee reasonably and in good faith believes the act to be unlawful.
11. **Words and Phrases.** A belief that an act is unlawful is reasonable only when the act either is unlawful or is of a type that is unlawful.
12. **Employer and Employee: Discrimination: Proof.** The employer in an employment discrimination case does not need to proffer any reason for its actions until the plaintiff establishes a prima facie case that unlawful discrimination has occurred.

Appeal from the District Court for Phelps County: TERRI HARDER, Judge. Affirmed.

Thom K. Cope, of Polsky, Cope, Shiffermiller, Coe & Monzon, for appellant.

Timothy M. Welsh and Donna S. Colley, of Berens & Tate, P.C., for appellee.

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

GERRARD, J.

NATURE OF CASE

Gary S. Wolfe filed a complaint with the Nebraska Equal Opportunity Commission (NEOC) claiming that his employer, Becton Dickinson and Company (BD), discriminated against him because of Wolfe's knowledge of and opposition to illegal drug use by other employees. Wolfe subsequently filed a lawsuit in the Phelps County District Court alleging that BD unlawfully fired him in retaliation for his NEOC complaint. The district court granted summary judgment in favor of BD, and Wolfe appeals.

The first question presented by this case is whether the protection afforded by the Nebraska Fair Employment Practice Act (FEPA) applies to an employee's opposition to unlawful activities, not of the employer, but of other employees. The second question presented concerns what minimum showing is necessary regarding the discrimination claim underlying a retaliatory discharge claim.

We determine that FEPA does not protect an employee who is in opposition to his or her fellow employees' unlawful activities

and that a reasonable, good faith belief in the underlying discrimination claim is necessary for a retaliatory discharge claim. Because Wolfe failed to meet these standards, we affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

BD hired Wolfe on February 4, 1980. He worked without official incident until January 1997, although, by his own admission, Wolfe complained of problems with his coworkers going back several years.

Wolfe joined the BD substance abuse team on January 24, 1997. He testified that he was subsequently subjected to ridicule by his coworkers by being called a "narc" and a "DEA." Wolfe testified that he informed his supervisor and BD's human resources director of his belief that his coworkers were using illegal drugs. Liberally construed, Wolfe's testimony indicated that he told them the illegal drug use occurred both off and on the worksite, although this evidence is contradicted. The only support Wolfe gives for these allegations is hearsay and conjecture—there was no direct knowledge or witnessing of illegal drug usage. One of Wolfe's reports occurred in August 1997, while the date of the other report is not clear from the record.

Sometime after these reports, on March 6, 1998, BD issued Wolfe a corrective action and subsequently transferred him to a different department. BD put him on probation and relieved him of his duties on a safety committee. He was also told to attend the counseling sessions made available to him. Wolfe claims in his NEOC complaint that his overtime privileges were revoked. Later, BD conducted a survey of Wolfe's coworkers concerning Wolfe's allegedly inappropriate behavior occurring after the March 6 corrective action. According to BD, all these measures were motivated by Wolfe's disruption of the workforce.

On April 9, 1998, Wolfe filed an NEOC "whistleblower" complaint, alleging that the transfer, the corrective action, the privileges revocation, the investigation, and the coworker harassment were in retaliation for his opposition to illegal drug use by his coworkers. BD was made aware of Wolfe's complaint on April 13.

On May 13, 1998, after BD had conducted a preliminary investigation, Wolfe was suspended for continuing to disrupt the workplace after his March 6 corrective action. The suspension was to facilitate a full investigation. Six days later, Wolfe was fired, because, according to BD, the full investigation supported the coworkers' complaints that Wolfe did indeed continue to engage in behavior specifically mentioned as inappropriate in the March 6 corrective action.

Wolfe then filed a petition with the district court, alleging two causes of action, the "whistleblower" claim and a retaliatory discharge claim. After Wolfe brought this action, BD filed a motion for summary judgment. After a hearing, the district court granted summary judgment. Wolfe timely appealed.

ASSIGNMENTS OF ERROR

Wolfe assigns that the district court erred in granting summary judgment. Specifically, Wolfe assigns, restated, that the court erred in finding (1) that no genuine issue of material fact existed regarding whether Wolfe engaged in protected activity regarding his first claim, (2) that no genuine issue of material fact existed regarding whether Wolfe met the good faith requirement of his second claim, and (3) that BD had a legitimate business reason for Wolfe's dismissal.

STANDARD OF REVIEW

[1] 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. *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d 168 (2003).

[2] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002).

[3,4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the lower court. *Fox v. Nick*, 265 Neb. 986, 660 N.W.2d 881 (2003). Statutory interpretation presents a question of law. *Id.*

ANALYSIS

WHISTLEBLOWER CLAIM

FEPA makes it unlawful for an employer to discriminate against its employee on the basis of the employee's opposition to an unlawful practice. Neb. Rev. Stat. § 48-1114 (Reissue 1998).

The district court assumed that the "practice" in this statute referred to any unlawful practice *of the employer*. The parties do not dispute that the alleged unlawful acts which Wolfe opposed—illegal drug use—were those of his fellow employees and not of his employer, BD. Whether FEPA protects this type of opposition is a question of first impression in Nebraska.

The text of § 48-1114, under which Wolfe brings his first claim, states in its entirety:

> It shall be an unlawful employment practice for an employer to discriminate against any of his or her employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he or she (1) has opposed any practice made an unlawful employment practice by the Nebraska Fair Employment Practice Act, (2) has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the act, or (3) has opposed any practice or refused to carry out any action unlawful under federal law or the laws of this state.

[5-7] 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. *Wilder v. Grant Cty. Sch. Dist. No. 0001*, 265 Neb. 742, 658 N.W.2d 923 (2003). Seen in context of the entire act and in light of the apparent purposes the act is meant to serve, the "practice" in § 48-1114(3) refers to an unlawful practice of the employer. The statute's purpose is not served by giving an extra layer of protection from discharge to those employees who happen to voice their opposition to any manner of unlawful activity. While it may be unfair in many instances to disadvantage an employee for his or her vocal opposition to unlawful activities unrelated to the

employment, FEPA "'"is not a general 'bad acts' statute."'" See *Wimmer v. Suffolk County Police Dept.*, 176 F.3d 125, 135 (2d Cir. 1999) (speaking of analogous title VII employment discrimination act). See, also, *Little v. United Technologies*, 103 F.3d 956 (11th Cir. 1997) (title VII); *Crowley v. Prince George's County, Md.*, 890 F.2d 683 (4th Cir. 1989) (title VII); *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978) (title VII). There are many other abuses not proscribed by FEPA-type acts, including discharge for opposition to racial discrimination by other employees against the public, see *Wimmer, supra*, and discharge for opposition to discrimination based on an employee's sexual orientation, see *Hamner v. St. Vincent Hosp. and Health Care Center*, 224 F.3d 701 (7th Cir. 2000) (title VII).

[8] The evil addressed by § 48-1114(3) is the exploitation of the employer's power over the employee when used to coerce the employee to endorse, through participation or acquiescence, the unlawful acts of the employer. The legislative history bears out this interpretation. The 1985 amendment adding subsection (3) to § 48-1114 was intended "to provide some protection for employees in the private sector who are asked by their employer or labor union to do something that is illegal." Statement of Purpose, L.B. 324, Committee on Business and Labor, 89th Leg., 1st Sess. (Feb. 13, 1985). Both the text of the rule and reasonable policy dictate that an employee's opposition to *any* unlawful act of the employer—whether or not the employer pressures the employee to actively join in the illegal activity—is protected under § 48-1114(3).

Therefore, since a § 48-1114(3) violation must include either the employee's opposition to an unlawful practice of the employer or the employee's refusal to honor an employer's demand that the employee do an unlawful act, Wolfe has failed to present a prima facie case for his first cause of action. The only unlawful act he alleges is illegal drug use by BD's employees. BD is not alleged to have been involved in the drug use or even to have endorsed its use. Liberally construed, Wolfe's allegations might include the breach of some duty of BD to act on credible information of drug abuse on its worksite. However, Wolfe's reports were not credible, being completely unsubstantiated by anything but hearsay and conjecture. No duty arises from such

completely unsubstantiated information. Furthermore, the record lacks any allegation that Wolfe voiced any opposition to this supposed inaction. His opposition was consistently framed as being directed toward the alleged illegal drug use alone. Therefore, Wolfe's first assignment of error is without merit. There is no genuine issue of material fact regarding whether Wolfe engaged in a protected activity. The court did not err in granting summary judgment regarding Wolfe's first cause of action.

RETALIATORY CLAIM

[9] A prima facie case of retaliatory discharge of an employee consists of a discharge following a protected activity of which the employer was aware. *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985). The record shows that Wolfe was terminated after he filed an NEOC complaint, a complaint of which BD was admittedly aware. The question, then, is whether Wolfe's filing of this NEOC complaint was a protected activity. If it was not, as a matter of law, the summary judgment was not erroneous.

If Wolfe's NEOC complaint was based upon actual, unlawful discrimination, the filing of that complaint would have been a protected activity. However, it was not so based. This court has not previously explained exactly what must be true of the discriminatory act underlying the retaliation claim. Other jurisdictions are not unanimous; some require actual proof of discrimination while others find even defamatory and malicious filings sufficient. But the vast majority of jurisdictions require a reasonable, good faith belief that the employer unlawfully discriminated.

The U.S. Supreme Court has concluded that an unreasonable belief of unlawful acts cannot form the basis for title VII protection of a complaining employee against retaliation, but left unanswered whether a reasonable belief would suffice. *Clark County School Dist. v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001). The Court cited without explicitly endorsing the Ninth Circuit's doctrine that title VII can "protect employee 'oppos[ition]' not just to practices that are actually 'made . . . unlawful' by Title VII, but also to practices that the employee could reasonably believe were unlawful." 532 U.S. at 270. The Court stated that it had "no occasion to rule on the propriety of

this interpretation, because even assuming it is correct, no one could reasonably believe that the incident recounted above violated Title VII." *Id.* The Court, then, at least adopted the interpretation that unreasonable beliefs cannot form the basis of the discrimination complaint underlying a retaliatory claim. What it left undecided was whether a reasonable, though incorrect, belief in unlawful discrimination could form the basis.

All federal circuit courts have concluded that a belief must be reasonable—but need not necessarily be correct—to form the underlying basis for a retaliation claim. See, e.g., *Green v. Administrators of Tulane Educational Fund*, 284 F.3d 642 (5th Cir. 2002); *Childress v. City of Richmond, Va.*, 120 F.3d 476 (4th Cir. 1997); *Wyatt v. City of Boston*, 35 F.3d 13 (1st Cir. 1994); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853 (3d Cir. 1990). Most circuit courts require that the belief be in good faith as well. *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307 (11th Cir. 2002); *Little v. Windermere Relocation, Inc.*, 265 F.3d 903 (9th Cir. 2001); *Foster v. Time Warner Entertainment Co., L.P.*, 250 F.3d 1189 (8th Cir. 2001); *McMenemy v. City of Rochester*, 241 F.3d 279 (2d Cir. 2001); *Hamner v. St. Vincent Hosp. and Health Care Center*, 224 F.3d 701 (7th Cir. 2000); *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000); *Parker v. Baltimore & O. R. Co.*, 652 F.2d 1012 (D.C. Cir. 1981). See, also, *Selenke v. Medical Imaging of Colorado*, 248 F.3d 1249 (10th Cir. 2001) (applying principle to Americans with Disabilities Act).

Many state courts similarly interpret their fair employment practice acts to require a good faith, reasonable basis for the underlying discrimination claim. *Viktron/Lika v. Labor Com'n*, 38 P.3d 993 (Utah App. 2001); *Cox & Smith Inc. v. Cook*, 974 S.W.2d 217 (Tex. App. 1998); *Sada v. Robert F. Kennedy Medical Center*, 56 Cal. App. 4th 138, 65 Cal. Rptr. 2d 112 (1997); *Conrad v. Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996); *McCabe v. Board of Johnson County Comm'rs*, 5 Kan. App. 2d 232, 615 P.2d 780 (1980). But see *Bordell v. General Elec. Co.*, 88 N.Y.2d 869, 667 N.E.2d 922, 644 N.Y.S.2d 912 (1996) (requiring that employee oppose actual violation of law before employee is protected from retaliation by employer).

Solid public policy reasons also validate the propriety of requiring a reasonable, good faith belief while not requiring an

actually unlawful practice. First, unless we interpret FEPA to require a reasonable, good faith belief, employees who fear dismissal could exploit FEPA by filing a frivolous claim and threatening their employer with a lengthy and costly retaliation suit. Conversely, were we to interpret FEPA to require that the act opposed actually be unlawful before FEPA protects the employee, employees would stop sincere, informal opposition to perceived illegality.

[10] The best rule is that an employee is protected by FEPA from employer retaliation for his or her opposition to an act of the employer only when the employee reasonably and in good faith believes the act to be unlawful. Under this rule, Wolfe needs a reasonable, good faith belief that BD broke the law when it subjected him to the disciplinary actions over his complaints about his coworkers using illegal drugs—the basis for his original NEOC filing. If he can show this, he has shown a prima facie retaliation claim.

[11] In order for such a belief to be reasonable, the act believed to be unlawful must either in fact be unlawful or at least be of a type that is unlawful. The discrimination Wolfe alleges must be of a type which at some level is prohibited by law. As the Seventh Circuit Court of Appeals stated in *Hamner, supra*, "[i]f a plaintiff opposed conduct that was not proscribed by [law], no matter how frequent or severe, then his sincere belief that he opposed an unlawful practice cannot be reasonable." *Id.* at 707 (dismissing as unreasonable underlying claim of sexual orientation discrimination because such discrimination did not violate any federal employment law). See, also, *Wimmer v. Suffolk County Police Dept.*, 176 F.3d 125 (2d Cir. 1999) (holding that opposition to employees' racial discrimination against public cannot form basis of retaliation claim because that discrimination does not violate title VII). Since an employer breaks no law by leveling adverse employment ramifications against an employee who complained about the non-work-related unlawful actions of coworkers, Wolfe's opposition to the disciplinary actions cannot form a reasonable belief that he opposed an unlawful practice of the employer.

Wolfe, therefore, fails in his second assignment of error. Wolfe's belief that the disciplinary actions were unlawful must

not only be in good faith, it must also be reasonable. As a matter of law it was not. Therefore, no issue of material fact regarding Wolfe's retaliation claim exists.

[12] Finally, Wolfe's third assignment of error is without merit. The employer in an employment discrimination case does not need to proffer any reason for its actions until the plaintiff establishes a prima facie case that unlawful discrimination has occurred. *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999); *IBP, inc. v. Sands*, 252 Neb. 573, 563 N.W.2d 353 (1997). Since Wolfe never established that prima facie case, the district court never had need to inquire of BD's motives in dismissing Wolfe. The court did not make any findings in its summary judgment regarding BD's proffered reasons for dismissing Wolfe. This was not error.

CONCLUSION

For all of the above reasons, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
REGINA RATHJEN, APPELLANT.
662 N.W.2d 591

Filed June 6, 2003. No. S-02-050.

1. **Motions to Suppress: Judgments: Appeal and Error.** When reviewing a trial court's ruling on a motion to suppress evidence, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
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. **Statutes: Probation and Parole.** The question whether a probationer, inmate, or parolee is acting as an undercover agent of state or local agencies in violation of Neb. Rev. Stat. § 29-2262.01 (Reissue 1995) is a mixed question of law and fact.
4. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.

5. **Probation and Parole: Courts: Evidence.** When deciding whether a parolee is acting as an undercover agent of any state or local law enforcement agency in violation of Neb. Rev. Stat. § 29-2262.01 (Reissue 1995), a court must examine the totality of the circumstances to determine, among other things, who initiated the undercover investigation, whether a federal or outside agency was contacted by local law enforcement to continue the investigation, and the amount of cooperation or control maintained by local law enforcement in the ongoing investigation.
6. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial.
7. **Evidence: New Trial: Appeal and Error.** When considering the sufficiency of the evidence in determining whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence presented by the State and admitted by the trial court irrespective of the correctness of that admission.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Judgment reversed, sentences vacated, and cause remanded for a new trial.

Kirk E. Naylor, Jr., for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

GERRARD, J.

The Legislature has determined as a matter of public policy:

> [A]n inmate who has been released on parole . . . 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 [statute] shall not be admissible against any person in any proceeding whatsoever.

Neb. Rev. Stat. § 29-2262.01 (Reissue 1995).

Regina Rathjen was arrested, tried, and convicted pursuant to a jury verdict on charges of conspiracy to commit first degree murder, possession of methamphetamine, and possession of a defaced firearm. Before the trial, Rathjen filed a motion to suppress, alleging that most of the evidence against her was unlawfully derived from state or local agency use of a parolee as an undercover agent

in violation of Nebraska law. After a suppression hearing, the trial court denied the motion, determining that the parolee was an undercover agent of the federal Bureau of Alcohol, Tobacco, and Firearms (ATF) agency, not of the state and local agencies working with the ATF. At trial, the objection to the admission of the evidence was renewed, and Rathjen now appeals her conviction on this ground.

The question presented is whether a state agency can circumvent the law forbidding state and local agencies from using parolees as undercover agents by enlisting a federal agency to direct the parolee while the state agency remains a prominent participant in the investigation. We conclude that the State cannot do so and reverse the judgment of convictions, vacate the sentences, and remand the cause to the district court for a new trial.

FACTUAL BACKGROUND

On November 30, 2000, York Police Department (YPD) Sgt. Norman Cobb telephoned J.W. to inform her of something in a matter unrelated to these proceedings. Cobb knew that J.W. was on parole at the time of the telephone call. Cobb called only to relay information to J.W. and not to solicit information from her. However, during that conversation, J.W. told Cobb that an acquaintance named "Rathjen" had contacted J.W. about getting a handgun in order to harm a person Rathjen believed to be a drug informant who had given Rathjen's name to the police. Cobb told J.W. to keep him informed. Cobb then contacted Sgt. Glenn Elwell of the Nebraska State Patrol (NSP) to gain the benefit of his expertise in the area.

On December 1, 2000, Cobb happened to be at the county courthouse at the same time as J.W. During this chance meeting, J.W. told Cobb of Rathjen's continuing desire to acquire a gun from J.W. On December 3, Cobb taped a statement from J.W., and on December 4, J.W. read and signed a written transcript of the statement. This was standard operating procedure. At this meeting on December 4, J.W. told Cobb that she had again been contacted by Rathjen to acquire a gun with the explicit intention of using it to kill the person who had "narc'd" on Rathjen.

That same day, Cobb again discussed the issue with Elwell. Cobb and Elwell discussed the statute which forbids state

agencies from using parolees as undercover agents. Elwell indicated that he could contact Mickey Leadingham, an ATF agent, to seek his cooperation in the case. Upon the request, Leadingham obtained authority from the U.S. Attorney's office to open a federal investigation. Such cooperation is not unusual, as Leadingham testified that 80 percent of his time is spent working with state and local authorities.

A law enforcement officer's meeting took place on December 6, 2000, in York, Nebraska, attended by Elwell, Leadingham, J.W., and J.W.'s parole officer, among others. At the meeting, Leadingham asked J.W. if she was willing to surreptitiously record her conversation with Rathjen. She agreed to do so. Leadingham instructed her to communicate only to him, with the exception being that in an emergency, she could contact Cobb or Elwell if she could not reach Leadingham. On December 20, J.W. did call Cobb, but the reason for the call was to find and communicate with Leadingham.

At this December 6, 2000, meeting, it was decided to attempt to record a conversation between Rathjen and J.W. at their place of employment. The purpose of the conversation was to set up a rendezvous between Rathjen and Leadingham. J.W. was fitted with one of the NSP's recording devices because Leadingham had misplaced his. The microphone was supplied by Leadingham. The device was both secured to J.W.'s body and removed after the encounter with Rathjen by J.W.'s parole officer, who was the only female in the group apart from J.W. herself. Leadingham assigned various tasks to the officers present. After the plan was made, Elwell advised J.W. on the surveillance plan, saying, "What we're gonna do is we're gonna let you get in your truck and just go ahead, drive. Start that way, and we'll wait a little bit. Then we'll pull out and we'll follow you." The meeting went as planned, and J.W. told Rathjen of her friend "Mickey," a supposed Texan who could get a gun for her. Leadingham received the recording and the wire from the parole officer. A meeting between Rathjen and Leadingham was set up for January 7, 2001. The NSP also provided surveillance assistance for this rendezvous.

However, this January 7, 2001, meeting failed. Rathjen did not keep the appointment to meet with Leadingham at the prearranged location. J.W. then told Leadingham that her parole

officer withdrew approval of J.W.'s involvement in the case. Leadingham then asked Elwell to confirm this, which he did. J.W. supplied no more undercover assistance. Leadingham, assuming the cover identity of J.W.'s gun-supplying friend "Mickey," contacted Rathjen directly and set up another meeting for January 11. Elwell suggested bringing methamphetamine, and Leadingham agreed. The contraband was supplied by the NSP. The defaced firearm was also supplied by the NSP, as was the video recorder used in the operation. Officers from the NSP, the YPD, and the ATF assisted in the sting, which resulted in the arrest of Rathjen. Elwell did not direct this sting operation, and in fact, Elwell had only about 24 hours' notice of the January 11 sting. The sting went as planned and resulted in the arrest of Rathjen and substantial amounts of incriminating evidence.

After the arrest, Leadingham gave J.W. $200 from the ATF funds for her cooperation. J.W.'s truck and trailer were subsequently burned out, ostensibly in retaliation for her cooperation, which motivated an investigator to give Leadingham $500 out of the NSP's Rural Apprehension Program drug task force fund to give to J.W. Cobb requested that the local Crimestoppers board give J.W. some funds as well, and she received $1,000 from that source.

PROCEDURAL BACKGROUND

On February 7, 2001, Rathjen was charged by information with three counts: conspiracy to commit first degree murder, possession of methamphetamine, and possession of a defaced firearm. Rathjen filed a motion to suppress on June 14. The district court held a suppression hearing and, in a written order dated October 17, denied the motion. A trial commenced, resulting in a jury verdict of guilty on all counts. The district court adjudged Rathjen guilty and, on December 17, sentenced her to terms of imprisonment of 12 to 15 years for conspiracy to commit first degree murder, 3 to 5 years for possession of methamphetamine with intent to distribute, and 20 months to 5 years for possession of a defaced firearm. The sentences for conspiracy to commit first degree murder and possession of a defaced firearm were to be served concurrently, while the sentence for possession of methamphetamine with intent to distribute was ordered to be served consecutive to

the sentence for conspiracy to commit first degree murder. Rathjen timely appealed.

ASSIGNMENT OF ERROR

Rathjen assigns, restated, that the district court erred by determining that the use of a parolee in her case was not a violation of § 29-2262.01 and that as a result, the district court improperly admitted evidence developed as a direct result of the unlawful use of the parolee.

STANDARD OF REVIEW

[1] When reviewing a trial court's ruling on a motion to suppress evidence, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (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. *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002).

ANALYSIS

The question before the court is whether J.W. was acting as an "undercover agent" of any state or local law enforcement agency when she cooperated with the investigation of Rathjen in December 2000 and January 2001. Section 29-2262.01 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.

It is undisputed that J.W. was a parolee during her cooperation with this investigation. Furthermore, J.W. clearly acted as an undercover agent of law enforcement when she arranged meetings with Rathjen, pretended to cooperate with Rathjen's criminal

plan, wore a hidden recording device, and played a crucial part in setting up the eventual sting operation, all at the behest and direction of law enforcement officials. The only question before us is whether J.W. was acting as an agent for state and local law enforcement agencies when she participated in the sting operation.

[3,4] We determine that the question whether a probationer, inmate, or parolee is acting as an undercover agent of state or local agencies is a mixed one of law and fact. In the first instance, we must interpret the meaning of § 29-2262.01. This interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Baker, supra.* In construing § 29-2262.01, we must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *In re Interest of DeWayne G. and Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). After independently placing a reasonable construction on the statute, we then review the district court's findings of fact. The facts in this case are not largely in dispute. Therefore, we analyze these relatively undisputed facts to determine, independently, whether the involvement of a state or local agency rises to the level which indicates that J.W. was acting as an undercover agent for it during the course of the Rathjen investigation.

[5] In construing § 29-2262.01, it is rather obvious that the Legislature, for a number of public policy reasons, did not want inmates, probationers, *or parolees* acting as undercover agents in any capacity for state or local law enforcement agencies. The issues of institutional control, public safety, and evidentiary reliability were so important that the Legislature determined that any violation of § 29-2262.01 would result in the suppression of evidence derived from a tainted undercover source. Thus, even though § 29-2262.01 can control only the activities of state and local law enforcement officials, and not federal authorities, we will examine the activities of state and local law enforcement with the overall purpose of the statute in mind, and not place a construction that would defeat the statutory purpose in spirit or

application. When deciding whether a parolee was acting as an undercover agent of any state or local law enforcement agency, we will examine the totality of the circumstances to determine, among other things, who initiated the undercover investigation, whether a federal or outside agency was contacted by local law enforcement to continue the investigation, and the amount of cooperation or control maintained by local law enforcement in the ongoing investigation. These factors are nonexclusive, but will serve as guideposts in determining the degree of involvement that local law enforcement may have in an investigation when deciding whether the provisions of § 29-2262.01 have been violated.

When considering the totality of the circumstances in the instant case, we observe that the undercover investigation was initiated by the YPD and the NSP. Cobb, a sergeant with the YPD, by good fortune and good police work, had contact with J.W. on November 30, 2000, and initially found out that a person named "Rathjen" had contacted J.W. about getting a handgun to harm a person Rathjen believed to be a drug informant. Cobb told J.W. to keep him informed. In the meantime, Cobb contacted Elwell, a sergeant with the NSP, to gain the benefit of his expertise. At another chance meeting at the county courthouse on December 1, J.W. saw Cobb and told him of Rathjen's continuing desire to acquire a gun from J.W. On December 3, Cobb taped a statement from J.W., and the next day, J.W. read and signed a written transcript of the statement.

On December 4, 2000, Cobb again discussed the issue with Elwell. Cobb and Elwell specifically discussed § 29-2262.01, which forbids state agencies from using parolees as undercover agents. It was at this time that Elwell indicated he could contact Leadingham, an ATF agent, to seek his cooperation in the case.

A law enforcement officer's meeting took place on December 6, 2000, attended by Elwell, Leadingham, J.W., and J.W.'s parole officer, among others. At the meeting, Leadingham asked J.W. if she was willing to surreptitiously record Rathjen. She agreed. At this meeting, it was decided to attempt to record a conversation between Rathjen and J.W. at their place of employment. The purpose of the conversation was to set up a rendezvous between Rathjen and Leadingham.

Not only did the YPD and the NSP initiate the investigation and help set up the December 6, 2000, meeting among state and federal law enforcement officials in York, but it was at this time that state and local law enforcement continued their substantial cooperation in the ongoing undercover investigation. J.W. was fitted with one of the NSP's recording devices because Leadingham had misplaced his. The device was both secured to J.W.'s body and removed after the encounter with Rathjen by J.W.'s state parole officer, who was the only female in the group apart from J.W. herself. After the plan was made, Elwell advised J.W. on the surveillance plan. The initial surveillance meeting went as planned, and Leadingham received the recording and the wire from the state parole officer. A meeting between Rathjen and Leadingham was then set up for January 7, 2001. The NSP also provided surveillance assistance for this rendezvous.

In short, although Leadingham and the ATF took the lead in the Rathjen investigation on or after December 6, 2000, it was the initial contact by state and local law enforcement officers, and the ongoing cooperation of these officers, that led directly to J.W.'s role as an undercover agent for law enforcement in the present case. Under the totality of the circumstances, we conclude that both the spirit and the letter of § 29-2262.01 were violated and that J.W. was acting as an undercover agent of state and local law enforcement officers on and after December 6, 2000. Therefore, under the provisions of § 29-2262.01, the evidence derived from the use of J.W.'s undercover cooperation was inadmissible at trial. The district court erred in denying Rathjen's motion to suppress.

In its brief, the State argues that even if the district court erred, its error was harmless. However, the evidence made inadmissible by this statute is not just J.W.'s testimony, but all evidence derived from the unlawful use of J.W as an undercover agent. The statutory language, "[a]ny evidence derived in violation of this section," is a codification of the "fruit of the poisonous tree" doctrine. See, *Miles v. State*, 365 Md. 488, 781 A.2d 787 (2001); *State v. Farha*, 218 Kan. 394, 544 P.2d 341 (1975). J.W.'s unlawful role in the investigation was an indispensable link to acquiring most of the evidence used against Rathjen at trial; without J.W.'s clandestine cooperation, the January 11, 2001, sting operation would not

have occurred. The tainted evidence admitted at trial is not purged on attenuation, inevitability, or independent source grounds. The evidence has come " ' "by exploitation of [the] illegality." ' " *State v. Manning*, 263 Neb. 61, 67, 638 N.W.2d 231, 236 (2002) (quoting *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). While J.W.'s testimony of events occurring before she became an agent on December 6, 2000, is admissible, her testimony of events occurring after becoming an agent, as well as the other evidence derived directly or indirectly from her undercover work, is inadmissible. It cannot be said that the admission of this evidence did not materially influence the jury to reach a verdict adverse to the substantial rights of Rathjen. See *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000). Therefore, the district court's error was not harmless.

[6,7] Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003). When considering the sufficiency of the evidence in determining whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence presented by the State and admitted by the trial court irrespective of the correctness of that admission. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). After examining the record, we conclude that the evidence admitted by the trial court would have been sufficient to sustain a conviction; thus, remand is proper.

CONCLUSION

For the foregoing reasons, we reverse the district court's judgment of convictions, vacate the sentences imposed on Rathjen, and remand the cause for a new trial.

JUDGMENT REVERSED, SENTENCES VACATED, AND CAUSE REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. OSCAR GONZALEZ-FAGUAGA, APPELLANT.

662 N.W.2d 581

Filed June 6, 2003. No. S-02-172.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: 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. When 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. **Pleas.** A plea of no contest is equivalent to a plea of guilty.
4. **Pleas: Waiver.** Normally, a voluntary guilty plea waives all defenses to a criminal charge.
5. **Postconviction: Effectiveness of Counsel: Pleas.** In a postconviction action brought by a defendant convicted because of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
6. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution or 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.
7. **Effectiveness of Counsel: Proof.** To demonstrate that his or her counsel's performance was deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.
8. **Trial: Effectiveness of Counsel: Presumptions.** In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
9. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** In determining whether trial counsel's performance was deficient, an appellate court affords trial counsel due deference to formulate trial strategy and tactics.
10. **Plea Bargains: Prosecuting Attorneys.** When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.
11. **Plea Bargains: Attorneys at Law.** If the State commits a material breach of a negotiated plea agreement, it would be a rare circumstance when a lawyer with ordinary training and skill in the area of criminal law would not inform the court of the breach.
12. **Postconviction: Effectiveness of Counsel: Proof.** The prejudice component of the test stated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), focuses on the question whether counsel's deficient performance renders the result of the trial or the proceeding fundamentally unfair.
13. **Effectiveness of Counsel: Proof.** To prove prejudice for an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that

but for counsel's unprofessional errors, the result of the proceeding would have been different.

14. **Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
15. **Judges: Plea Bargains: Sentences.** A judge is not bound to give a defendant the sentence recommended by a prosecutor under a plea agreement.
16. **Plea Bargains: Effectiveness of Counsel.** To determine whether a defendant suffered prejudice as a result of counsel's deficient performance in failing to object to the State's breach of a plea agreement, the focus is on whether counsel's deficient performance sacrificed the defendant's ability to protect the bargain the defendant had struck with the State.
17. **Plea Bargains: Prosecuting Attorneys: Sentences: Specific Performance.** When the State breaches a plea agreement, the defendant generally has the option of either having the agreement specifically enforced or withdrawing his or her plea, even if the sentencing judge has stated on the record that he or she would have given the defendant the same sentence had the prosecutor complied with the plea agreement.
18. **Plea Bargains.** To protect his or her rights after the State has breached a plea agreement, the defendant must move to withdraw the plea, or the defendant loses the ability to withdraw the plea.
19. **Plea Bargains: Prosecuting Attorneys: Specific Performance.** If the defendant objects to the breach of a plea agreement by the State, but fails to move to withdraw the plea, he or she is limited to seeking specific performance.
20. ____: ____: ____. If the defendant remains silent when the State breaches a plea agreement, he or she can neither move to withdraw the plea nor seek specific performance of the agreement.
21. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the court whether counsel shall be appointed to represent the defendant.
22. **Postconviction: Justiciable Issues: Right to Counsel: Appeal and Error.** When the assigned errors in the postconviction petition before the district court contain no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.
23. **Postconviction: Justiciable Issues: Right to Counsel.** When the defendant's postconviction petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to counsel.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed in part, and in part reversed and remanded with directions.

Rachel A. Daugherty, of Lauritsen, Brownell, Brostrom, Stehlik, Thayer & Myers, for appellant.

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

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

CONNOLLY, J.

In October 2000, Oscar Gonzalez-Faguaga, under a plea agreement, pled no contest to one count of first degree assault. Gonzalez-Faguaga subsequently moved for postconviction relief. The district court denied his motion without an evidentiary hearing. The issue is whether the district court should have held an evidentiary hearing on Gonzalez-Faguaga's claim that his trial counsel was ineffective.

He alleges that his counsel failed to bring to the trial court's attention that the State had breached the plea agreement. Because Gonzalez-Faguaga pled sufficient facts to show ineffective assistance of trial counsel and the record fails to affirmatively show that he is not entitled to relief, we reverse in part, and remand with directions for an evidentiary hearing.

I. BACKGROUND

Gonzalez-Faguaga stabbed Ricardo Ibarra in the chest. The State charged him with first degree assault, use of a deadly weapon in the commission of a felony, and two counts of terroristic threats. Under a plea agreement reached with the State, Gonzalez-Faguaga withdrew his initial not guilty plea and entered a plea of no contest to the first degree assault charge.

At the arraignment in which Gonzalez-Faguaga pled no contest, the court inquired about the terms of the plea agreement. The prosecutor stated that in return for Gonzalez-Faguaga's plea of no contest to the charge of first degree assault, the State would drop the remaining charges. The prosecutor also told the court that if Gonzalez-Faguaga was under a hold by the Immigration and Naturalization Service (INS) at the time of the sentencing, the State would recommend time served; but that if he was not under an INS hold, it would stand silent.

Gonzalez-Faguaga's counsel responded that he was under the impression that the State, regardless of whether there was an INS hold, would recommend time served. The prosecutor then clarified that the State would recommend time served only if there was an INS hold at the time of the sentencing hearing. Gonzalez-Faguaga and his counsel then had an off-the-record discussion,

after which his counsel told the court that Gonzalez-Faguaga was willing to proceed on the terms set out by the prosecutor.

After Gonzalez-Faguaga's conversation with his counsel, the court, through an interpreter, told him

> Mr. Gonzalez-Faguaga, as I understand the plea agreement that you entered into with the State is that the State agreed to dismiss [the other counts]. The State further agreed at the time of your sentencing if you were convicted of Count I that if you are facing deportation by the Immigration and Naturalization Service at the time of your sentence, the State will . . . make a recommendation to the Court you serve a sentence of the time you've spent in jail on this charge until its completion. If you are not facing deportation by the Immigration and Naturalization Service on the date of your sentencing, the State will stand silent at your sentencing and make no recommendation to the Court.
>
> Is that your entire understanding of the plea agreement that you entered into with the State?

Through the interpreter, Gonzalez-Faguaga responded in the affirmative. The trial court then found Gonzalez-Faguaga guilty of first degree assault and sentenced him to serve 10 to 15 years in prison.

Gonzalez-Faguaga filed a direct appeal, during which he was represented by the counsel he had had when he entered his no contest plea. His sole assignment of error in his direct appeal was the excessiveness of the sentence.

After the Nebraska Court of Appeals affirmed his conviction, see *State v. Gonzalez-Faguaga*, 10 Neb. App. xxv (No. A-00-1306, June 29, 2001), Gonzalez-Faguaga moved to vacate and set aside his conviction. He also requested court-appointed counsel and an interpreter. The district court denied his motions for counsel and an interpreter and determined, without an evidentiary hearing, that he was not entitled to postconviction relief.

II. ASSIGNMENTS OF ERROR

Gonzalez-Faguaga assigns, reordered and restated, that the district court erred in refusing to grant an evidentiary hearing on his claims that his trial counsel was ineffective by (1) not informing the trial court that the prosecution had breached the plea

agreement, (2) allowing him to enter a no contest plea when his trial counsel did not know the terms of the plea agreement, (3) advising him to plead no contest when the factual basis to support the conviction was inadequate, (4) advising him to plead no contest when there was a question whether he understood the constitutional right he was waiving as interpreted, (5) advising him to plead no contest when there was a possible self-defense claim, and (6) reciting an incorrect factual narrative at the sentencing hearing.

Gonzalez-Faguaga also assigns that the district court erred in not appointing counsel to represent him on his motion for postconviction relief and in not allowing him to amend his motion.

III. 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. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (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. When 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. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

IV. ANALYSIS

1. Ineffective Assistance of Counsel

Gonzalez-Faguaga argues that the court should have held an evidentiary hearing on his claim and that his counsel failed to inform the trial court that the State had breached the terms of the plea agreement. Because we conclude that this claim has merit, we reverse in part, and remand with directions for an evidentiary hearing.

[3-5] A plea of no contest is equivalent to a plea of guilty. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). Normally, a voluntary guilty plea waives all defenses to a criminal charge. But, in a postconviction action brought by a defendant convicted

because of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002); *State v. Buckman, supra*. We also note that because Gonzalez-Faguaga was represented by his trial counsel on direct appeal, he is not procedurally barred from asserting an ineffective assistance of counsel claim in his motion for postconviction relief. See *State v. Buckman, supra*.

[6] To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution or 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. *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002).

(a) Deficient Performance

[7-9] To demonstrate that his or her counsel's performance was deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *Id.* We afford trial counsel due deference to formulate trial strategy and tactics. *Id.*

[10] The U.S. Supreme Court has recognized that " 'plea bargaining' is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). The benefits to be derived from plea bargaining, however, "presuppose fairness in securing agreement between an accused and a prosecutor." 404 U.S. at 261. Thus, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. Accord *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002).

[11] If the State commits a material breach of a negotiated plea agreement, it would be a rare circumstance when a lawyer with ordinary training and skill in the area of criminal law would not inform the court of the breach. See, *State v. Carrillo*, 597 N.W.2d

497 (Iowa 1999); *State v. Smith*, 207 Wis. 2d 258, 558 N.W.2d 379 (1997). While we afford counsel due deference to formulate trial strategy and tactics, it is difficult to imagine what possible advantage a defendant could gain by his or her counsel's remaining silent in such a situation. Only by pointing out the breach can counsel protect the benefits the defendant bargained to receive in exchange for his or her plea. See *State v. Birge, supra.*

Here, Gonzalez-Faguaga has alleged that as part of the plea agreement he entered into, the State agreed to recommend time served if he were under an INS hold at the time of the sentencing; that at the time of the sentencing, Gonzalez-Faguaga had "an INS hold lodged against him"; and that instead of recommending time served, the State stood silent. Gonzalez-Faguaga has also alleged that counsel failed to object when the State stood silent at the sentencing hearing. The record does not affirmatively contradict these allegations and, if proved, they would show that the State breached the terms of the plea agreement and that his trial counsel performed deficiently in not objecting to the breach.

(b) Prejudice

To establish a right to postconviction relief based on a claim of ineffective assistance of counsel, it is not enough for the defendant to show that counsel's performance was deficient. See *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002). The defendant must also allege and prove that counsel's deficient performance prejudiced the defense in his or her case. See *id.*

[12-14] The prejudice component of the test stated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), focuses on the question whether counsel's deficient performance renders the result of the trial or the proceeding fundamentally unfair. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). To prove prejudice for an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington, supra*; *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003).

In rejecting Gonzalez-Faguaga's claim that his trial counsel was ineffective for failing to object to the State's breach of the plea agreement, the court apparently concluded that the failure to object did not prejudice Gonzalez-Faguaga. In his order denying postconviction relief, the judge—who was the same judge who sentenced Gonzalez-Faguaga—stated:

> The record reflects that the Defendant was informed by the Court that whatever recommendations were made regarding sentence the Court was not bound to follow any sentence recommendations given by the State and/or the Defendant and that the Court reserved the right to sentence Defendant as provided by Nebraska statute.

Apparently, the court meant that the failure to point out the breach was not prejudicial, because even if the State had recommended time served, the judge would have given Gonzalez-Faguaga the same sentence. We disagree.

[15,16] It is true that a judge is not bound to give a defendant the sentence recommended by a prosecutor under a plea agreement. See *State v. Griger*, 190 Neb. 405, 208 N.W.2d 672 (1973). That does not mean, however, that to show prejudice, Gonzalez-Faguaga had to allege that but for his counsel's failure to object, the judge would have imposed a different sentence. See *State v. Carrillo*, 597 N.W.2d 497 (Iowa 1999). Instead, the focus is on whether counsel's deficient performance sacrificed Gonzalez-Faguaga's ability to protect the bargain he had struck with the State, thereby rendering the result of the proceedings "fundamentally unfair."

[17] When the State breaches a plea agreement, the defendant generally has the option of either having the agreement specifically enforced or withdrawing his or her plea. *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002). This is true even if the sentencing judge has stated on the record that he or she would have given the defendant the same sentence had the prosecutor complied with the plea agreement. See, *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) (finding error and remanding even though sentencing court had stated that it would have given same sentence had prosecutor fulfilled plea bargain); *State v. Birge, supra* (noting that once State has violated

plea agreement, violation cannot be cured by trial court's statement that it will not be influenced by prosecutor's actions).

[18-20] However, to protect his or her rights after the State has breached a plea agreement, the defendant must move to withdraw the plea, or the defendant loses the ability to withdraw the plea. See *State v. Birge, supra*. If the defendant objects to the breach, but fails to move to withdraw the plea, he or she is limited to seeking specific performance. See *id.* Moreover, if the defendant remains silent upon the breach, he or she can neither move to withdraw the plea nor seek specific performance of the agreement. See *id.*

Thus, the failure of Gonzalez-Faguaga's counsel to object to the breach of the plea agreement, if proved, rendered the proceedings fundamentally unfair. The failure to object prevented Gonzalez-Faguaga from protecting the benefit he had bargained for in exchange for his plea. A proper objection and motion to withdraw by his counsel would have led to a "different outcome" in the sense that Gonzalez-Faguaga would have been allowed to withdraw his plea. Alternatively, he would have been entitled to resentencing in proceedings not tainted by the State's breach of the plea agreement. See *State v. Carrillo, supra*. See, also, *State v. Smith*, 207 Wis. 2d 258, 558 N.W.2d 379 (1997) (holding that failure of trial counsel to object to breach of plea agreement is presumptively prejudicial).

(c) Resolution

We determine that Gonzalez-Faguaga has pled facts showing that (1) the State committed a material breach of the plea agreement; (2) his counsel failed to bring the breach to the court's attention; and (3) as a result, he lost the ability to either withdraw his plea or seek specific performance of the plea agreement. If proved, these allegations would show that his trial counsel was ineffective in not objecting to the plea agreement. Because the record fails to affirmatively show that he is not entitled to relief on this claim of ineffective assistance of counsel, the court's decision denying Gonzalez-Faguaga an evidentiary hearing was clearly erroneous.

2. Failure to Appoint Counsel

[21-23] Gonzalez-Faguaga also assigns as error the failure of the district court to assign counsel for him. Under the Nebraska Postconviction Act, it is within the discretion of the court whether counsel shall be appointed to represent the defendant. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). When the assigned errors in the postconviction petition before the district court contain no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant. *Id.* When, however, the defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to counsel. *Id.*

As previously discussed, Gonzalez-Faguaga's motion for postconviction relief presents a justiciable issue. Accordingly, the court abused its discretion in denying his request for appointment of counsel.

V. CONCLUSION

We reverse in part, and remand with directions to appoint counsel and to hold an evidentiary hearing on Gonzalez-Faguaga's claim that his trial counsel was ineffective in failing to bring to the court's attention the State's breach of the plea agreement. We have reviewed Gonzalez-Faguaga's other assignments of error and determine that they are without merit. Further, to the extent Gonzalez-Faguaga, acting pro se, argues that the trial court and postconviction court committed plain error, we determine that the record shows no plain error. Therefore, because the other assignments of error are without merit and there was no plain error, we affirm the remainder of the district court's decision.

Affirmed in part, and in part reversed and remanded with directions.

HARSH INTERNATIONAL, INC., APPELLANT, V. MONFORT INDUSTRIES, INC., APPELLEE.

662 N.W.2d 574

Filed June 6, 2003. No. S-02-381.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. **Judgments: Statutes: Appeal and Error.** Concerning questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Workers' Compensation: Contribution: Parties.** The Nebraska Workers' Compensation Act bars an action by a third-party tort-feasor against an employer for contribution based on a claim arising from an injury to an employee.
4. **Workers' Compensation: Intent.** Intentional acts of an employer fall within the scope of the Nebraska Workers' Compensation Act.
5. **Workers' Compensation: Contribution: Parties: Intent.** Nebraska does not recognize an exception that would allow a third party to seek contribution from an employer who is under the provisions of the Nebraska Workers' Compensation Act when it is alleged that the employer acted intentionally.
6. **Workers' Compensation: Vendor and Vendee: Claims.** The relationship between vendor and vendee will not support a claim for implied indemnification against an employer who is a vendee and is under the provisions of the Nebraska Workers' Compensation Act.
7. **Workers' Compensation: Parties: Contracts.** Nebraska does not recognize an exception that would allow a third party to seek indemnity from an employer who is under the provisions of the Nebraska Workers' Compensation Act when there is not a special relationship or express contract of indemnification.
8. **Demurrer: Pleadings.** If, upon the sustainment of a demurrer, it is clear that no reasonable possibility exists that an amendment will correct a pleading defect, leave to amend need not be granted.
9. **Judgments: Res Judicata.** Under res judicata, a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action.
10. **Res Judicata.** Res judicata bars relitigation not only of those matters litigated, but also of those which might have been litigated in an earlier proceeding.
11. ____. Res judicata applies to the litigation of defenses.
12. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

David E. Pavel, of David E. Pavel Law Offices, P.C., for appellant.

Robert D. Mullin, Jr., and William J. Birkel, of McGrath, North, Mullin & Kratz, P.C., for appellee.

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

CONNOLLY, J.

The appellant, Harsh International, Inc. (Harsh), sued Monfort Industries, Inc. (Monfort), for indemnity or contribution after Harsh settled a lawsuit with one of Monfort's employees. The employee was injured in the course of his employment by a mixer manufactured by Harsh. Monfort demurred, and the district court dismissed the petition with prejudice.

On appeal, Harsh asks this court to recognize intentional tort, implied indemnity, and comparative negligence exceptions to the rule that workers' compensation is the exclusive remedy against an employer for injury to an employee.

We decline to adopt exceptions for intentional torts and decline to extend an exception for implied contracts of indemnity beyond instances involving a special relationship. We determine that issues of comparative negligence are res judicata. Accordingly, we affirm.

BACKGROUND

In February 1995, a Monfort employee, Maximino Rodriguez, was seriously injured when he became entangled in a rotating shaft located below a mixer manufactured by Harsh. In 1997, Rodriguez and his wife sued Harsh under a products liability theory. Monfort was named as a defendant solely for compliance with the Nebraska Workers' Compensation Act (Act). In that action, Harsh moved to file a third-party complaint against Monfort. The motion asserted that Monfort might be liable to Harsh for all or part of Rodriguez' claim and that the outcome of the claim was dependant on the outcome of Rodriguez' claim against Harsh. The district court overruled the motion, and Harsh appealed. The Nebraska Court of Appeals dismissed because there was not a final order. See *Rodriguez v. Harsh International*, 7 Neb. App. xl (No. A-98-911, Nov. 2, 1998). Harsh never filed a proper appeal of the issue. At the conclusion of trial, but before the jury returned a verdict, Harsh settled the cases with Rodriguez

and his wife for $1 million, to be paid in installments. Because of an arrangement with Rodriguez and his wife, Monfort was, or will be, credited with amounts it advanced under the Act.

In 2001, Harsh filed an amended petition against Monfort seeking indemnity or contribution from Monfort because of Monfort's negligence, strict liability, or unjust enrichment. The petition alleged that in 1993, it sold three stainless steel mixers and stands to Monfort, including the mixer that injured Rodriguez. The mixers were substantially modified according to directions provided by Monfort. Harsh was not involved in system design, installation, or placement of the mixers. Harsh also had no knowledge of how the mixers were configured, installed, and maintained. Harsh alleged that Monfort was a sophisticated user of the mixers and did not follow or implement safety rules to guard against dangers presented by the mixers. Harsh alleged that Monfort's modifications to the mixers were the proximate cause of Rodriguez' injuries.

Harsh sought indemnity under an implied contract of indemnity. Harsh also sought contribution, alleging that Monfort acted in a "dual capacity" as the designer of the mixers. Harsh alleged that Monfort could not be immune from suit under the Act when it acted as a designer.

Harsh next sought contribution or indemnity under the comparative negligence statutes. Harsh alleged that the public policy of Nebraska is to assess damages in proportion to the fault of the defendants. Harsh further alleged that adoption of the comparative negligence statutes abrogated the doctrine of employer immunity from suit under the Act. Finally, Harsh sought contribution or indemnity under theories of strict liability and unjust enrichment.

Monfort demurred, alleging that the petition failed to state a cause of action and that the claims had been the subject of another action between the parties. The court determined that the Act relieves an employer from liability, including actions filed by third parties. The court noted that an exception was recognized for a claim of contractual indemnity. Noting that a majority of states reject a doctrine of implied indemnity, the court concluded that Harsh failed to plead sufficient facts to show that there was an implied contract of indemnity between the parties. The court next determined that Nebraska had never adopted a dual capacity

doctrine as an exception to an employer's immunity from suit under the Act.

Addressing the claims of comparative negligence, strict liability, and unjust enrichment, the court determined that Harsh could not seek indemnification when it chose to voluntarily settle its action with Rodriguez. In the alternative, the court determined that the comparative negligence statutes did not abrogate the doctrine of immunity from suit as provided in the Act. As a result, the court sustained the demurrer and dismissed the petition without leave to amend. Harsh's motion for a new trial was overruled, and Harsh appeals.

ASSIGNMENTS OF ERROR

Harsh lists 16 assignments of error, which we consolidate as follows: The district court erred in (1) failing to recognize an implied contract of indemnity, (2) failing to recognize an action for contribution when the employer committed an intentional tort, (3) failing to apply principles of comparative negligence, (4) failing to find unjust enrichment, (5) sustaining the demurrer and dismissing the petition, and (6) denying leave to amend.

STANDARD OF REVIEW

[1] 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. *Regier v. Good Samaritan Hosp.*, 264 Neb. 660, 651 N.W.2d 210 (2002).

[2] Concerning questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Guenzel-Handlos v. County of Lancaster*, 265 Neb. 125, 655 N.W.2d 384 (2003).

ANALYSIS

Harsh contends that it may bring an action for contribution against Monfort as an intentional tort-feasor. In the alternative, Harsh argues that it can bring an indemnity action because there was an implied contract of indemnity. Monfort counters that Neb.

Rev. Stat. § 48-148 (Reissue 1998) bars any action by third-party tort-feasors for either indemnity or contribution.

Section 48-148 provides:

> If any employee . . . of any employer subject to the Nebraska Workers' Compensation Act files any claim with, or accepts any payment from such employer, or from any insurance company carrying such risk, on account of personal injury, or makes any agreement, or submits any question to the Nebraska Workers' Compensation Court under such act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.

Neb. Rev. Stat. § 48-118 (Cum. Supp. 1994), the version in effect at the time of Rodriguez' injuries, provides that if the injured employee recovers from a third party for injuries sustained, the employer shall be subrogated and reimbursed for any compensation paid.

[3] We have recognized that the majority of jurisdictions have held that a third-party tort-feasor, who is liable for injuries to a worker, is not entitled to recover contribution from the worker's employer. This is true even if the employer's negligence concurred in causing the injury and the injury was covered by a workers' compensation act. *Vangreen v. Interstate Machinery & Supply Co.*, 197 Neb. 29, 246 N.W.2d 652 (1976). In *Vangreen*, we stated:

> The decisions are based on two theories. First, that an employer covered by a compensation act does not have a common liability with a third party tort-feasor which is a necessary requisite to securing contribution. Second, that compensation acts must be construed as specifically limiting the liability of the employer, not only to the employee, but as to third persons as well.

197 Neb. at 31, 246 N.W.2d at 654. Thus, we held in *Vangreen* that the Act bars an action by a third-party tort-feasor against the employer for contribution based on a claim arising from an injury to an employee.

[4] Harsh argues, however, that an exception applies when the employer is an intentional tort-feasor. We decline to recognize an exception. We have stated that the Act provides the exclusive

remedy by the employee against the employer for *any* injury arising out of and in the course of the employment. *Abbott v. Gould, Inc.*, 232 Neb. 907, 443 N.W.2d 591 (1989). Thus, we have held that intentional acts of an employer fall within the scope of the Act. *Id.*

[5] Here, when the Act limits the employer's liability to the employee for intentional acts, we decline to create an exception that would extend the employer's liability to third parties. As we noted in *Vangreen*, because of the exclusive remedy provision in § 48-148, an employer covered by the Act does not have a common liability with a third-party tort-feasor. A common liability is a necessary requirement for securing contribution. Further, the Act must be construed as specifically limiting the liability of the employer, not only to the employee, but as to third parties as well. Accordingly, we do not recognize an exception that would allow a third party to seek contribution from the employer when it is alleged that the employer acted intentionally.

In the alternative, Harsh argues that it may recover indemnity or contribution under an implied contract of indemnity. Thus, Harsh asks us to recognize an implied indemnity doctrine as an exception to the defense that § 48-148 provides the exclusive remedy against the employer for injuries sustained by an employee.

In *Vangreen*, the district court dismissed a cross-claim against an employer for indemnity. We noted that the bar against contribution claims has also, in some circumstances, been applied to indemnity claims. We then stated: "The majority rule holds that, when the relation between the parties involves 'no contract or special relation capable of carrying with it an implied obligation to indemnify, the basic exclusiveness rule generally cannot be defeated by dressing the remedy itself in contractual clothes such as indemnity . . . .'" *Vangreen v. Interstate Machinery & Supply Co.*, 197 Neb. 29, 33, 246 N.W.2d 652, 654 (1976). Because in *Vangreen* there was no allegation of a right to recover under an express or implied contract, we affirmed the dismissal of the cross-claim.

We specifically allowed an express contractual indemnification action against an employer in *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988). There, we held:

> [W]hen an employer, liable to an employee under the Nebraska Workers' Compensation Act, agrees to indemnify a third party for a loss sustained as the result of the third party's payment to the indemnitor's employee, the employer's exclusion from liability accorded by the Worker's Compensation Act does not preclude the third party's action to enforce the indemnity agreement with the indemnitor-employer.

229 Neb. at 169, 425 N.W.2d at 879.

[6] Although we indicated in *Vangreen, supra*, that a contract of indemnity could be implied, we discussed the issue in terms of a special relationship. A small minority of jurisdictions recognize the implied indemnity doctrine, while the great majority reject the implied indemnity doctrine as an exception in the absence of a special relationship. See 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 121.07[1] (2002). Examples of a special relationship are those such as principle and agent, bailor and bailee, lessor and lessee, or a situation giving rise to vicarious liability. See, *Ramos v. Browning Ferris Industries*, 103 N.J. 177, 510 A.2d 1152 (1986); *Diekevers v SCM Corp*, 73 Mich. App. 78, 250 N.W.2d 548 (1976). In contrast, the relationship between vendor and vendee will not support a claim for implied indemnification against an employer who is a vendee. *Ramos, supra.*

[7] We decline to extend the exception beyond instances involving a special relationship or express contracts of indemnification. Under an express contract of indemnity, an employer has explicitly agreed to reimburse a third party for payment to an injured employee. The employer has expressly created a contractual duty of reimbursement to the third party. Likewise, a special relationship permits the primary defendant to be held liable for injuries proximately caused by the negligence of another defendant. But when the duty to indemnify is not express and a special relationship does not exist, we construe the Act to specifically limit the liability of the employer.

Here, there was no express contract of indemnity and it is clear that the relationship between Harsh and Monfort was that of vendor and vendee. The allegation that Monfort requested modifications to the mixer and changed its design does not change the

relationship between the parties. Thus, Harsh cannot allege a relationship that could give rise to an implied contract of indemnity to defeat the exclusive remedy provision of § 48-148.

[8] Harsh contends that it should have been given leave to amend its petition. If, upon the sustainment of a demurrer, it is clear that no reasonable possibility exists that an amendment will correct a pleading defect, leave to amend need not be granted. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). We determine that because the relationship between Harsh and Monfort is clear, the court properly denied leave to amend.

Harsh next contends that Monfort's actions were the sole proximate cause of the injury and that the comparative negligence statutes should apply. See Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995). We determine that the issue is res judicata because the comparative negligence defense could have been litigated in the action between Rodriguez and Harsh.

Harsh attempted to join Monfort as a third-party defendant in the action between Rodriguez and Harsh. The court dismissed the third-party petition, and Harsh's appeal was dismissed for lack of jurisdiction. See *Rodriguez v. Harsh International*, 7 Neb. App. xl (No. A-98-911, Nov. 2, 1998). Harsh never filed a proper appeal of the dismissal of Monfort and then settled the case.

[9-11] Under res judicata, a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action. *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002). Res Judicata bars relitigation not only of those matters litigated, but also of those which might have been litigated in an earlier proceeding. *Dakota Title v. World-Wide Steel Sys.*, 238 Neb. 519, 471 N.W.2d 430 (1991). Res judicata also applies to the litigation of defenses. *Id.*

Here, the proper time for Harsh to have raised the defense of comparative negligence was in the action between it and Rodriguez. Harsh unsuccessfully attempted to join Monfort as a third-party defendant in the action, but then abandoned any comparative negligence claim when it voluntarily settled the case and failed to properly appeal the dismissal of the third-party petition. Harsh cannot now attempt to litigate the defense of comparative negligence by bringing suit directly against Monfort.

[12] Finally, Harsh assigned as error the failure of the court to find that there was unjust enrichment. But Harsh does not argue the issue in its brief. We also note that Harsh does not argue the issues of dual capacity or strict liability. Errors that are assigned but not argued will not be addressed by an appellate court. *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003). We do not address these issues.

CONCLUSION

We do not recognize an exception to the exclusive remedy provision under § 48-148 that would allow a third party held liable to an injured employee to seek contribution from an employer for the employer's alleged intentional acts. We also do not recognize an implied indemnity exception to the exclusive remedy provision outside of the existence of a special relationship. We determine that issues of comparative negligence are res judicata. Thus, we do not address whether comparative negligence of an employer may be raised as a defense to an action between an injured employee and a third party. Finally, we determine that Harsh is not entitled to leave to amend its petition.

AFFIRMED.

TONI E. MCCLURE, APPELLANT AND CROSS-APPELLEE, V. WILTON AND EILEEN FORSMAN AND CROSSROADS FARMS, INC., APPELLEES AND CROSS-APPELLANTS.

662 N.W.2d 566

Filed June 6, 2003. No. S-02-414.

1. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
2. **Judgments: Verdicts.** 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. **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.

4. **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.
5. **Negligence: Words and Phrases.** Ordinary negligence is defined as the doing of something that a reasonably careful person would not do under similar circumstances or the failing to do something that a reasonably careful person would do under similar circumstances.
6. **Negligence: Liability.** One cannot be held responsible on the theory of negligence for an injury caused by an act or omission unless the negligent tort-feasor had knowledge or was reasonably charged with knowledge that the act or omission involved danger to another.
7. **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.
8. **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.
9. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

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

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

Caroline M. Cooper and Daniel M. Placzek, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellees.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

This is the second appellate appearance of this case. The appellant, Toni E. McClure, was injured when her van slid into a ditch after she drove across a public highway that had been sprayed by water from a pivot irrigation system owned and operated by appellees, Wilton and Eileen Forsman and Crossroads Farms, Inc.

(collectively appellees). McClure sued appellees based on negligence in the district court for Hamilton County. Following a jury trial resulting in a defense verdict, the district court entered judgment for appellees. McClure appealed. See *McClure v. Forsman*, 9 Neb. App. 669, 617 N.W.2d 640 (2000). The Nebraska Court of Appeals concluded that the jury was instructed on a matter not supported by the pleadings or the evidence. The Court of Appeals reversed the judgment and remanded the cause for a new trial.

After a second trial, the jury again returned a verdict in favor of appellees. McClure filed a posttrial motion for judgment notwithstanding the verdict or, in the alternative, a motion for new trial, which the district court denied. Judgment was entered in conformity with the jury's verdict. McClure appeals, and appellees cross-appeal. For the reasons recited below, we affirm the decision of the district court. Because we affirm the district court's decision, we do not address the issue raised in appellees' cross-appeal.

II. STATEMENT OF FACTS

On August 31, 1995, at approximately 6 a.m., McClure was driving her van along a gravel road in Hamilton County. She noticed something "very black" on the road in front of her. As McClure slowed down and attempted to maneuver around the "black" patch, she lost control of her van, which left the roadway and ended up on its side in a ditch. The "black" patch was later determined to be a pool of water created by appellees' center-pivot irrigation system's spraying water onto the roadway.

The accident was investigated by the Hamilton County Sheriff's Department, and Wilton was ticketed by the sheriff's department for violating Neb. Rev. Stat. § 39-301 (Reissue 1998), which prohibits, inter alia, "diverting water onto or across [a public] road so as to saturate, wash, or impair the . . . passability of such public road." Wilton pled guilty to the charge, which is a Class V misdemeanor, and paid a fine and court costs.

On July 21, 1997, McClure brought a negligence action against appellees. She filed an amended petition (petition) on December 24, 1998, which is the operative petition for purposes of trial and this appeal. In her petition, McClure claimed, inter alia, that because appellees' center-pivot irrigation system was spraying

water on the roadway, she lost control of her van and rolled her van into a ditch along the side of the road. McClure claimed that as a result of the accident, she sustained chronic cervical and lumbar strain injuries. McClure sought general damages for pain and suffering, permanent disability, loss of enjoyment of life, and lost earnings, as well as special damages for her medical bills and the damage to her van.

The case was originally tried to a jury on March 22 and 23, 1999, and the jury returned a verdict in favor of appellees. McClure appealed. On appeal, the Court of Appeals concluded that one of the jury instructions did not instruct the jury as to the issues presented by the pleadings and supported by the evidence. Accordingly, the Court of Appeals reversed the judgment and remanded the cause for a new trial. *McClure, supra.*

A new jury trial was conducted beginning on March 11, 2002, and continuing through March 13. The present appeal is taken from the second trial. During the trial, at the close of all the evidence, the district court denied McClure's motion for a directed verdict. In addition, during the jury instruction conference, the district court refused to give McClure's requested instruction No. 3. McClure's requested instruction No. 3 reads as follows:

> Defendant pleaded guilty to violating Nebraska Revised Statute §39-301. A plea of guilty creates the legal presumption that the Defendant did, in fact, violate the statute. For the Defendant to be excused from violating this statute, it is his burden to show facts which take him out of the scope of the statute as described in the previous instruction, namely, that Defendant did not "divert water onto or across such road so as to saturate, was[h], or impair the maintenance, construction, or passability of such public road. . .[.]"

The district court did, however, give the jury the following instruction No. 18:

> It is claimed that the defendant Wilton Forsman violated Nebraska Revised Statute § 39-301. A plea of guilty creates the legal presumption that the defendant did, in fact, violate the statute. The violation of a statute is evidence that you may consider, along with all of the other facts and circumstances in the case, in deciding whether or not there was any negligence.

Also during the jury instruction conference, appellees requested that the district court instruct the jury on the affirmative defense of McClure's contributory negligence, based upon McClure's alleged failure to keep and maintain a proper lookout, failure to maintain control of her van, and failure to drive at a speed that was reasonable and proper under the circumstances. The district court refused appellees' requested contributory negligence instruction.

The case was given to the jury at approximately 11:30 a.m. on March 13, 2002. At 3:45 p.m., the jury returned a unanimous verdict in favor of appellees. McClure filed a motion for judgment notwithstanding the verdict or, in the alternative, a motion for new trial, which was denied. McClure appeals, and appellees cross-appeal.

III. ASSIGNMENTS OF ERROR

McClure claims, renumbered and restated, that the district court erred (1) in overruling her motion for a directed verdict and her motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial; (2) in refusing to give her requested jury instruction No. 3 regarding the effect of Wilton's guilty plea for violating § 39-301; and (3) in giving jury instruction No. 18. On cross-appeal, appellees claim the district court erred in refusing to instruct the jury on McClure's alleged contributory negligence.

IV. STANDARDS OF REVIEW

[1-3] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003); *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002). 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. *Moyer, supra*; *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744

(2002). 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. *Moyer, supra*; *Bowley v. W.S.A., Inc.*, 264 Neb. 6, 645 N.W.2d 512 (2002).

[4] 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. See, *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003); *Reicheneker v. Reicheneker*, 264 Neb. 682, 651 N.W.2d 224 (2002).

V. ANALYSIS

1. Motion for Directed Verdict and Motion for Judgment Notwithstanding Verdict or, Alternatively, Motion for New Trial

McClure claims that the district court erred in failing to sustain her motion for a directed verdict made at the close of all the evidence and in failing to sustain her motion for judgment notwithstanding the verdict or, in the alternative, her motion for new trial. On appeal, McClure asserts that appellees were negligent as a matter of law, arguing that "[a] reasonably careful person would not put water on a public road . . . in complete disregard to [sic] the safety of the public." Brief for appellant at 12. In particular, McClure argues that appellees "watered [the] road . . . all the time, and had done so for years. Two completely disinterested witnesses both testified that this road was always wet, during irrigation season, on a weekly basis." Brief for appellant at 12-13. In support of her first assignment of error, McClure claims that

> there is no relevant evidence upon which a reasonable mind could conclude that [appellees] were not negligent. . . .
>
> It is clear from [the] record that the evidence is insufficient to sustain a verdict in favor of [appellees]. For that reason, the trial court should have directed a verdict, sustained the motion for judgment notwithstanding the verdict, or granted a new trial.

Brief for appellant at 20. Contrary to McClure's assertion, a review of the record shows that there is a dispute in the evidence

which precluded entry of a directed verdict and which supports the district court's ruling denying McClure's posttrial motions.

[5,6] We have previously stated that "[o]rdinary negligence is defined as the doing of something that a reasonably careful person would not do under similar circumstances or the failing to do something that a reasonably careful person would do under similar circumstances." *Drake v. Drake*, 260 Neb. 530, 541, 618 N.W.2d 650, 660 (2000). We have also recognized, however, that "[o]ne cannot be held responsible on the theory of negligence for an injury caused by an act or omission unless the negligent tort-feasor had knowledge or was reasonably charged with knowledge that the act or omission involved danger to another." *Wilson v. F & H Constr. Co.*, 229 Neb. 815, 819-20, 428 N.W.2d 914, 918 (1988).

In the instant case, Wilton testified that he had no notice prior to August 31, 1995, that appellees' center-pivot irrigation system was spraying water onto the road, making the road wet. Wilton testified that he disagreed with the testimony of other witnesses that appellees' irrigation system had made the road wet periodically throughout the summer. Furthermore, in answer to the question "[t]o your knowledge, was this road wet in this spot from this pivot at anytime before the morning of the accident on August 31st, 1995?" Wilton responded, "Not to my knowledge."

[7] 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. *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003). Furthermore, 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. *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003); *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002). 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. *Moyer, supra*; *Bowley v. W.S.A., Inc.*, 264 Neb. 6, 645 N.W.2d 512 (2002).

Contrary to McClure's assertion, there was a dispute in the evidence as to whether the section of the roadway upon which McClure was traveling at the time of her accident was frequently

wet and whether appellees had knowledge or could be charged with knowledge of the roadway's wet condition on the day of the accident and prior thereto. Because there was a dispute in the record and reasonable minds could draw more than one conclusion from the evidence, we conclude that the district court did not err in denying McClure's motion for a directed verdict, see *Walls, supra*, and further did not err in denying McClure's motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial. See *Moyer, supra*. Accordingly, there is no merit to this assignment of error.

2. Jury Instructions

(a) McClure's Requested Jury Instruction No. 3

McClure claims that the district court erred in failing to give the jury her requested jury instruction No. 3, which reads as follows:

> Defendant pleaded guilty to violating Nebraska Revised Statute §39-301. A plea of guilty creates the legal presumption that the Defendant did, in fact, violate the statute. For the Defendant to be excused from violating this statute, it is his burden to show facts which take him out of the scope of the statute as described in the previous instruction, namely, that Defendant did not "divert water onto or across such road so as to saturate, was[h], or impair the maintenance, construction, or passability of such public road. . .[.]"

McClure claims that the basis for her requested instruction was this court's decision in *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998). McClure's reliance on *Tapp* is misplaced, and the district court did not err in refusing to give McClure's requested instruction No. 3.

To establish reversible error from a court's refusal to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the requested instruction. See, *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003); *Reicheneker v. Reicheneker*, 264 Neb. 682, 651 N.W.2d 224 (2002).

As noted, McClure relies on *Tapp* as the source of her refused instruction. *Tapp* is inapposite. *Tapp* was a negligence case involving, inter alia, the propriety of certain jury instructions where it was claimed that a party's conduct violated a statute pertaining to the rules of the road and that such violation was evidence of negligence. We approved that portion of a proposed instruction which, under the facts of that case, properly stated that once a prima facie violation of the statute had been established, it was incumbent on the party so implicated to show facts that took him or her out of the scope of the statute.

In contrast to *Tapp*, which involved a disputed claim that the opposing party had violated a statute, in the instant case, there was no dispute that Wilton had been convicted of violating § 39-301. Indeed, in his testimony, Wilton admitted that he had pled guilty and paid a fine. Unlike *Tapp*, in the instant case, the statutory violation was undisputed and, thus, McClure's tendered instruction No. 3, regarding, inter alia, the "Defendant's" shifting burden, was not warranted by the evidence, *Farmers Mut. Ins. Co., supra*, and would have confused the jury. See *Cobb v. Sure Crop Chem. Co.*, 255 Neb. 625, 587 N.W.2d 355 (1998). The district court properly refused to give McClure's proposed instruction No. 3.

(b) Jury Instruction No. 18

McClure claims the district court erred in giving jury instruction No. 18, which reads as follows:

> It is claimed that the defendant Wilton Forsman violated Nebraska Revised Statute § 39-301. A plea of guilty creates the legal presumption that the defendant did, in fact, violate the statute. The violation of a statute is evidence that you may consider, along with all of the other facts and circumstances in the case, in deciding whether or not there was any negligence.

[8] The record reflects that during the jury instruction conference, counsel for McClure specifically stated that he had "[n]o objection" to instruction No. 18. 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. *Nebraska*

Nutrients v. Shepherd, 261 Neb. 723, 626 N.W.2d 472 (2001); *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). Accordingly, we review instruction No. 18 for plain error and find none.

Instruction No. 18 is generally based on NJI2d Civ. 3.03. However, the district court deviated from pattern jury instruction No. 3.03 by omitting a sentence which states that a statutory violation does "not necessarily prove negligence" and further deviated from instruction No. 3.03 by injecting language derived from McClure's proposed jury instruction No. 3 to the effect that a defendant's plea of guilty to the charge of a statutory violation creates the legal presumption that the defendant did, in fact, violate the statute.

[9] Although we have stated that the Nebraska pattern jury instructions are to be used whenever applicable, *Tank v. Peterson*, 228 Neb. 491, 423 N.W.2d 752 (1988), we have recognized that a failure to use the pattern jury instructions does not require reversal. See, generally, *Nguyen v. Rezac*, 256 Neb. 458, 590 N.W.2d 375 (1999). In the instant case, to the extent the district court deviated from the pattern instruction, it did so in McClure's favor. Plain error

> exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

In re Grand Jury of Douglas Cty., 263 Neb. 981, 989-90, 644 N.W.2d 858, 864 (2002). McClure was not prejudiced by the district court's giving of instruction No. 18, and the result is not unjust. Therefore, the giving of such instruction did not constitute plain error. Accordingly, we find no merit to this assignment of error.

3. Cross-Appeal

Because we affirm the district court's decision entering judgment in conformity with the jury verdict in favor of appellees and against McClure, we do not address the issue raised in appellees' cross-appeal.

VI. CONCLUSION

For the reasons set forth above, we find no merit in McClure's claims that the district court erred in denying McClure's motion for directed verdict and motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial, and further erred in its instructions to the jury. We affirm the district court's decision entering judgment in conformity with the jury verdict in favor of appellees and against McClure.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. SCOTT H. RASMUSSEN, RESPONDENT.

662 N.W.2d 556

Filed June 6, 2003. No. S-02-503.

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 when the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
4. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
5. ____. 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.
6. ____. The misappropriation of a client's funds is more than a grievous breach of professional ethics. It violates basic notions of honesty and endangers public confidence in the legal profession.
7. ____. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment.

Original action. Judgment of disbarment.

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

Scott H. Rasmussen, pro se.

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

PER CURIAM.

The Counsel for Discipline of the Nebraska Supreme Court, the relator, filed formal charges against Scott H. Rasmussen alleging multiple ethical violations. This court appointed a referee, and a hearing was held on the charges. The referee determined that Rasmussen's conduct had breached several disciplinary rules. The referee recommended a suspension of not less than 2 years. Rasmussen filed exceptions to the report and recommendation of the referee.

I. FACTS

Rasmussen was admitted to the practice of law on October 9, 1985. During the time period relevant to this proceeding, Rasmussen practiced law in Omaha.

The formal charges filed by the relator contained four counts, which are described separately below.

1. COUNT I

Count I arises out of Rasmussen's representation of Harold and Barbara Vickerses. While represented by another lawyer, the Vickerses were involved in a lawsuit with tenants who leased property from them. After the district court determined that the Vickerses owed money to the tenants, they terminated the services of their attorney and hired Rasmussen to evaluate the possibility of an appeal. The Vickerses also wanted Rasmussen to investigate bringing an action against the tenants for damage they had allegedly caused to the property.

When the Vickerses hired Rasmussen, the parties entered into a written fee agreement. Under the agreement, Rasmussen was to bill the Vickerses at the rate of $100 per hour and the Vickerses agreed to pay a $1,500 retainer, against which Rasmussen would initially

bill. The agreement also provided that Rasmussen would send monthly itemized statements to the Vickerses.

After receiving the retainer, Rasmussen moved for a new trial. The motion was denied, and the Vickerses decided not to file an appeal. Rasmussen also did some preparatory work to determine whether to file a new lawsuit against the tenants.

The last work Rasmussen did for the Vickerses occurred in March 1998. He sent a letter to the Vickerses requesting that they provide him with more information so that he could commence a new lawsuit against the tenants. After the Vickerses sent the requested information, they had little or no communication with Rasmussen over the next 1½ years.

As noted previously, under the terms of the fee agreement, Rasmussen was required to send monthly itemized statements to the Vickerses. In early 1998, at the request of the Vickerses, Rasmussen sent them a statement. It indicated that he had done $1,200 worth of legal work and that $300 remained of the retainer they had paid. The statement, however, was not itemized. This was the only statement that the Vickerses received from Rasmussen during his representation.

The Vickerses sent a letter to the Counsel for Discipline on February 11, 2000. The letter stated that Rasmussen "still owes us the remaining three hundred dollars [of the retainer] with some interest for using it all this time, plus an itemized statement so that we can see where all our money went." The Counsel for Discipline forwarded the letter to Rasmussen and requested a written response. Rasmussen failed to respond, and the Counsel for Discipline sent him another letter.

On March 27, 2000, Rasmussen mailed a letter to the Counsel for Discipline responding to the Vickerses' allegations. At the end of the letter, Rasmussen wrote, "I understand from their letter that Mr. and Mrs. Vickerses would like the remainder of their retainer back. That is their right. Perhaps you can give all of us some guidance that will bring this whole case to a conclusion." Rasmussen failed to include an itemized statement with the letter, and he did not refund the remainder of the retainer.

In April 2000, the Vickerses sent a letter to the Counsel for Discipline replying to Rasmussen's letter. Once again, they requested that Rasmussen provide an itemized statement and that

he refund the remainder of the retainer. On May 1, the Counsel for Discipline forwarded a copy of the letter to Rasmussen and directed him to provide an itemized statement and refund the remainder of the retainer.

Rasmussen provided an itemized statement on June 1, 2000. Around the same time, he also refunded the $300 that remained from the retainer.

Concerning count I, the relator charged and the referee found that Rasmussen had violated the following provisions of Canons 1 and 9 of the Code of Professional Responsibility:

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

2. Count II

Roger Gallagher hired Rasmussen in July 2000 to assist him in seeking relief from a 1998 conviction for felony sexual assault. Gallagher, who is physically disabled, also asked Rasmussen to investigate filing a 42 U.S.C. § 1983 (2000) action because the Department of Correctional Services had failed to address his needs. The charges against Rasmussen in count II addressed both his neglect in addressing Gallagher's case and his mishandling of a $3,000 retainer that Gallagher paid to him.

(a) Neglect

Under their fee agreement, Gallagher was required to pay Rasmussen a retainer of $3,000. After Gallagher had paid the retainer, Rasmussen visited him on two occasions, once in July

2000 and once in September, to discuss the case. In October, Rasmussen filed a motion for postconviction relief. On October 6, the court denied the motion, reasoning that Gallagher had previously been denied postconviction relief and was therefore barred from bringing another motion for postconviction relief.

On October 11, 2000, following the denial of his motion for postconviction relief, Rasmussen sent Gallagher a letter notifying him of the decision. The letter stated that Rasmussen would investigate an appeal and "be in touch within 7 days." After receiving the letter, Gallagher sent a letter to Rasmussen inquiring what legal action they should take next. Gallagher also made several telephone calls to Rasmussen. We note that because of security restrictions, Gallagher was generally unable to leave messages with Rasmussen's voice mail.

Despite his promise in the October 11, 2000, letter and Gallagher's repeated attempts to communicate with him, Rasmussen did not contact Gallagher again until he sent a letter in January 2001. In the letter, Rasmussen wrote:

> As for your Habeas Corpus, I have not forgotten you. However, I do not believe that you have a strong case to be released upon your original conviction. I believe that your stronger case to be [sic] your current treatment and the inability to care for you and the systems previous ways that it has dealt with disabled prisoners.

Rasmussen did not explain how he had reached these legal conclusions.

After receiving the January 2001 letter, Gallagher sent a letter to Rasmussen inquiring why Rasmussen did not believe that a habeas corpus action would be successful and imploring him to "Get the Lead out."

According to Rasmussen, he sent a petition for habeas corpus and a letter instructing Gallagher to sign the petition in February 2001. Gallagher denied receiving the letter or the petition and claimed that despite repeated telephone calls and letters, he had no contact with Rasmussen after January 2001.

Gallagher's attempts to communicate with Rasmussen continued even after Gallagher had filed his complaint with the Counsel for Discipline in April 2001. We note that in his communications with the Counsel for Discipline, Rasmussen indicated that he

wished to continue as Gallagher's counsel. Moreover, as late as July 2001, Gallagher expressed a willingness to allow Rasmussen to continue as his counsel. Gallagher even prepared an application for commutation and filings for a federal habeas corpus action and a 42 U.S.C. § 1983 action and sent them to Rasmussen for his review. But at no time after February 2001 did Rasmussen contact Gallagher directly or do any legal work for him. Eventually, Gallagher was forced to file the habeas corpus action on his own.

Gallagher officially terminated Rasmussen's representation of him in a letter dated December 5, 2001. In the letter, Gallagher demanded that Rasmussen return personal records that Gallagher had provided to Rasmussen. When Gallagher had sent these records to Rasmussen, he had asked that Rasmussen make copies and return the originals. Rasmussen, however, kept the records.

Rasmussen failed to respond to the December 5, 2001, letter, and Gallagher sent another letter demanding the return of his records in February 2002. Only when the relator took Rasmussen's deposition at the end of February 2002, did Rasmussen return Gallagher's personal records. We note that Rasmussen's failure to return Gallagher's records impeded Gallagher's ability to seek relief in federal court.

(b) Mishandling of Retainer

The second aspect of the charges relating to Rasmussen's representation of Gallagher address Rasmussen's mishandling of his trust account and the $3,000 retainer that Gallagher paid to him. Under the terms of their written fee agreement, Rasmussen was to bill Gallagher at the rate of $100 per hour and Gallagher agreed to pay a $3,000 retainer, against which Rasmussen would bill. Rasmussen admitted at the hearing that under the terms of the agreement, he was to deposit the retainer into his trust account and that only when he earned a portion of the fee could he withdraw it.

Rasmussen deposited Gallagher's $3,000 retainer into his trust account on July 14, 2000. The Counsel for Discipline contends that Rasmussen immediately withdrew the entire retainer from the account, well before he had earned any fees.

At the same time that he deposited Gallagher's check into his trust account, Rasmussen wrote a $3,000 check to himself.

Rasmussen initially contended that the $3,000 withdrawn on July 14, 2000, was not Gallagher's retainer. Instead, he argued that it was for fees that he had earned for working on an estate and that he did not withdraw the $3,000 that he claims to have earned for work done on Gallagher's case until March 2002.

At the hearing before the referee, however, Rasmussen admitted that he had received a $4,500 fee for his handling of the estate and the Counsel for Discipline presented evidence showing that Rasmussen had withdrawn this fee from his trust account in two separate transactions, one on May 15, 2000, and the other on May 22. After being confronted with this evidence, Rasmussen conceded that the July 14 withdrawal of $3,000 was not for the estate work. Instead, he claimed to not remember why he had withdrawn this money.

The confusion over why the $3,000 had been withdrawn on July 14, 2000, was compounded by Rasmussen's mismanagement of his trust account. The referee aptly described it as "appalling." In writing checks from the trust account, Rasmussen only sporadically noted in the memorandum portion of the check which client the check was for. Moreover, he did not maintain a trust account ledger and he did not always balance his trust account when he received bank statements. Rasmussen appears to have lost a number of returned checks and bank statements. He was also unable to describe why a number of deposits and withdrawals had been made in the account.

Moreover, Rasmussen also engaged in questionable billing practices concerning the Gallagher account.

Despite the fact that the written fee agreement between Rasmussen and Gallagher provided that Rasmussen would "send Client bills each month" Rasmussen concedes that he did not send monthly bills to Gallagher. Further, although Rasmussen claims to have sent an itemized bill in March 2002 to Gallagher, Gallagher testified that he never received the bill and that he saw it only when the Counsel for Discipline showed it to him at his deposition.

When Gallagher terminated Rasmussen as his counsel in December 2001, he requested that Rasmussen return the $3,000 retainer. Rasmussen failed to do so. In February 2002, Gallagher again requested that Rasmussen return the retainer. Rasmussen,

however, refused to do so. He claims that he worked 31 hours on Gallagher's case and that as a result, he is entitled to the retainer. Gallagher has filed a civil suit and, at the time of the hearing, was still attempting to recover the $3,000.

(c) Referee's Findings on Count II

Concerning count II, the relator charged and the referee found that Rasmussen had violated the following provisions of Canons 1, 6, and 9 of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (5) Engage in conduct that is prejudicial to the administration of justice. . . .
>
> . . . .
>
> DR 6-101 Failing to Act Competently.
>
> (A) A lawyer shall not:
>
> . . . .
>
> (3) Neglect a legal matter entrusted to him or her.
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> (A) All funds of clients paid to a lawyer or law firm shall be deposited in an identifiable account or accounts maintained in the state in which the law office is situated in one or more state or federally chartered banks, savings banks, savings and loan associations, or building and loan associations insured by the Federal Deposit Insurance Corporation, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay account charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

> (B) A lawyer shall:
>
> . . . .
>
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.
>
> (4) Promptly pay or deliver to the client, as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

The referee also made a specific finding that at the formal hearing, Rasmussen "was not truthful in regard to whether he deposited the $3,000.00 Gallagher fee into his trust account and then immediately withdrew it."

3. Count III

Amy Rezac hired Rasmussen in July 1998 after receiving a letter from the Internal Revenue Service (IRS) notifying her that she owed additional taxes for the 1995 tax year. The IRS claimed that Rezac had failed to report tips earned while she was working as a waitress in New York City.

After Rasmussen began representing Rezac, she received a second letter from the IRS stating that she owed about half the amount stated in the original letter. She assumed this reduction was because of work Rasmussen had done, although she had not received any information from Rasmussen about what work he had completed on her case. Rasmussen also apparently believed that the second letter reflected a reassessment of how much Rezac owed, and he told her that paying the amount listed in the second letter would cost less than disputing the matter. Rezac agreed, and Rasmussen instructed her to put a restrictive endorsement on the check. He believed that the restrictive endorsement would act as an accord and satisfaction, thereby resolving the matter completely when the IRS endorsed it.

In July 1999, Rezac received another letter from the IRS informing her that she owed an additional $3,949.01 and that her restrictive endorsement had not acted as an accord and satisfaction. Later discussions with the IRS revealed that the amount listed in the second letter represented only a partial assessment equal to the Social Security tax that the IRS claimed Rezac owed.

A more complete assessment showed that Rezac owed $3,949.01 in federal income tax as well.

Upon learning that the IRS still claimed that she owed income tax, Rezac attempted to contact Rasmussen. According to Rezac, she telephoned him at least 10 times between July and September 1999, but was only able to get his voice mail. She also sent him faxes and letters. He did not respond to her inquiries until some time in September or October.

Rasmussen mailed a letter to the IRS in October 1999 complaining about the IRS' claims that Rezac owed additional income tax and requesting further clarification. He did not, however, send a copy of the letter to Rezac. Because she did not know that Rasmussen had sent the letter to the IRS, she made several attempts to contact Rasmussen during late 1999 and early 2000. Rasmussen failed to respond to these inquiries until late January 2000.

Rezac received a letter from the New York Department of Revenue in February 2000 notifying her that she had underreported her 1995 income tax and that she owed the State of New York income tax. She forwarded the material to Rasmussen.

During March 2000, Rezac once again made several telephone calls to Rasmussen's office seeking to make an appointment with him. Rasmussen failed to respond to most of these calls. When he did respond, he set up an appointment to meet with Rezac, but he then canceled the meeting and it had to be rescheduled.

Rasmussen sent a letter to the New York Tax Compliance Division in May 2000 notifying it that Rezac disputed any liability. He did not, however, forward a copy to Rezac.

In a July 5, 2000, letter, Rezac instructed Rasmussen to send another letter to the New York Department of Revenue and requested that he provide her with a copy of everything that he had sent to the IRS and the State of New York. Although Rasmussen sent the letter to the New York Department of Revenue, he did not send Rezac a copy of the letter. Moreover, he failed to provide Rezac with the other information she had requested in the July 5 letter.

After terminating Rasmussen's representation of her in August 2000, Rezac hired another attorney. She is still attempting to resolve her tax issues with the IRS and the State of New York.

Concerning count III, the relator charged and the referee found that Rasmussen had violated DR-102(A)(1) and (5) and DR 6-101(A)(3).

4. Count IV

Count IV addresses Rasmussen's failure to cooperate with the Counsel for Discipline during its investigation. The record contains several examples of Rasmussen's noncooperation with the Counsel for Discipline. Rasmussen failed to respond timely or appropriately to the Counsel for Discipline's inquiries about each of the counts outlined above. Rasmussen also failed to appear at a deposition scheduled for January 15, 2001, and the deposition had to be rescheduled. Further, the Counsel for Discipline was forced to serve multiple subpoenas to obtain documents necessary to investigate its case. Finally, Rasmussen failed to obey the referee's September 13, 2002, order which required him "to fully comply with all of the Relator's discovery requests on or before Tuesday, September 17th at 1:00 P.M."

Concerning count IV, the relator charged and the referee found that Rasmussen had violated DR-102(A)(1) and (5).

5. Referee's Recommended Sanction

The relator originally recommended a 1-year suspension for Rasmussen's sanction. The referee rejected that as being too lenient. After stating that he was "sorely tempted to recommend disbarment," the referee recommended a suspension of not less than 2 years, reasoning that "[p]erhaps during a substantial suspension [Rasmussen] can reflect upon his behavior and reform it."

II. ASSIGNMENT OF ERROR

Rasmussen claims that the relator has not shown by clear and convincing evidence that he violated the Code of Professional Responsibility.

III. STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which this court reaches a conclusion independent of the findings of the referee; provided, however, that when the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of

the facts rather than another. *State ex rel. Counsel for Dis. v. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001).

IV. ANALYSIS

[2] Rasmussen complains that the relator has failed to meet its burden of proof. To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Huston, supra.*

As to count I, the evidence presented at the hearing shows that on February 11, 2000, the Vickerses sent a letter to the Counsel for Discipline in which they requested that Rasmussen return the $300 that remained of the retainer they had paid him. The Counsel for Discipline forwarded the letter to Rasmussen. Yet, Rasmussen—despite additional letters from both the Counsel for Discipline and the Vickerses demanding the return of the $300—inexplicably waited until June to return the money. This evidence established clearly and convincingly that Rasmussen violated DR 1-102(A)(1) and (5) and DR 9-102(B)(4).

The evidence presented by the relator in support of count II showed that Rasmussen neglected Gallagher's case, paid to himself Gallagher's entire retainer before he had earned any of it, and failed to maintain records showing how he had used Gallagher's retainer. This evidence established clearly and convincingly that Rasmussen violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), and DR 9-102(A)(1) and (2) and (B)(3).

Concerning count III, the evidence established that Rasmussen did only perfunctory legal work for Rezac while consistently ignoring her attempts to contact him. Moreover, when Rasmussen provided her with legal advice, it was highly questionable. We find that the relator proved by clear and convincing evidence that in representing Rezac, Rasmussen violated DR 1-102(A)(1) and (5) and DR 6-101(A)(3).

Count IV addresses Rasmussen's behavior during the relator's investigation and the disciplinary proceedings. The record is, as noted by the referee, replete with instances of Rasmussen's noncooperation. Accordingly, we find that the there is clear and convincing evidence establishing that Rasmussen violated DR 1-102(A)(1) and (5).

We note that although the formal charges accused Rasmussen of violating his oath of office, see Neb. Rev. Stat. § 7-104 (Reissue 1997), the referee's report is silent on the issue. We find that the evidence clearly and convincingly shows that Rasmussen violated his oath of office.

[3-5] We now turn to the question of the appropriate sanction for Rasmussen. 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 of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002). Each case must be evaluated individually in light of its particular facts and circumstances. *Id.* 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. *Id.*

[6,7] Some of the ethical violations that Rasmussen committed are of the type for which we have typically reserved the most severe sanctions. We are particularly distressed by the callousness with which he treated Gallagher. Rasmussen did very little legal work for Gallagher, and that which he did do, he did poorly. He failed to return Gallagher's personal records, despite Gallagher's requests. He ignored Gallagher's repeated attempts to communicate with him, something we find particularly troublesome given that Rasmussen seems to have had little trouble staying in contact with Gallagher before he received Gallagher's retainer. Finally, and more important, Rasmussen paid himself Gallagher's retainer before he had earned it, conduct which we have treated as being the equivalent of misappropriating funds. See, e.g., *State ex rel. Counsel for Dis. v. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001). The misappropriation of a client's funds is more than a grievous breach of professional ethics. It violates basic notions of honesty and endangers public confidence in the legal profession. *State ex rel. NSBA v. Gridley*, 249 Neb. 804, 545 N.W.2d 737 (1996). Absent mitigating circumstances, the appropriate discipline in cases of misappropriation

or commingling of client funds is disbarment. *State ex rel. Counsel for Dis. v. Huston, supra*; *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000).

Moreover, Rasmussen has treated these proceedings with the same type of callousness and dishonesty with which he has treated his clients. Since complaints were lodged against him, Rasmussen has (1) failed to timely or appropriately respond to the relator's inquiries; (2) missed his first deposition; (3) failed to comply with the referee's discovery orders; (4) lied while under oath at the formal hearing; (4) failed to file a posthearing brief with the referee, despite indicating that he would do so; and (5) without notice or explanation, failed to appear at oral arguments before this court.

Although Rasmussen presented no mitigating circumstances, the referee recommended a sanction of not less than a 2-year suspension. He reasoned that "[p]erhaps during a substantial suspension [Rasmussen] can reflect upon his behavior and reform it." We do not share the referee's confidence in the ability of Rasmussen to reform his behavior. Rasmussen has failed to demonstrate any sincere regret for his behavior, and he continues to show disrespect for his clients and the legal system. Given the gravity of Rasmussen's offenses, the need to deter others from committing similar offenses, Rasmussen's poor attitude, our belief that he is either unwilling or unable to reform his behavior, the need to protect the public from his future misconduct, and the lack of any mitigating circumstances, we conclude that disbarment is the appropriate remedy.

V. CONCLUSION

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

JUDGMENT OF DISBARMENT.

IN RE INTEREST OF RICHARD KOCHNER, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON. RICHARD KOCHNER, APPELLANT, V. MENTAL HEALTH BOARD, LANCASTER COUNTY, APPELLEE.

662 N.W.2d 195

Filed June 6, 2003. No. S-02-998.

1. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record.
2. ____: ____. In reviewing a district court's judgment under the Nebraska Mental Health Commitment Act, appellate courts will affirm the district court's judgment unless, as a matter of law, the judgment is unsupported by evidence which is clear and convincing.
3. **Mental Health: Evidence: Attorneys at Law.** Oral argument made by counsel during a hearing before a mental health board is not evidence.
4. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower courts as to those errors is to be affirmed.
5. **Mental Health.** Before a person may be committed for treatment by a mental health board, the board must determine that the person meets the definition of a mentally ill dangerous person as set out in Neb. Rev. Stat. § 83-1009 (Reissue 1999).
6. **Mental Health: Proof: Words and Phrases.** To meet the definition of a mentally ill dangerous person in Neb. Rev. Stat. § 83-1009 (Reissue 1999), the State must show that the person suffers from a mental illness and that the person presents a substantial risk of harm to others or to himself or herself.
7. **Mental Health: Other Acts: Proof.** To confine a person against his or her will because that person is likely to be dangerous in the future, it must be shown that he or she has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt, or threat to do substantial harm to himself or herself or to another.
8. ____: ____: ____. Any act that is used as evidence of dangerousness must be sufficiently probative to predict future behavior and the subject's present state of dangerousness.
9. ____: ____: ____. In determining whether an act is sufficiently recent to be probative on the issue of dangerousness, each case must be decided on the basis of the surrounding facts and circumstances.
10. **Mental Health: Other Acts: Time.** There is no definite time-oriented period to determine whether an act is recent for the purposes of Neb. Rev. Stat. § 83-1009 (Reissue 1999). Each case must be decided on the basis of the surrounding facts and circumstances.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Dorothy A. Walker, and Matthew G. Graff, Senior Certified Law Student, for appellant.

Gary E. Lacey, Lancaster County Attorney, and Barbara J. Armstead for appellee.

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

CONNOLLY, J.

The Lancaster County Mental Health Board (Board) determined that the appellant, Richard Kochner, is a mentally ill dangerous person under Neb. Rev. Stat. § 83-1001 et seq. (Reissue 1999 & Cum. Supp. 2000), of the Nebraska Mental Health Commitment Act (Commitment Act). The Board ordered him committed for inpatient treatment. The district court, sitting as an appellate court under § 83-1043, affirmed the Board's decision, and Kochner appealed. We affirm.

ASSIGNMENTS OF ERROR

Kochner assigns, restated, that the district court erred in concluding that (1) his statutory right to have a hearing within 7 days of being taken into protective custody was not denied; (2) there was sufficient evidence to support the Board's order of commitment; (3) inpatient treatment was the least restrictive treatment alternative available; and (4) the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (2000) did not require the State to provide the type of community-based program recommended by his expert as an alternative to inpatient treatment.

STANDARD OF REVIEW

[1,2] The district court reviews the determination of the mental health board de novo on the record. See, § 83-1043; *In re Interest of Ely*, 220 Neb. 731, 371 N.W.2d 724 (1985). In reviewing a district court's judgment under the Commitment Act, appellate courts will affirm the district court's judgment unless, as a matter of law, the judgment is unsupported by evidence which is clear and convincing. *In re Interest of S.B.*, 263 Neb. 175, 639 N.W.2d 78 (2002).

BACKGROUND

In 1991, Kochner sexually assaulted his 14-year-old daughter. He was convicted of sexual assault on a child as a result of the incident and was sentenced to probation for a period of 2 years.

In May 1999, the State charged Kochner with sexual assault of a child. The State alleged that he had sexually assaulted a girl for whom his wife was babysitting. He pled no contest to the charges, and the court sentenced him to 2 to 5 years' imprisonment.

Kochner, who was serving his sentence at the Omaha Correctional Center, was scheduled to be released on October 4, 2001. On August 14, Mark E. Weilage, Ph.D., a clinical psychologist at the Omaha Correctional Center, sent a letter to the Douglas County Attorney's office recommending that Kochner be referred to the Board for possible postincarceration commitment.

On September 13, 2001, the Douglas County Attorney filed a petition claiming that Kochner was a mentally ill dangerous person and that "mental-health-board-ordered treatment" was the least restrictive means for addressing the issue. The petition also claimed that "the immediate custody of [Kochner] is required to prevent the occurrence of the harm described by section [sic] § 83-1009." The parties agree that the Douglas County Mental Health Board ordered Weilage to take Kochner into protective custody on September 13. But, it is unclear how long Weilage held Kochner in protective custody.

Sometime on or after September 13, 2001, the case was transferred to Lancaster County. On October 1, the Lancaster County Attorney filed an amended petition. The county attorney alleged that "the immediate custody of [Kochner] is required to prevent the occurrence of the harm described by § 83-1009." Apparently on the same day, the Lancaster County Mental Health Board issued a summons on the amended petition and a warrant for Kochner's arrest. The summons set October 11 as the date for the hearing on whether to commit Kochner.

The record does not show the exact date that officials from Lancaster County took Kochner into protective custody. In its brief, the State claims that Kochner "was served with a warrant to appear before the Lancaster County Mental Health Board" on October 3, 2001, but that he was not taken into protective custody until October 4. Brief for appellee at 5. Kochner, however, claims he was taken into protective custody by officials from Lancaster County on October 3.

The Board held a hearing on October 11, 2001. At the hearing, Kochner moved to dismiss the amended petition because

the summons failed to set a hearing within 7 days of the time he was taken into protective custody. See § 83-1027. The Board denied the motion to dismiss.

The Board held a hearing on the substantive issues on January 29, 2002. The State presented evidence from Weilage; John Nason; and Mary Paine, Ph.D. Weilage testified that Kochner failed to complete a treatment program for sexual offenders. Nason, a mental health technician with the Lancaster County correctional facility, testified about an incident that occurred in mid-October 2001 in which he had observed Kochner masturbating in the correctional facility's library.

Paine, a clinical psychologist, was the State's expert witness. She diagnosed Kochner as having "[p]edophilia . . . non-exclusive, cognitive disorder NOS, . . . personality disorder NOS, with prominent anti-social and prominent schizotypal features." When asked if she believed Kochner poses a risk to himself or others, Paine testified to a reasonable degree of psychological certainty that he is "at moderate to high risk with the emphasis being on the high risk of re-offending sexually against minor females."

Paine rejected the contention that because 4 years had passed since the last sexual assault, there was no evidence that Kochner posed an immediate threat. Paine pointed out that Kochner had been imprisoned for much of that period and that he had failed to complete treatment while incarcerated. Paine also stated that Kochner's inappropriate sexual behavior at the Lancaster County correctional facility indicated that he still had poor judgment and a lack of impulse control.

Paine also testified that the least restrictive treatment alternative which would successfully treat Kochner's mental illness was inpatient sex offender treatment at the Lincoln Regional Center.

A. Jocelyn Ritchie, Ph.D., a psychologist specializing in neuropsychology, testified for Kochner. She diagnosed him as having pedophilia and cognitive disorder, as well as personality disorder with antisocial and schizotypal features. She placed Kochner at moderate risk for recidivism. Ritchie also opined as to what was the least restrictive treatment option. She believed that a regimented outpatient treatment program would be successful if Kochner was kept away from children and he lived in a supervised community residence.

The Board determined that Kochner "suffers from pedophilia, opposite sex, non-exclusive; cognitive disorder, NOS; and personality disorder, NOS, with anti-social and schizotypal features." It also concluded that Kochner "presents a substantial risk to other persons within the near future as manifested by recent acts of violence toward other persons." The Board determined that "neither voluntary hospitalization nor other treatment alternatives less restrictive of [Kochner's] liberty are available to prevent the harm described in the petition by reason that [Kochner], in his present mental condition, requires inpatient treatment." Accordingly, the Board ordered Kochner committed for inpatient treatment.

Kochner appealed the Board's decision to the district court. The court affirmed the Board's decision.

ANALYSIS

Timeliness of Hearing

Section 83-1027 provides:

> Upon the filing of the petition provided by sections 83-1025 and 83-1026 stating the county attorney's belief that the immediate custody of the subject is not required for the reasons provided by sections 83-1025 and 83-1026, the clerk of the district court shall cause a summons fixing the time and place for a hearing to be prepared and issued to the sheriff for service. . . . The summons shall fix a time for the hearing within seven days after the subject has been taken into protective custody.

In his first assignment of error, Kochner argues that § 83-1027 requires that a hearing be held within 7 days of the time that the person is taken into protective custody. He claims that his hearing was held more than 7 days after he was taken into protective custody and that thus, the Board should have dismissed the petition. We, however, decline to address the merits of this assignment of error, because the record presented is inadequate to show that Kochner was ever held under the authority of a mental health board for more than 7 consecutive days without a hearing.

The parties' briefs reveal a disagreement over which day Kochner was taken into protective custody. Kochner claims that he was taken into protective custody by Lancaster County on

October 3, 2001, 8 days before the initial hearing. In its brief, however, the State claims that the Lancaster County sheriff served Kochner with "a warrant to appear before the Lancaster County Mental Health Board" on October 3, but that Lancaster County did not take Kochner into protective custody until October 4, 7 days before the initial hearing. Brief for appellee at 5. If the State's date is correct, then even if we adopted Kochner's interpretation of § 83-1027, the statute would not have been violated because the hearing would have been held within 7 days of the time that Lancaster County took Kochner into protective custody.

The record does not provide a basis by which we can resolve the dispute over which day Lancaster County took Kochner into protective custody. A summons and an arrest warrant, both issued by the Lancaster County Mental Health Board, appear in the record, but the return is not filled out on either one. The record also contains a form that the Lancaster County Attorney apparently provides to subjects of a pending mental health hearing. The form is dated October 3, 2001, but it is unclear if this date refers to the date that the form was printed, the date Kochner was served with the summons, or the date that Kochner was taken into protective custody by Lancaster County.

[3] We note that to support his contention that he was taken into protective custody on October 3, 2001, Kochner's brief cites only to portions of the oral argument made by his counsel before the Board. Oral argument made by counsel during a hearing before a mental health board is not evidence. See *State v. Bassette*, 6 Neb. App. 192, 571 N.W.2d 133 (1997). See, also, *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001). Moreover, in a refreshing display of candor, Kochner's counsel conceded at oral argument, before this court, that the record was insufficient to show which day Lancaster County took Kochner into protective custody.

Alternatively, Kochner argues that we should use the date that Kochner was taken into custody under the authority of an order from the Douglas County Mental Health Board. The petition was originally filed in Douglas County, and on September 13, 2001, the Douglas County Mental Health Board issued an order directing Weilage to take Kochner into protective custody. Subsequently (the exact date is unclear), a district court judge from Douglas County issued an order authorizing the case to be

transferred to the Lancaster County Mental Health Board. The Lancaster County Attorney then filed an amended petition, and the Lancaster County Mental Health Board issued a summons and an arrest warrant. Kochner, as we understand it, suggests that he remained in protective custody under the authority of the September 13 order at the time that the Lancaster County sheriff picked him up and that therefore, we should use September 13 as the trigger date for when a hearing must be held under § 83-1027.

The record, however, is insufficient to show that Kochner was held under the authority of the September 13, 2001, order for more than 7 days without a hearing. The September 13 order states protective custody was to last for a period of up to 7 days "unless you receive further instruction from this Board." Nothing in the record shows that the order was extended beyond 7 days. It is equally plausible that the September 13 custody order simply expired and that Kochner was "released" back to the exclusive custody of the Department of Correctional Services, where he remained until the Lancaster County sheriff took him into protective custody on either October 3 or 4. Thus, on the record before us, we cannot say that Kochner was held in protective custody under the authority of a mental health board for more than 7 consecutive days without receiving a hearing.

[4] It is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower courts as to those errors is to be affirmed. *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000). Because we cannot tell from the record whether Kochner was held in protective custody for more than 7 consecutive days without a hearing, we decline to address the merits of his first assignment of error.

Substantial Risk of Harm

[5,6] Before a person may be committed for treatment by a mental health board, the board must determine that the person meets the definition of a mentally ill dangerous person as set out in § 83-1009. See *In re Interest of Vance*, 242 Neb. 109, 493 N.W.2d 620 (1992). To meet the definition of a mentally ill dangerous person, the State must show that the person suffers from a mental illness and that the person presents a substantial risk of

harm to others or to himself or herself. See, § 83-1009; *In re Interest of Vance, supra.* Kochner does not dispute, and the record supports, the Board's conclusion that he suffers from pedophilia and was therefore mentally ill. He does, however, challenge the Board's determination that he presents a substantial risk of harm to others.

The State relied on § 83-1009(1) in attempting to prove that Kochner presented a substantial risk of harm to others. In its pertinent part, § 83-1009(1) provides that a mentally ill dangerous person is any mentally ill person who presents a "substantial risk of serious harm to another person or persons within the near future *as manifested by evidence of recent violent acts.*" (Emphasis supplied.) To meet the recent violent act requirement of § 83-1009, the State relied on the sexual assault that Kochner committed in 1998. Kochner argues that this sexual assault was not recent enough to meet the requirements of § 83-1009. We disagree.

[7-9] The recent violent act requirement is meant as a safeguard to ensure that the liberty of the subject is not unjustly restrained. See, generally, John Q. La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 Buffalo L. Rev. 499 (1981). See, also, *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975) (declaring predecessor to current Commitment Act violated due process rights, in part because it did not have recent overt act requirement). We have said:

> "To confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to another."

In re Interest of Blythman, 208 Neb. 51, 57, 302 N.W.2d 666, 671 (1981), quoting *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974). Thus, "any act that is used as evidence of dangerousness must be sufficiently probative to predict future behavior and the subject's present state of dangerousness." *In re Interest of Blythman*, 208 Neb. at 59, 302 N.W.2d at 672. "[I]n determining whether an act is sufficiently recent to be probative on the issue of dangerousness, ' "[e]ach case must be decided on the basis of the surrounding facts and circumstances." ' " *In re Interest of*

Vance, 242 Neb. at 114, 493 N.W.2d at 624, quoting *State v. Hayden*, 233 Neb. 211, 444 N.W.2d 317 (1989). Accord *In re Interest of Tweedy*, 241 Neb. 348, 488 N.W.2d 528 (1992).

In *In re Interest of Blythman, supra*, the State relied on a sexual assault that the subject had committed 5 years before the hearing before the Lincoln County Mental Health Board. The subject had been incarcerated since the time of the assault. He argued that to allow the assault to meet the recent act requirement would have permitted involuntary civil commitment regardless of how remote in time the acts or threats of violence were. In response, we stated:

> The argument is well taken. However, such a result does not necessarily follow if it is kept in mind that any act that is used as evidence of dangerousness must be sufficiently probative to predict future behavior and the subject's present state of dangerousness. It is conceivable that an act more recent than another would be less probative of the subject's future conduct than the earlier act. Considering all of the factors, we cannot say that as a matter of law an act which occurred 5 years ago is too remote to be probative of the subject's present state of dangerousness. This is particularly true since the subject did not have an opportunity to commit a more recent act in the intervening years.
>
> The fact situation in this case is somewhat unique in that the subject's mental illness manifests itself in sexual acts toward young girls. He has not had the opportunity to commit such an act in the past 5 years because he has been incarcerated in the Penal Complex, where he has had no access to prospective victims. We cannot believe that the Legislature intended that by requiring a recent act or threat, a mentally ill person should be given the opportunity to commit a more recent act once a sufficient amount of time has passed since the last act. Judicial action need not be forestalled until another young girl is sexually assaulted, or some other harm takes place.

208 Neb. at 59, 302 N.W.2d at 672. See, also, *In re Interest of Vance*, 242 Neb. 109, 493 N.W.2d 620 (1992); *In re Interest of McDonell*, 229 Neb. 496, 427 N.W.2d 779 (1988).

The facts of this case are similar to those in *In re Interest of Blythman, supra.* Kochner's pedophilia manifests itself in an attraction to young girls. Because he has been incarcerated for 3 years, he has lacked access to prospective victims. Equally important, significant evidence was presented at the hearing showing that Kochner remains a danger because of his illness. He refuses to acknowledge that he suffers from pedophilia, and he continues to claim that he does not remember what happened during the two previous assaults. Because of his unwillingness to acknowledge his illness, he was unable to complete a sex offender specific treatment program while he was incarcerated. He also continues to demonstrate poor impulse control, as evidenced by the October 2001 incident at the Lancaster County correctional facility where he was observed masturbating in the library. The State's expert, Paine, testified that until Kochner acknowledges his illness and receives treatment, he will continue to pose a moderate-to-high risk of committing further sexual assaults on children.

Kochner argues that this case is distinguishable from *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981), because of the time that lapsed between when he committed the 1998 sexual assault and when he was arrested for the assault. The record shows that the sexual assault occurred in either early October or late November 1998. Kochner was apparently first contacted about the assault in December 1998. The record shows that he was arrested for the assault in either March or April 1999 and that the State filed an information in May. He argues that the lapse of 5 to 6 months between the time of the assault and the time he was arrested indicates that the county did not consider him to be an immediate danger. Cf. *Hill v. County Board of Mental Health*, 203 Neb. 610, 617, 279 N.W.2d 838, 841 (1979) ("act or threat is 'recent' within the meaning of section 83-1009 . . . if the time interval between it and the hearing of the mental health board is not greater than that which would indicate processing of the complaint was carried on with reasonable diligence under the circumstances existing, having due regard for the rights and welfare of the alleged mentally ill dangerous person").

[10] There is, however, no "definite time-oriented period to determine whether an act is recent. Each case must be decided on the basis of the surrounding facts and circumstances." See *In re Interest of Blythman*, 208 Neb. at 58, 302 N.W.2d at 671. Here, several relevant factors affect whether the 1998 assault is sufficiently recent to be probative on the issue of dangerousness: (1) Kochner's history of sexual assault, (2) his inability to reoffend while he was incarcerated, (3) his continuing inability to confront his illness, and (4) his lack of impulse control. Given these factors, we cannot say that the district court erred as a matter of law in concluding that the 1998 sexual assault was sufficiently recent to meet the requirements of § 83-1009. Cf. *In re Interest of Vance*, 242 Neb. 109, 493 N.W.2d 620 (1992).

Less Restrictive Treatment Alternatives

Kochner next argues that the Board's order violates the Commitment Act because the State failed to show by clear and convincing evidence that treatment alternatives less restrictive than commitment for inpatient treatment were available. Section 83-1038 provides in part:

> The disposition ordered by the mental health board shall represent the alternative which imposes the least restraint upon the liberty of the subject required to successfully treat the particular mental illness and prevent the particular harm which was the basis for the board's finding the person to be a mentally ill dangerous person. The board shall consider all treatment alternatives, including any treatment program or conditions suggested by the subject, the subject's counsel, or any interested person, including outpatient treatment, consultation, chemotherapy or any other program or set of conditions. Full-time inpatient hospitalization or custody shall be considered a treatment alternative of last resort.

To support his claim, Kochner relies upon Ritchie's testimony. She recommended that Kochner be placed in an outpatient program in which he would be "closely supervised and receive services and case management equivalent to intensive supervised parole." The program envisioned by Ritchie would have placed numerous restrictions on Kochner, including:

a. living in a supervised community residence and 100% compliance with all [its] rules and regulations,

b. 100% attendance and active participation in intensive outpatient individual sex offender treatment . . . .

. . . .

e. random urinalysis for substance abuse and random liver enzyme assays for alcohol use.

f. the appointment of a guardian to manage his affairs including personal and financial decision-making . . . .

. . . .

h. an agreement by [Kochner] and all immediate significant others that he will be required to take steps to actively avoid any and all contact with children . . . .

i. an agreement by [Kochner] that he is never to be alone with children under any circumstances, and that in those circumstances where he cannot avoid being in the presence of particular children . . . he is supervised by an awake, informed service provider or other awake, informed person [sic] approved by his clinical team[.]

Ritchie conceded that no program like the one she envisioned existed in Lancaster County, but testified that the county could develop such a program with "a variety of mechanisms and resources available to it."

The Board rejected Ritchie's hypothetical outpatient treatment program and determined that inpatient treatment was the least restrictive treatment alternative available. It noted that it knew of no outpatient treatment program that would have included the physical constraints envisioned by Ritche—particularly those that required Kochner to stay away from children. It also reasoned that the "close supervision and specially designed sex offender program envisioned by both Dr. Paine and Dr. Ritchie is [sic] virtually impossible in any environment except the Lincoln Regional Center program."

In reaching its decision, the Board relied primarily on Paine's testimony that inpatient treatment was the least restrictive treatment option. Kochner argues that Paine's testimony is insufficient to support the Board's conclusion because the only basis for her opinion was that no current outpatient program in Lancaster County would accept Kochner. This argument,

however, mischaracterizes Paine's testimony. She did testify that because Kochner had consistently denied or minimized his previous offenses, she was not aware of any outpatient sex offender program in Omaha or Lincoln which would accept him. But that was not the sole basis for her opinion. Paine also testified that the level of risk presented by Kochner was too high to place him in an outpatient program, even one with the restrictions suggested by Ritchie. Moreover, she pointed out that Kochner lacked "any insight whatsoever in[to] his sexual deviancy" and was "non-disclosing regarding the majority of his sexual thoughts and urges." In Paine's opinion, these two factors meant that Kochner would be unable to identify and report the symptoms of his mental illness in an outpatient regimen and that therefore the greater degree of supervision associated with an inpatient program was warranted. Finally, Paine noted that Kochner also suffers from cognitive disabilities as a result of a head injury he suffered as a teenager and that the inpatient sex offender program at the Lincoln Regional Center was specifically modified to treat such individuals.

Upon its de novo review of the record, the district court agreed with the Board's conclusion that commitment was the least restrictive treatment recommendation. Given Paine's testimony, the district court did not err in reaching this determination.

CONCLUSION

We cannot say, as a matter of law, that the district court's judgment upholding the Board's commitment order was unsupported by clear and convincing evidence. We have reviewed Kochner's remaining assignment of error and find it to be without merit. Accordingly, the determination of the district court is affirmed.

AFFIRMED.

STEPHAN, J., participating on briefs.

JEROME M. HALL, APPELLANT, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

663 N.W.2d 97

Filed June 13, 2003. No. S-02-578.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Statutes: Legislature: Intent.** In reading 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.
3. **Statutes: Employer and Employee: Armed Forces.** Statutes which require that employees be granted military leaves of absence "without loss of pay" require the employer to provide the full amount of the employee's civilian compensation.
4. **Statutes: Appeal and Error.** As an aid to statutory interpretation, appellate courts must look to a statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
5. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
6. ____. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.
7. **Legislature: Statutes: Presumptions: Intent.** The Legislature is presumed to know language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Reversed.

John E. Corrigan, of Law Office of John P. Fahey, P.C., for appellant.

Paul D. Kratz, Omaha City Attorney, and Bernard J. in den Bosch for appellee.

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

MCCORMACK, J.

NATURE OF CASE

In this appeal, we are asked to interpret the term "workday" for purposes of military leave found in Neb. Rev. Stat. § 55-160 (Reissue 1998).

BACKGROUND

Appellant, Jerome M. Hall, is a firefighter for the Omaha Fire Department and at all times relevant to this appeal, served as a military reservist. As a member of the reserves, Hall was entitled to paid military leave under § 55-160, which at the time this case was filed, provided in relevant part:

> All employees, including elected officials of the State of Nebraska, or any political subdivision thereof, who shall be members of the National Guard, Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, and Coast Guard Reserve, shall be entitled to leave of absence from their respective duties, *without loss of pay*, on all days during which they are employed with or without pay under the orders or authorization of competent authority in the active service of the state or of the United States, for not to exceed fifteen *workdays* in any one calendar year. Such leave of absence shall be in addition to the regular annual leave of the persons named herein.

(Emphasis supplied.) The collective bargaining agreement between appellee, City of Omaha, Nebraska (City), and the Professional Firefighters Association of Omaha, Local No. 385, mirrors the language in the state statute providing military leave of absence, except the agreement contains the language 15 "days" instead of 15 "workdays." The agreement was based on the state statute.

We note that this appeal is a matter of last impression because § 55-160 has been amended and no longer provides paid leave in terms of workdays. The amended statute provides that "[m]embers who normally work or are normally scheduled to work one hundred twenty hours or more in three consecutive weeks shall receive a military leave of absence of one hundred twenty hours each calendar year." See 2002 Neb. Laws, L.B. 722 (effective date July 20, 2002).

Duties within the fire department are divided into two primary functions, suppression and bureau. Hall is a member of the suppression personnel. Suppression personnel respond to service calls such as fire and other emergencies. They work 24-hour shifts from 7 a.m. to 7 a.m. the following day. These employees are then off work for 24 hours and then return for another 24-hour shift the

next day. After completing five 24-hour shifts within a 10-day cycle, suppression personnel are off for 5 consecutive days. Bureau personnel provide other services, including arson investigation and public education. They work four 10-hour shifts per workweek. Suppression personnel work an average of 56 hours per workweek, and bureau personnel work an average of 40 hours per workweek.

Since 1985, in order to comply with § 55-160 allowing up to 15 "workdays" for military leave of absence, the fire department's policy allowed suppression personnel to receive a maximum of 360 hours of leave (15 days × 24 hours) per year and the bureau personnel to receive 150 hours of leave per year (15 days × 10 hours). In October 2000, the fire chief changed this policy. The new policy construes the term "workday" in § 55-160 to mean 1 calendar day, midnight to midnight, whereas the old policy considered a "workday" to be synonymous with one's work shift. The new policy reduced military leave of absence for suppression personnel to 180 hours per year (15 days × an average of 12 hours per day). The military leave of absence hours for bureau personnel remained the same.

In December 2000, Hall filed a petition against the City challenging the fire department's new policy. Hall alleged that the policy violated § 55-160. Hall further requested that the City be ordered to refrain from further violation of his statutory rights and that the City be ordered to reimburse Hall for the annual leave he expended as a result of the denial of the use of his military leave.

Evidence adduced at trial revealed that Hall expended 109 hours of annual leave or personal vacation time in military service, for which he otherwise would have been compensated under the old policy for paid military leave of absence. Additional testimony revealed that the military leave provision in the collective bargaining agreement had not been changed since the mid-1970's, but since that time, there have been three different military leave policies. The City argued that article 2, paragraph 10, of the agreement, which provides the City "[t]he right to adopt, modify, change, enforce, or discontinue any existing rules, regulations, procedures and policies which are not in direct conflict with any provision of the Agreement," allowed the City to change its policy regarding the state statute. As such, the City asserted that it

was free to interpret the term "workday" to mean a 24-hour calendar day, midnight to midnight.

In its order dated May 2, 2002, the district court agreed with the City that it had the right to change its policy as to compensation for military leave. The court also determined that the reduction from 360 hours to 180 hours did not violate § 55-160 or the collective bargaining agreement, as it fully paid the firefighters for up to 15 days per year.

ASSIGNMENTS OF ERROR

Hall assigns that the district court erred in (1) concluding that the City's change in its interpretation of the term "workday" as contained in § 55-160 did not violate Hall's right to receive paid military leave for up to 15 workdays in any 1 calendar year and (2) considering the question of whether or not the fire chief had the unilateral right to change the City's policy with respect to military leave set forth in the collective bargaining agreement based on language contained in the agreement regarding management rights when Hall never made any allegation of a violation of the agreement in the pleadings.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003); *Hartman v. City of Grand Island*, 265 Neb. 433, 657 N.W.2d 641 (2003).

ANALYSIS

On appeal, Hall argues that the term "workday," for purposes of military leave, equates to an employee's work shift. Hall further argues that as such, he is entitled to 360 hours (15 days × 24 hours) of military leave in any calendar year. The pertinent provisions of the military leave statute at issue provide that "[a]ll employees . . . *shall* be entitled to leave of absence from their respective duties, *without loss of pay*, on all days during which they are employed . . . not to exceed fifteen *workdays* in any one calendar year." (Emphasis supplied.) § 55-160.

[2,3] In reading 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. *Operating Engrs. Local 571 v. City of Plattsmouth*, 265 Neb. 817, 660 N.W.2d 480 (2003); *First Data Corp. v. State*, 263 Neb. 344, 639 N.W.2d 898 (2002). From the language used in § 55-160, we found it to be clear that the Legislature intended that nonemergency military leave should result in no salary deduction for 15 working days. See *King v. School Dist. of Omaha*, 197 Neb. 303, 248 N.W.2d 752 (1976). Statutes which require that employees be granted military leaves of absence "without loss of pay" require the employer to provide the full amount of the employee's civilian compensation. Annot., 8 A.L.R.4th 704 (1981).

[4] Since it is clear that military leave shall not result in loss of pay, we now are asked to determine the length of time that military leave is allowed without loss of pay. Nebraska's statute provides paid leave without loss of pay in terms of workdays whereas the majority of statutes provide leave in terms of days. See State Individual Employment Rights Laws (Emp. Law Prof. Series, Sharon Shipley ed., CCH 2002). The term "workday" is defined as follows: the part of a day during which work is done; the number of hours constituting the required day's work for the regular wage or salary. Webster's New World College Dictionary 1539 (3d ed. 1996). The term "day" is defined as any 24-hour period—the period between the rising and setting of the sun—and any specified time period, especially as distinguished from other periods. Black's Law Dictionary 402 (7th ed. 1999). Given these assorted definitions, the term "workday" can be construed differently. As an aid to statutory interpretation, appellate courts must look to a statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003). The main policy behind giving reservists paid leave is to encourage voluntary participation and thereby maintain a trained and ready national military force. *Reed v. City of Tulsa*, 569 P.2d 451 (Okla. 1977). Behind military leave statutes is the basic principle that a person who serves in the armed forces should not be

penalized for that service in civilian life. *Howe v. City of St. Cloud*, 515 N.W.2d 77 (Minn. App. 1994). Military leave provisions are construed broadly to give effect to this purpose. *Id.*

In order to best promote military service and to afford the greatest percentage of employees paid military leave without loss of pay, we define the term "workday," for purposes of military leave, to mean any 24-hour period in which work is done. Any other construction would penalize an employee for working a shift which overlaps the midnight hour and thus may discourage military service. To construe the term "workday," as the district court did in this case, to mean the 24-hour period from midnight to midnight thwarts the clear intent of the Legislature. The court's interpretation penalizes the firefighters, not for working 24-hour shifts, but, rather, for having the shift extend over the midnight hour. If a firefighter worked from midnight to midnight, he or she would be allowed 360 hours of military pay (15 days × 24 hours) under the court's interpretation. Another firefighter whose shift overlapped the midnight hour would be limited to just 180 hours of military leave (15 days × an average of 12 hours per day). The court's construction results in a loss of pay for some employees and, as such, violates the express terms of § 55-160 that the leave of absence be "without loss of pay."

[5,6] The district court found that the City's old policy overpaid suppression personnel and was unfair to bureau personnel. The district court determined that the City's new policy in construing the term "workday" to mean any 24-hour period from midnight to midnight was a fairer policy for all firefighters. Yet, we do not find a requirement within § 55-160 that provides for the distribution of paid military leave to be fair. The statute requires only that employees shall be entitled to military leave without loss of pay. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000). To the extent policy issues are raised, they are better addressed through new legislation. Furthermore, we find that the district court's decision does not give any effect to the term "work." A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything

plain, direct, and unambiguous out of a statute. *Wilder v. Grant Cty. Sch. Dist. No. 0001*, 265 Neb. 742, 658 N.W.2d 923 (2003). The district court's construction equates workday to calendar day. The term "calendar day" is defined as a consecutive 24-hour day running from midnight to midnight. Black's Law Dictionary 402 (7th ed. 1999). Because equating workday to a calendar day effectively writes out the term "work," we refuse to adopt the district court's interpretation.

[7] As previously mentioned, § 55-160 was recently amended. The Legislature is presumed to know language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended. *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994). The amended statute allows employees to receive up to 120 hours of military leave each calendar year, which equates to 15 days at the common 8-hour workday. The term "workdays" has been eliminated. We refuse to construe the term "workday," prior to the statute's amendment, to mean the common 8-hour shift, because that construction does not presume a change in the law.

CONCLUSION

We construe the term "workday" for purposes of military leave to mean any 24-hour period in which work is done. Because our construction differs from the district court's decision, we reverse the district court's order.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
MICHELLE LEIBHART, APPELLANT.
662 N.W.2d 618

Filed June 13, 2003. No. S-02-751.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but

the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

3. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **Rules of Evidence: Expert Witnesses.** In those limited situations in which a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, pursuant to Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. Once the validity of the expert's reasoning or methodology has been satisfactorily established, any remaining questions regarding the manner in which that methodology was applied in a particular case will generally go to the weight of such evidence.
5. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
6. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
7. **Convictions: Juries: Circumstantial Evidence.** In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences that may be drawn therefrom.
8. **Assault: Intent.** First degree assault is a general, and not specific, intent crime, and thus the intent required under Neb. Rev. Stat. § 28-308(1) (Reissue 1995) relates to the assault, not to the injury which results.
9. **Criminal Law: Intent.** When one deliberately does an act which proximately causes and directly produces a result which the criminal law is designed to prevent, the actor is legally and criminally responsible for all the natural or necessary consequences of the unlawful act, although a particular result of the act was not intended or desired.
10. ____: ____. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
11. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.

12. **Trial: Effectiveness of Counsel: Proof: Convictions: Words and Phrases: Appeal and Error.** To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt.

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

Pamela P. Beck, of Beck Law Office, for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Michelle Leibhart was convicted in the district court for Buffalo County of first degree assault and was sentenced to 1 to 3 years' imprisonment. Leibhart was charged with assaulting an 18-month-old child who was in her care, and at trial, the State, over Leibhart's objection, presented expert testimony to the effect that the child's injury was consistent with shaken baby syndrome. Leibhart appeals her conviction. We affirm.

STATEMENT OF FACTS

Leibhart provided daycare in her home in Kearney, Nebraska, for three children, including the victim, Emily V. On November 10, 2000, Emily's mother dropped her off at Leibhart's home at approximately 7:50 a.m. Leibhart had provided daycare for Emily since shortly after Emily's birth on April 23, 1999. Leibhart's husband was home from work on November 10 and was present when Emily was dropped off. He left the home and was gone from approximately 8:30 until 9:30 a.m. and then left

again sometime before 10 a.m. with the Leibharts' son for haircuts. When Leibhart's husband returned around 11 a.m., there were emergency vehicles at the house.

At approximately 10:55 a.m., Sharon Waller, who lived across the street from the Leibharts, heard her doorbell ring. When she got to the door, she saw Leibhart walking back across the street, crying and carrying a small child cradled in her arms. Waller noticed that the child appeared to be " 'lifeless' " and therefore called the 911 emergency dispatch service for help. When emergency personnel arrived, they found Leibhart sitting on her porch holding Emily. Leibhart told emergency personnel she did not know what was wrong with Emily. Emily was then transported to Good Samaritan Hospital in Kearney.

At the hospital, Emily was examined by her pediatrician, Dr. Kenton Shaffer. Shaffer determined that Emily had suffered a brain injury, and a CAT scan revealed bleeding and swelling on the left side of her brain. Emily was flown to Children's Hospital in Omaha, Nebraska, for further emergency care. At Children's Hospital, Emily was treated by Dr. Michael Moran. Emily was in intensive care at Children's Hospital for approximately 3 weeks and remained at Children's Hospital for an additional week. Emily then spent several weeks in rehabilitation at Madonna Rehabilitation Hospital in Lincoln, Nebraska. Emily suffered permanent impairment as a result of the brain injury.

On November 13, 2000, two Kearney police officers interrogated Leibhart at the Buffalo County Law Enforcement Center. Leibhart was informed of her *Miranda* rights, and the officers questioned her for approximately 1 hour regarding the events of November 10. The interrogation ended when the officers asked Leibhart whether she had shaken Emily and Leibhart invoked her right to an attorney.

The investigation continued, and on August 20, 2001, the State filed an information charging Leibhart with first degree assault and alleging that on November 10, 2000, Leibhart had intentionally or knowingly caused serious bodily injury to Emily. Prior to trial, on March 20, 2002, Leibhart filed a motion in limine seeking to exclude evidence to the effect that Emily's injury was the result of shaken baby syndrome. Leibhart asserted that the theory of shaken baby syndrome as a cause of

certain injuries was not supported by reliable scientific authority, data, or research.

Trial began on April 17, 2002. The State called Emily's parents as witnesses. Emily's father testified that on the evening of November 9, 2000, Emily had bumped the top of her head when she was crawling underneath a table and stood up. He testified that she appeared to be fine afterward and that he did not know of any other accidents or injuries to Emily that night. Emily's mother testified that she dropped Emily off at Leibhart's house on the morning of November 10. She testified that Emily appeared to be fine that morning and did not appear to be suffering any effects from bumping her head the night before. When Emily's mother left Emily with Leibhart, Emily was "kinda fussy" but went willingly to Leibhart. Emily's mother was at the Leibhart house for only a few minutes, and the only adults she observed at the house were Leibhart and Leibhart's husband.

The State called Shaffer as a witness. Shaffer testified regarding his qualifications and his examination of Emily when she was brought to Good Samaritan Hospital on November 10, 2000. He testified that from observing her physical condition, he concluded that she had suffered a brain injury, and a CAT scan showed bleeding and swelling on the left side of her brain.

The State questioned Shaffer regarding his review of MRI and CAT scan information that was subsequently provided to Shaffer by Children's Hospital. When the State asked Shaffer whether his review of such information enabled him to form an opinion as to the nature or cause of Emily's injury, Leibhart objected "on the basis of foundation," stating "[w]e don't have sufficient foundation to answer that question." The district court overruled Leibhart's foundational objection, and Shaffer testified that Emily had suffered shaken baby syndrome. Shaffer elaborated by testifying that the injury indicated that Emily had been shaken in a manner such that the brain was shaken back and forth and that small blood vessels and nerve cells in the brain were torn. He testified that there was diffuse brain injury which was indicative of shaking, as opposed to trauma from something such as a fall or a hit to the head which would result in a more localized injury. Shaffer also testified that the shaking need not be forceful or for a long period of time for the shaking

to cause the injury from which Emily suffered. Shaffer testified that he saw no signs of external injuries or bruising or evidence of blunt trauma on the outside of Emily's head. Shaffer finally testified that symptoms of shaken baby syndrome would have manifested themselves within minutes of the precipitating event.

The State presented other witnesses. The State's final witness was Moran. Prior to Moran's testimony, Leibhart requested a hearing outside the jury's presence to consider the scientific reliability of the shaken baby syndrome theory. A hearing was conducted pursuant to *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), in which we adopted the principles set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), with respect to expert testimony.

At the hearing, Moran testified regarding his qualifications as a pediatrician and, in particular, his training with respect to shaken baby syndrome. He testified that clinical studies had been conducted to study shaken baby syndrome and that shaken baby syndrome was a scientifically recognized medical diagnosis within the pediatric community. Neither the State nor Leibhart presented any evidence other than Moran's testimony at the hearing. At the conclusion of the hearing, the district court found that shaken baby syndrome "ha[d] been clinically tested" and that "it is generally accepted within the scientific medical community of pediatrics." The court therefore ruled that Moran's testimony was admissible and that testimony concerning shaken baby syndrome would be received.

The jury then returned, and Moran testified before the jury regarding his qualifications. Moran described the features of shaken baby syndrome and explained shaken baby syndrome in terms of general causation. When the State asked for Moran's opinion as to the nature and cause of Emily's injury, Leibhart objected on the basis that there was "not sufficient foundation to give us an opinion." The court overruled the objection. With respect to specific causation, Moran testified that Emily's injury was consistent with shaken baby syndrome and that there was no other explanation for her injury. He testified that the injury could not have been caused by a bump on the head or a fall from a couch and that the shaking that resulted in her injury could not

have been done by another child. He further testified that the injury could have resulted from as little as 3 to 10 seconds of shaking and that the symptoms of the injury would have manifested themselves within minutes.

In her defense, Leibhart presented various witnesses who gave testimony to the effect that they knew Leibhart, that they had not known her to be abusive to children, and that they would have confidence placing a child in her care. Leibhart also testified in her own defense. She testified that after Emily's mother dropped Emily off on November 10, 2000, Emily was playing with Leibhart's 2½-year-old son. When Emily tried to take a telephone away from Leibhart's son, he got mad and hit her on the head with the telephone a few times. This incident happened around 8:30 a.m., and after Leibhart's husband and son left for haircuts, Leibhart was the only adult in the house with Emily and two other children. At around 10 a.m., Emily had been playing with the other children but then came over to Leibhart and laid her head on Leibhart's leg. Leibhart thought Emily appeared tired, so she picked her up and rocked her to sleep. Leibhart then laid Emily on the couch in the living room and went into the kitchen to do some cooking. After approximately 15 minutes, Leibhart returned to the living room to check on the children. She saw that Emily was lying face down on the floor beside the couch. When Leibhart picked her up, Emily was gasping for air. Leibhart took Emily to Waller's house across the street to get help. Waller offered to call the 911 emergency dispatch service, so Leibhart returned with Emily to her porch and waited there with her until emergency personnel arrived and took Emily to the hospital.

During direct examination, Leibhart's counsel elicited testimony that when Leibhart was interrogated by the police on November 13, 2000, she did not tell them that her son had hit Emily on the head with the telephone. Leibhart testified that she did not think of the telephone incident at the time and was thinking only of events that occurred immediately before she realized that Emily seemed tired. At trial, Leibhart denied that she had shaken Emily.

On April 19, 2002, the jury found Leibhart guilty of first degree assault. On May 23, the district court sentenced Leibhart to 1 to 3 years' imprisonment. Leibhart appeals her conviction.

ASSIGNMENTS OF ERROR

Leibhart asserts that (1) the district court erred in allowing Shaffer and Moran to testify regarding shaken baby syndrome and overruling her motion in limine to exclude such testimony on the basis that it lacked sufficient reliability under the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); (2) the evidence was insufficient to sustain a conviction for first degree assault because (a) there was not sufficient evidence to sustain a finding that Leibhart inflicted the injury on Emily and (b) there was not sufficient evidence to sustain a finding that the injury was inflicted "intentionally or knowingly"; and (3) trial counsel provided ineffective assistance by (a) failing to obtain a ruling on her motion in limine prior to Shaffer's testimony, (b) eliciting testimony regarding her failure to tell police on November 13, 2000, that her son had hit Emily on the head with a telephone, then commenting on such silence during closing arguments, and failing to object to the State's cross-examination regarding her silence, (c) failing to call an expert to refute the State's expert testimony regarding shaken baby syndrome both during the hearing and at trial, and (d) failing to cross-examine the State's expert regarding the existence of medical evidence that Emily suffered a blow to her head.

STANDARDS OF REVIEW

[1,2] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). See, also, *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) (abuse of discretion is proper standard of review of district court's evidentiary ruling on admission of expert testimony under *Daubert*). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Schafersman, supra.*

[3] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue

is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

ANALYSIS

Expert Testimony.

Leibhart first asserts that the district court erred in admitting the expert testimony of Shaffer and Moran regarding shaken baby syndrome and in overruling her motion in limine to exclude such testimony on the basis that it lacked sufficient reliability. We conclude that the district court did not abuse its discretion in ruling to admit expert testimony regarding shaken baby syndrome.

In *Schafersman*, 262 Neb. at 232, 631 N.W.2d at 876, we directed

> for trials commencing on or after October 1, 2001, that in trial proceedings, the admissibility of expert opinion testimony under the Nebraska rules of evidence should be determined based upon the standards first set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

We note that although *Schafersman* was a civil case, Neb. Evid. R. 702 applies to both civil and criminal cases, and that therefore our holding in *Schafersman* applies to the admission of expert testimony in both civil and criminal cases. The trial in the instant case commenced on April 17, 2002, and therefore the admissibility of expert opinion testimony in this case, once sufficiently called into question by Leibhart, was to be determined based on the *Daubert* standards adopted by this court in *Schafersman*.

We noted in *Schafersman* that in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), the U.S. Supreme Court determined that the *Daubert* standards were to apply not only to "scientific" knowledge, but to all types of expert testimony. *Schafersman v. Agland Coop*, 262 Neb.

215, 631 N.W.2d 862 (2001). In the present case, Leibhart challenged the testimony of doctors regarding the theory of shaken baby syndrome. Such testimony was expert testimony, and its admissibility was governed by the *Daubert* standards.

[4] In *Schafersman*, we described how *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), was to be applied to inquiries regarding the admission of expert opinion testimony. We stated that

> in those limited situations in which a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, pursuant to Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.

Schafersman, 262 Neb. at 232, 631 N.W.2d at 876-77. We noted that "once the validity of the expert's reasoning or methodology has been satisfactorily established, any remaining questions regarding the manner in which that methodology was *applied* in a particular case will generally go to the weight of such evidence." *Id.* at 232, 631 N.W.2d at 877. We stated in *Schafersman* that *Daubert* "does not require that courts reinvent the wheel each time that evidence is adduced, but it does permit the reexamination of certain types of evidence where recent developments raise doubts about the validity of previously relied-upon theories or techniques." *Schafersman*, 262 Neb. at 228, 631 N.W.2d at 874.

> "The essential requirement of *Daubert* and its progeny is that to avoid exclusion, experts must offer the courts more than unsupported assertions; they must offer evidence about the basis of their asserted expertise sufficient to enable a judge to conclude that their expert testimony will provide dependable information to the factfinder."

Schafersman, 262 Neb. at 229, 631 N.W.2d at 875.

We described the *Daubert* inquiry as follows:

> In evaluating expert opinion testimony under *Daubert*, where such testimony's factual basis, data, principles,

> methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline. . . . In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that *Daubert* said might "bear on" a judge's gatekeeping determination. . . . These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. . . . These factors are, however, neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.

(Citations omitted.) *Schafersman v. Agland Coop*, 262 Neb. 215, 233, 631 N.W.2d 862, 877 (2001).

At the *Daubert* hearing in the present case, Moran testified regarding his qualifications as a pediatrician and, in particular, his training with respect to shaken baby syndrome. He testified that clinical studies had been conducted to study shaken baby syndrome, that such studies had been subject to peer review and publication, that the diagnostic error rate in such studies had been small, and that shaken baby syndrome was a scientifically recognized medical diagnosis within the pediatric community. Leibhart cross-examined Moran regarding studies conducted by certain clinicians who theorized that mere shaking is insufficient to generate the forces necessary to cause the injuries associated with shaken baby syndrome and that blunt trauma was also required to produce such injuries. Moran testified that such clinicians had determined that their competing theory required more study. Neither the State nor Leibhart presented evidence other than Moran's testimony at the hearing.

At the conclusion of the *Daubert* hearing, the district court found that shaken baby syndrome had been "peer reviewed, it ha[d] been clinically tested as the best it can and it has [a] small

error rate"; that there was "considerable literature put out by professional scientific organizations that substantiate the findings"; and that "it is generally accepted within the scientific medical community of pediatrics." The court determined that expert testimony concerning shaken baby syndrome was scientifically reliable. The court found that the expert testimony that the State sought to admit would assist the jury in understanding the evidence and in determining specific issues that arose within the case. The court therefore ruled that such testimony would be received.

We note that the evidence presented at the *Daubert* hearing in this case was not extensive and consisted mainly of Moran's testimony and his reference to the relevant literature. However, the level of inquiry in a *Daubert* hearing may vary depending on the nature of the expert testimony challenged, and the inquiry in the present case was appropriate and sufficient. As we stated in *Schafersman*, *Daubert* "does not require that courts reinvent the wheel each time that evidence is adduced." 262 Neb. at 228, 631 N.W.2d at 874. In this respect, we note that expert testimony regarding shaken baby syndrome has been previously admitted by courts in this state. See, *State v. Reynolds*, 240 Neb. 623, 483 N.W.2d 155 (1992); *State v. Wojcik*, 238 Neb. 863, 472 N.W.2d 732 (1991). See, also, *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). We also note that for some time, courts in other states have found shaken baby syndrome to be a generally accepted diagnosis in the medical community. *State v. Lopez*, 306 S.C. 362, 412 S.E.2d 390 (1991); *State v. McClary*, 207 Conn. 233, 541 A.2d 96 (1988); *Matter of Lou R.*, 131 Misc. 2d 138, 499 N.Y.S.2d 846 (1986). General acceptance is one of several factors that may be considered to determine the reliability of expert testimony. In this regard, we note that a reexamination under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), is most appropriate "where recent developments raise doubts about the validity of previously relied-upon theories or techniques." *Schafersman*, 262 Neb. at 228, 631 N.W.2d at 874. In the present case, although Leibhart cross-examined Moran regarding studies which might have raised doubts about accepted theories of shaken baby syndrome, Moran's testimony indicated that such studies needed

further testing and that the prevailing literature adhered to previously relied-upon theories regarding shaken baby syndrome.

In accordance with the *Daubert* standards as prescribed by this court in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), we conclude that the district court did not abuse its discretion in ruling to admit expert testimony regarding shaken baby syndrome. With respect to general causation, the district court did not abuse its discretion in concluding on this record that the reasoning or methodology underlying testimony regarding shaken baby syndrome was valid, and with respect to specific causation, the district court did not abuse its discretion in concluding that such reasoning or methodology properly could be applied to the facts in issue in this case. Based on the evidence presented at the hearing, the court concluded that testimony regarding shaken baby syndrome in general was sufficiently reliable under the *Daubert* standards because the theory had been clinically tested and peer reviewed, the findings had been substantiated as documented by considerable literature, the studies showed a low error rate, and the findings were generally accepted within the field of pediatrics. In addition, testimony regarding the specific injuries related to shaken baby syndrome indicated that such expert testimony could be applied to the facts in issue in this case because such injuries were similar to the injury sustained by Emily and causes other than shaken baby syndrome could be excluded. We therefore conclude that Leibhart's assignments of error with regard to such expert testimony are without merit.

Sufficiency of Evidence.

Leibhart next asserts that the evidence presented by the State in this case was insufficient to support her conviction for first degree assault, a Class III felony under Neb. Rev. Stat. § 28-308(2) (Reissue 1995). Section 28-308(1) provides that one commits first degree assault if he or she "intentionally or knowingly causes serious bodily injury to another person." Leibhart argues that the evidence in the present case was insufficient in two respects: (1) there was not sufficient evidence to sustain a finding that Leibhart was the person who inflicted the injury on Emily and (2) there was not sufficient evidence to sustain a finding that the injury was "intentionally or knowingly" inflicted on Emily.

[5-7] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003). Circumstantial evidence is not inherently less probative than direct evidence. *Id.* In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences that may be drawn therefrom. *Id.*

Although there was no direct evidence that Leibhart was the person who inflicted the injury on Emily, there was sufficient circumstantial evidence that the jury could have relied on to find that Leibhart committed the assault. The testimony of witnesses, including Leibhart, established that from shortly before 10 a.m. until shortly before 11 a.m. on November 10, 2000, Leibhart was the only adult in Emily's presence. Testimony of Leibhart's husband and other witnesses established that the symptoms of a severe injury to Emily had not manifested themselves prior to the time Leibhart's husband left the house with the couple's son shortly before 10 a.m. Testimony of Leibhart and others established that shortly before 11 a.m., Leibhart went to Waller's house in an attempt to get emergency help for Emily. Shaffer testified that the injury inflicted on Emily was such that the symptoms would have manifested themselves "within a few minutes" after the injury was inflicted. Moran testified that because of the severity of Emily's injury, she would have begun to manifest symptoms within a few minutes or less after the injury was inflicted and that she would not have been expected to be lucid for more than a couple of minutes after sustaining the injury. Moran further testified that Emily's injury could not have been caused by a bump on the head or a fall from the couch and that the shaking that resulted in her injury could not have been done by another child.

There was therefore evidence in this case from which the jury could reasonably find that the injury inflicted on Emily was caused by her being shaken by an adult and that during the time the injury was inflicted, Leibhart was the only adult in Emily's presence. From these findings, the jury could reasonably infer that Leibhart shook Emily, thereby inflicting injury on her.

[8,9] With regard to Leibhart's argument that there was not sufficient evidence that the injury was "intentionally or knowingly" inflicted on Emily, we note that first degree assault is a general, and not specific, intent crime, and thus the intent required under § 28-308(1) relates to the assault, not to the injury which results. *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). When one deliberately does an act which proximately causes and directly produces a result which the criminal law is designed to prevent, the actor is legally and criminally responsible for all the natural or necessary consequences of the unlawful act, although a particular result of the act was not intended or desired. *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987). Therefore, the required intent in the present case was an intent to shake Emily, not necessarily an intent to cause the specific brain injury that resulted from her shaking.

[10] When the sufficiency of evidence as to criminal intent is questioned, we have stated that the intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002). As discussed above, there was evidence from which the jury could find that Leibhart shook Emily. There was also evidence from which the jury could find that Emily's injury constituted "serious bodily injury" which is defined as "bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." See Neb. Rev. Stat. § 28-109(20) (Reissue 1995). Shaffer testified that Emily suffered a permanent disability as the result of the incident and that she would never completely recover from her injury. Moran also testified that Emily sustained permanent injury or impairment and that without immediate medical intervention, she would have died.

Moran testified that shaken baby syndrome involves "non-accidental traumatic brain injury" and that Emily's injury was the result of shaken baby syndrome. He indicated that the cause of Emily's injury was being shaken by an adult. Shaffer testified that Emily's injury was the result of shaken baby syndrome, which he described as "something that was a violent episode"

which involved her being shaken with her "head flopping around and back and forth."

The evidence in this case, viewed in the light most favorable to the State, is sufficient to support Leibhart's conviction. See *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003). The testimony of witnesses was such that the jury could reasonably find that Leibhart was the sole adult in Emily's presence at the time Emily sustained her injury. Expert testimony supported a finding that Emily's injury was caused by her being shaken by an adult and that her injury could not be explained by another cause such as being hit or bumped on the head or falling off the couch. Expert testimony also supported a finding that Emily's injury was the result of a nonaccidental event. Viewing such evidence most favorably to the State, the jury could reasonably have found that Leibhart had shaken Emily and that she had done so intentionally and knowingly. We therefore reject Leibhart's assignments of error regarding sufficiency of the evidence.

Ineffective Assistance of Counsel.

[11] In this direct appeal, Leibhart claims that her trial counsel provided ineffective assistance in certain respects. A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003). The determining factor is whether the record is sufficient to adequately review the question. *Id.* If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

[12] To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. *Id.* To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt. *Id.*

Leibhart asserts that her trial counsel provided ineffective assistance in four respects. Her first argument is that trial counsel provided ineffective assistance by failing to obtain a ruling on her motion in limine challenging the admissibility of evidence regarding shaken baby syndrome prior to Shaffer's testimony. Because we have concluded that the trial court did not err in subsequently denying Leibhart's motion in limine and by admitting expert testimony regarding shaken baby syndrome, we conclude that Leibhart suffered no prejudice as a result of trial counsel's failure to obtain a ruling on the motion prior to Shaffer's testimony. Such testimony would have been properly admitted even if trial counsel had insisted on a ruling.

Leibhart also argues that trial counsel was ineffective in the following respects: eliciting testimony regarding her failure to tell police on November 13, 2000, that her son had hit Emily on the head with a telephone, commenting on such silence during closing arguments, and failing to object to the State's cross-examination regarding her silence; failing to call an expert to refute the State's expert testimony regarding shaken baby syndrome; and failing to cross-examine the State's expert regarding the existence of medical evidence that Emily suffered a blow to her head. A proper review of each of these assertions requires an evaluation of trial strategy. The second argument requires a showing that trial counsel could have called an expert to refute the State's expert testimony, and the third argument requires a showing of medical evidence that Emily suffered a blow to her head. Each of these arguments requires an evaluation of matters outside the record before us on direct appeal. We therefore conclude that the record on direct appeal is not sufficient to adequately review these arguments, and because these matters have not been raised or ruled on at the trial level and may require an evidentiary hearing, we will not address these matters on direct appeal. See *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003).

CONCLUSION

We conclude that the district court did not abuse its discretion in ruling to admit expert testimony regarding shaken baby syndrome under the *Daubert* standards prescribed by this court in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). We further conclude that the evidence in this case was sufficient to support Leibhart's conviction. Finally, we reject Leibhart's claims that her trial counsel provided ineffective assistance because each claim was either without merit or could not be adequately reviewed on the record before us in this direct appeal. We therefore affirm Leibhart's conviction and sentence for first degree assault.

AFFIRMED.

NICHOLAS GUERRIER, APPELLEE, V. MID-CENTURY INSURANCE COMPANY, APPELLANT.

663 N.W.2d 131

Filed June 20, 2003. No. S-01-1102.

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. **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.
3. **Insurance: Contracts.** An insurance policy is a contract.
4. **Contracts.** When the terms of the 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.
5. **Insurance: Contracts: Intent: Appeal and Error.** An appellate court reviewing an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made.
6. **Contracts.** A contract must be construed as a whole, and if possible, effect must be given to every part thereof.
7. **Insurance: Contracts: Words and Phrases.** Regarding words in an insurance policy, the language should be considered not in accordance with what the insurer intended the words to mean but according to what a reasonable person in the position of the insured would have understood them to mean.

8. **Insurance: Contracts.** Under Nebraska law, a court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous.
9. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
10. **Contracts.** The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
11. **Insurance: Contracts.** An ambiguous insurance policy will be construed in favor of the insured.
12. ____: ____. The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.

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

Daniel P. Chesire and Raymond E. Walden, of Lamson, Dugan & Murray, L.L.P., for appellant.

Daniel J. Epstein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Nicholas Guerrier filed this action against Mid-Century Insurance Company (Mid-Century) seeking damages for medical expenses under an automobile insurance policy. The district court sustained Guerrier's motion for summary judgment, finding that the policy was ambiguous and construing the policy in Guerrier's favor. Mid-Century appeals.

BACKGROUND

The facts are not in dispute. Guerrier was injured in an automobile accident and, as a result, incurred medical expenses, which were covered by workers' compensation. At the time of the accident, Guerrier was the named insured under an automobile insurance policy issued by Mid-Century. The policy included an endorsement relating to medical expenses incurred

in automobile accidents. The relevant provision of the endorsement states: "**PART III - MEDICAL Coverage E - Medical Expense Coverage** . . . We will pay **reasonable expenses** for **necessary medical services** furnished within three years from the date of the **accident** because of **bodily injury** sustained by an **insured person**."

In addition to describing the extent of coverage as quoted above, the endorsement also includes additional sections, including definitions, exclusions, and arbitration provisions. Two definitions included in the endorsement are relevant. They provide:

> **Necessary medical services** means medical services which are usual and customary for treatment of the injury, including the number or duration of treatments, in the county in which those services are provided.
>
> **Necessary medical services** are limited to necessary medical, surgical, dental, x-ray, ambulance, hospital, professional nursing and funeral services, and include the cost of pharmaceuticals, orthopedic and prosthetic devices, eyeglasses, and hearing aids. *We will reimburse you for any **necessary medical services** already paid by you.*
>
> . . . .
>
> **Reasonable Expenses** means expenses which are usual and customary for **necessary medical services** in the county in which those services are provided. *We will reimburse you for any **reasonable expenses** already paid by you.*

(Emphasis supplied.)

The policy defined "'you'" as "the 'named insured.'" The parties agree that Guerrier's medical expenses were "**reasonable expenses**" and that the medical services he received were "**necessary medical services**," as both are defined by the policy.

The parties filed cross-motions for summary judgment, each contending that they were entitled to judgment as a matter of law under the language of the policy. The district court entered judgment in favor of Guerrier, finding:

> The clause i[n] question [("**reasonable expenses** already paid by you")] . . . does not limit the coverage to expenses "already paid by you." If that were the case, the defendant easily could have stated in the policy that it would pay for the expenses "only paid by you." The coverage in question

> includes reasonable medical expenses not only paid on behalf of the plaintiff but reasonable medical expenses paid by the plaintiff. There is ambiguity in the clause in question and the ambiguity must be construed in favor of the insured plaintiff.

(Emphasis in original.)

ASSIGNMENTS OF ERROR

Mid-Century assigns, rephrased, that the district court erred in finding the endorsement language to be ambiguous and in construing the policy in favor of Guerrier.

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. *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003).

[2] 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*, 264 Neb. 435, 648 N.W.2d 769 (2002).

ANALYSIS

[3-7] The rules of law applicable in this case are familiar. An insurance policy is a contract. *American Fam. Mut. Ins. Co. v. Hadley, supra.* When the terms of the 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. *Reisig v. Allstate Ins. Co.*, 264 Neb. 74, 645 N.W.2d 544 (2002). An appellate court reviewing an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made. *Id.* The contract must be construed as a whole and, if possible, effect must be given to every part thereof. *Id.* Regarding words in an insurance policy, the language should be considered not in accordance with what the

insurer intended the words to mean but according to what a reasonable person in the position of the insured would have understood them to mean. *Decker v. Combined Ins. Co. of Am.*, 244 Neb. 281, 505 N.W.2d 719 (1993).

[8-12] Under Nebraska law, a court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous. *Reisig v. Allstate Ins. Co., supra.* A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Id.* The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001). An ambiguous insurance policy will be construed in favor of the insured. *Id.* The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *Reisig v. Allstate Ins. Co., supra.*

The district court found that the policy language was ambiguous. It reasoned that the policy could be read as providing coverage for expenses or medical services paid either directly by the named insured or by another on the insured's behalf. Because of the ambiguity, the district court construed the policy language in favor of Guerrier.

Mid-Century argues that there is no ambiguity in the language of the policy. It interprets the terms of the endorsement to require "reimbursement," under the plain meaning of that word, to the named insured under the definitional provisions only when the named insured has paid money out of his or her own pocket. It further interprets the policy to require payment of expenses to the provider of the medical services under the coverage clause when expenses have been incurred but not yet paid by anyone. Thus, Mid-Century contends that it is not required to "reimburse" for expenses or medical services "already paid by you" where, as in this case, the insured has paid nothing out of his own pocket, and it is also not required to "pay **reasonable expenses**" where another party has already paid the expenses on the insured's behalf.

We agree with Mid-Century's arguments that the policy is unambiguous, but disagree with Mid-Century's interpretation. Pursuant to the coverage clause of the endorsement, Mid-Century promises to pay reasonable expenses for necessary medical services. The Supreme Court of Alabama has said that a coverage clause substantially similar to the one in this case did not specifically require the insurer to pay either the insured or the insured's medical providers directly. *Auto-Owners Ins. Co. v. Abston*, 822 So. 2d 1187 (Ala. 2001). This language, "[t]aken in isolation . . . express[es] an unconditional obligation to reimburse medical expenses . . . ." *Mejia v. American Cas. Co.*, 55 Mass. App. 461, 465, 771 N.E.2d 811, 814 (2002). Reading the policy as a whole, as we are required to do, does not change the result. The definitional provisions do not modify the obligation to pay reasonable expenses, but merely express one manner in which Mid-Century's unconditional obligation may be fulfilled. Under the plain meaning of the terms of the policy, Mid-Century is obligated to pay the reasonable expenses of Guerrier, regardless of whether those expenses have already been paid by another. Thus, the district court did not err in granting summary judgment in favor of Guerrier.

CONCLUSION

For the reasons stated above, we affirm the district court's granting of summary judgment in favor of Guerrier and the entry of judgment in favor of Guerrier in the sum of $5,000.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JAMES M. WINKLER, APPELLANT.
663 N.W.2d 102

Filed June 20, 2003. No. S-02-177.

1. **Pleadings.** A denial of a plea in bar involves a question of law.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **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.

4. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
5. **Double Jeopardy: Proof.** Under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not.
6. **Double Jeopardy.** The *Blockburger* test applies equally to multiple punishment and multiple prosecution cases.
7. **Double Jeopardy: Sentences.** The *Blockburger*, or "same elements," test asks whether each offense contains an element not contained in the other. If not, they are the same offense and double jeopardy bars additional punishment and successive prosecution. If so, they are not the same offense and double jeopardy is not a bar to additional punishment or successive prosecution.
8. **Criminal Law: Statutes: Double Jeopardy.** In applying *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932), to separately codified criminal statutes which may be violated in alternative ways, only the elements charged in the case at hand should be compared in determining whether the offenses under consideration are separate or the same for purposes of double jeopardy.

Appeal from the District Court for Holt County: WILLIAM B. CASSEL, Judge. Affirmed and remanded for further proceedings.

David A. Domina and Audrea Y. Kappert, of Domina Law, P.C., for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

STEPHAN, J.

James M. Winkler appeals from an order of the district court for Holt County denying his plea in bar. Winkler argues that a successive prosecution for making terroristic threats under Neb. Rev. Stat. § 28-311.01(1)(a) (Reissue 1995) is barred by principles of double jeopardy after he pled guilty to third degree assault under Neb. Rev. Stat. § 28-310(1)(a) (Reissue 1995).

FACTS

On August 29, 2001, Winkler was charged by amended complaint in the county court for Holt County with assault in the

third degree, a Class I misdemeanor, and criminal mischief, a Class II misdemeanor. The amended complaint alleged that on or about December 24, 2000, Winkler "intentionally or knowingly or recklessly cause[ed] bodily injury to Matthew Drueke" and "intentionally damage[ed] property of another causing pecuniary loss in excess of $100.00, to-wit: two tires and a window of a Ford pickup belonging to Martin Drueke." The assault charge was pursuant to § 28-310(1)(a). Winkler subsequently entered pleas of no contest to both counts. In providing the factual basis for the pleas, the State asserted:

> By way of a factual basis, I would tell the Court that if called to the witness stand, the victim, Matthew Drueke, of count one, and the witnesses, Sarah McCabe and Travis Sanderson, if called to the witness stand, under oath would all testify that they were present on or about December 24, 2000, in Holt County, Nebraska, when the defendant, whom all three witnesses could identify personally, took the butt of a shotgun and thrust the butt of the shotgun through a closed pickup window — the — the driver's side of a pickup window, and that Matthew Drueke was sitting behind the wheel of that pickup and the defendant was shouting and was angry at Mr. Drueke, and that the defendant took that gun and with — with the butt of the gun, struck the window — the driver's side door window of the pickup and thrust it right on through and hit Matthew Drueke in the face, which blacked his eye and caused Mr. Drueke pain. And with regard to count two, all of those witnesses would testify that at the same time and place that the same defendant shot out the two tire — two tires of that same Ford pickup, as those witnesses all sat in the cab of the pickup, and broke the window of that Ford pickup as earlier described with the butt of that shotgun.

After determining that the pleas were entered knowingly and voluntarily, the court accepted the no contest pleas and found Winkler guilty on both counts.

Winkler was also charged in a separate amended complaint filed in the county court for Holt County on August 29, 2001, with making terroristic threats in violation of § 28-311.01(1)(a), a Class IV felony. The complaint alleged that on or about

December 24, 2000, Winkler "threaten[ed] to commit a crime of violence with the intent to terrorize another." Winkler waived his right to a preliminary hearing, and the case was bound over to the district court for Holt County. An information charging an identical violation of § 28-311.01(1)(a) was filed in the district court on November 27, 2001. On December 17, Winkler filed a plea in bar in the district court, alleging that prosecution was barred by the principles of double jeopardy because he had previously been convicted of the same offense in county court.

An evidentiary hearing on the plea in bar was held on January 7, 2002. At the hearing, Winkler offered as exhibits the bill of exceptions from the proceedings before the county court, the transcript of the county court proceedings, the legislative history of § 28-311.01, and the affidavit of Winkler's father. The exhibits were received without objection. Upon inquiry of the court, the State noted that the "another" referred to in the information was "Matthew Drueke and/or Travis Sanderson and/or Sarah McCabe and/or Cody Schaaf."

In an order filed February 4, 2002, the district court denied Winkler's plea in bar, reasoning that §§ 28-310 and 28-311.01 each required proof of a fact that the other did not and therefore were not the same offense. Winkler filed this timely appeal.

ASSIGNMENT OF ERROR

Winkler assigns, restated and summarized, that the district court erred in denying his plea in bar.

STANDARD OF REVIEW

[1,2] A denial of a plea in bar involves a question of law. *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001); *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999). 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. Rossbach*, 264 Neb. 563, 650 N.W.2d 242 (2002); *State v. Haltom*, 263 Neb. 767, 642 N.W.2d 807 (2002).

ANALYSIS

[3,4] 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. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002). The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001); *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000). In this action, Winkler contends that the second prosecution for making terroristic threats is barred by his conviction for third degree assault because both involve the same offense.

[5,6] In *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the U.S. Supreme Court defined the test to be used in determining whether two statutes penalize the same offense. The Court held that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not. In *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), the Court stressed that the *Blockburger* test applies equally to multiple punishment and multiple prosecution cases. We have adopted and applied the *Blockburger* test. See, e.g., *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

Relying on *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998), Winkler argues that the *Blockburger* test is not applicable to this case. In *White*, we addressed whether an implied acquittal for first degree premeditated murder barred a subsequent prosecution for first degree felony murder. The State contended that the two were not the same offense under the *Blockburger* test because each contained an element not contained in the other. We found, however, that premeditated murder and felony murder are not separate and independent offenses in the Nebraska statutes, but, rather, alternate ways in which criminal liability for first degree murder may be charged and prosecuted under a single statute, Neb. Rev. Stat. § 28-303 (Reissue 1995). We noted that "[i]n determining whether successive prosecutions violate the Double Jeopardy Clause when there has been a single violation of a single statute, the U.S. Supreme Court has expressly declined to

apply the *Blockburger* test." *White*, 254 Neb. at 572, 577 N.W.2d at 745, citing *Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). We therefore concluded that the *Blockburger* test was an inappropriate tool for analyzing whether a subsequent prosecution under an alternative theory of criminal liability derived from the same statute as the prior prosecution was barred by the Double Jeopardy Clause.

Here, Winkler was not successively prosecuted under two alternate theories of committing the same crime, but, rather, under two statutes defining distinct offenses which are separately codified in the Nebraska Criminal Code. The mere fact that each charge arose out of the same conduct does not support Winkler's argument that he is being successively prosecuted for the same crime committed by alternate means. In fact, the "same-conduct" theory advanced by Winkler has been directly rejected by the U.S. Supreme Court. See *United States v. Dixon, supra* (overruling "same-conduct" test of *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990)). Because this case involves successive prosecution under two distinct statutes, the *Blockburger* test is applicable.

[7] The *Blockburger*, or "same elements," test asks whether each offense contains an element not contained in the other. *State v. Stubblefield*, 249 Neb. 436, 543 N.W.2d 743 (1996), citing *United States v. Dixon, supra.* If not, they are the same offense and double jeopardy bars additional punishment and successive prosecution. *Id.* If so, they are not the same offense and double jeopardy is not a bar to additional punishment or successive prosecution. *Id.* Under Nebraska's penal code, both third degree assault and terroristic threats are crimes that may be committed in alternate ways. Section 28-310(1) provides: "A person commits the offense of assault in the third degree if he: (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or (b) Threatens another in a menacing manner." Thus, one can commit third degree assault by engaging in the conduct described in either § 28-310(1)(a) or (b). Similarly, § 28-311.01(1) provides:

> A person commits terroristic threats if he or she threatens to commit any crime of violence:
>
> (a) With the intent to terrorize another;

(b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or

(c) In reckless disregard of the risk of causing such terror or evacuation.

One can commit a terroristic threat by engaging in the conduct described in § 28-311.01(1)(a), (b), or (c). Because each of these statutes permits the State to charge the offense in alternative ways, we must first determine which elements of third degree assault must be compared to which elements of terroristic threats in applying the *Blockburger* test to determine whether the two offenses are separate or the same.

The U.S. Supreme Court provided some guidance on this issue in *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980). In that case, the defendant was convicted under the applicable District of Columbia code of the separate statutory offenses of rape and killing in the perpetration of the rape, both offenses involving the same victim. He was sentenced to consecutive terms of incarceration on each offense. Applying the *Blockburger* test, the Court held that the multiple punishments were prohibited by the Double Jeopardy Clause. In so holding, the Court rejected the Government's argument that felony murder and rape were not the same offense because felony murder could result from a killing in the perpetration of predicate offenses other than rape, including robbery, kidnapping, or arson. The Court reasoned that because rape was a necessary element in the felony murder charged in the case at issue, the *Blockburger* test should focus only on the elements of rape and felony murder predicated upon rape. The Court acknowledged, however, that the result would be different if it were applying the *Blockburger* test to rape and felony murder based upon a predicate offense other than rape.

In another case decided shortly after *Whalen*, the Court considered whether a motorist who had been convicted of failing to reduce speed to avoid a collision could subsequently be prosecuted for involuntary manslaughter arising from the same fatal accident. *Illinois v. Vitale*, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980). In addressing the issue of whether the two charges constituted the "same offense" for double jeopardy purposes, the Court utilized the *Blockburger* test. It concluded that if,

under the applicable Illinois statutes, "a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the 'same' under *Blockburger* and Vitale's trial on the latter charge would constitute double jeopardy." *Vitale*, 447 U.S. at 419-20. However, the Court noted that the record was unclear whether the State was required to or intended to rely on the failure-to-slow charge as the predicate offense for the manslaughter prosecution and stated that "if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the 'same' under the *Blockburger* test." *Id.* at 419. Because resolution of this uncertainty was determinative of the outcome, the Court remanded the cause for further proceedings consistent with its opinion.

[8] Courts have construed *Whalen* and *Vitale* as further defining the *Blockburger* test when comparing the elements of criminal statutes which can be violated in alternative ways. The Sixth Circuit Court of Appeals articulated the effect of *Whalen* and *Vitale* on the mechanics of the *Blockburger* test as follows:

> Courts have always looked to the *law* the indictment claims the defendant violated. If they did not do so, they would not know even what statutes are at issue under the *Blockburger* rule. What the reviewing court must do now in applying *Blockburger* is go further and look to the legal theory of the case or the elements of the specific criminal cause of action for which the defendant was convicted without examining the facts in detail.

Pandelli v. United States, 635 F.2d 533, 538 (6th Cir. 1980). The court concluded that in the case of criminal statutes which are "multi-purposed and written with many alternatives," it "makes more sense to ascertain the operation and deterrent purposes of such statutes for double jeopardy purposes by determining the elements—the legal theory—that constitute the criminal causes of action in the case at hand." *Id.* at 538-39. Other federal and state courts have reached similar conclusions. See, *Davis v. Herring*, 800 F.2d 513 (5th Cir. 1986); *U.S. v. Kuhn*, 165 F. Supp. 2d 639 (E.D. Mich. 2001); *Dixon v. State*, 364 Md. 209, 772 A.2d 283 (2001); *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991); *State v. DeLuca*, 108 N.J. 98, 527 A.2d 1355 (1987). We conclude that this is a logical and fair approach to

application of the *Blockburger* test. Thus, we hold that in applying *Blockburger* to separately codified criminal statutes which may be violated in alternative ways, only the elements charged in the case at hand should be compared in determining whether the offenses under consideration are separate or the same for purposes of double jeopardy.

Applying that principle to this case, we compare the elements of third degree assault as defined by § 28-310(1)(a), of which Winkler was convicted, and terroristic threats as defined by § 28-311.01(1)(a), with which he was subsequently charged. Third degree assault as defined by § 28-310(1)(a) requires proof that the defendant intentionally, knowingly, or recklessly caused bodily injury to another. Causing bodily injury is not an element of making terroristic threats under § 28-311.01(1)(a). Conversely, the offense of making terroristic threats under § 28-311.01(1)(a) requires proof of a threat to commit a crime of violence with intent to terrorize another. The making of a threat with intent to terrorize is not an element of third degree assault under § 28-310(1)(a). Because each of the charged offenses includes at least one element which is not included in the other, they are separate offenses for the purpose of double jeopardy and successive prosecution is therefore not constitutionally prohibited. Accordingly, although our reasoning differs somewhat from that of the district court, we conclude that there was no error in the denial of Winkler's plea in bar.

CONCLUSION

For the reasons discussed herein, the order of the district court denying Winkler's plea in bar is affirmed and the cause is remanded for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

K N ENERGY, A DIVISION OF KINDER MORGAN, INC., APPELLEE, V. VILLAGE OF ANSLEY AND CITIES OF BURWELL, LOUP CITY, ORD, BROKEN BOW, AND RAVENNA, MUNICIPAL CORPORATIONS OF THE STATE OF NEBRASKA, APPELLANTS.

663 N.W.2d 119

Filed June 20, 2003. No. S-02-385.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **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. **Statutes: Municipal Corporations.** Statutes granting powers to municipalities are to be strictly construed.
5. **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.
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.
7. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
8. **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.

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

David A. Hecker, of Kutak Rock, L.L.P., for appellants.

M.J. Bruckner, of Bruckner Law Firm, P.C., Stephen M. Bruckner and Heidi L. Evatt, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., and B.J. Becker and William M. Lopez, of Kinder Morgan, Inc., for appellee.

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

STEPHAN, J.

This appeal presents issues of law regarding how and when a municipality may initiate a proceeding for a review and possible adjustment of rates under the Municipal Natural Gas Regulation Act (MNGRA), Neb. Rev. Stat. §§ 19-4601 to 19-4623 (Reissue 1997).

FACTS

The material facts are uncontested. K N Energy (KNE) is a division of Kinder Morgan, Inc., a Kansas corporation authorized to do and doing business in the State of Nebraska. KNE is a public utility engaged in the retail sale and distribution of natural gas in various parts of Colorado, Nebraska, and Wyoming. The Village of Ansley and the Cities of Burwell, Loup City, Ord, Broken Bow, and Ravenna (the municipalities) are municipal corporations and political subdivisions of the State of Nebraska. Each of the municipalities is located in KNE's rate area 7, established pursuant to the MNGRA. See § 19-4606.

On February 24, 1998, the City of Broken Bow adopted the following resolution:

> BE IT HEREBY RESOLVED that the City of Broken Bow, Nebraska, intends to review the gas rates of KN Energy for possible rate adjustment pursuant to Neb. Rev. Stat. section 19-4618.
>
> BE IT HEREBY FURTHER RESOLVED that the City of Broken Bow, Nebraska, will contact other municipalities in the rate area to determine whether they are interested in cooperative efforts.
>
> BE IT FURTHER RESOLVED that the City of Broken Bow, Nebraska, will contact the Nebraska Energy Office to seek funding from the Municipal Natural Gas Regulation Revolving Loan Fund.

On March 2, 1998, the City of Ord adopted resolution No. 692, providing:

> BE IT HEREBY RESOLVED that the City of Ord, Nebraska, fully supports the efforts of Broken Bow to review the gas rates of KN Energy for possible rate adjustment pursuant to Neb. Rev. Stat. section 19-4618.

> BE IT HEREBY FURTHER RESOLVED that the City of Ord, Nebraska, will join with Broken Bow and other interested municipalities in rate area 7 to make this review a cooperative effort.
>
> BE IT FURTHER RESOLVED that the City of Ord, Nebraska, hereby directs Broken Bow, Nebraska to contact the Nebraska Energy Office to seek funding from the Municipal Natural Gas Regulation Revolving Loan Fund.
>
> BE IT FURTHER RESOLVED that this Resolution is contingent on 70% of the meters in rate area 7 joining with Broken Bow.

While the record is somewhat unclear on this point, the parties assert in their appellate briefs that after the adoption of these resolutions, KNE prepared a document entitled "Preliminary Revenue Requirements and Rate Study for Retail Natural Gas Service in Rate Area 7" which it submitted to the City of Broken Bow. Again, while the record is somewhat unclear, the parties agree in their briefs that no further action was taken pursuant to either of the 1998 resolutions.

Between February 10 and April 13, 1999, six of the municipalities in rate area 7, including Ord and Broken Bow, adopted resolutions initiating rate reviews. In December 1999, municipalities in rate areas 2, 3, 4, and 7 conducted rate area hearings pursuant to the 1999 resolutions. Eventually, each of the appellant municipalities adopted ordinances which prohibited KNE from recovering certain "above-market" costs of what is known as its P-0802 Contract. KNE then brought this action for declaratory and injunctive relief. KNE alleged that the rate ordinances adopted pursuant to the 1999 resolutions were invalid on various grounds, including a claim that Broken Bow and Ord violated § 19-4618 by initiating rate reviews more than once within a 36-month period.

KNE filed a motion for summary judgment, and the municipalities filed a motion for partial summary judgment. In an order entered on January 5, 2001, the district court sustained KNE's motion for summary judgment in part, concluding that as to rate area 7, the 1998 resolution adopted by Broken Bow triggered the 36-month limitation period under § 19-4618 with respect to all

municipalities in rate area 7, thereby invalidating the subsequent ordinances enacted pursuant to the rate review initiated by the 1999 resolutions. In a subsequent order, the district court declared each of the rate area 7 ordinances a nullity and permanently enjoined the municipalities from enforcing them. Following a denial of their motion for new trial, the municipalities initiated an appeal, which was dismissed pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2000). *KN Energy v. Village of Ansley*, 10 Neb. App. liii (No. A-01-1034, Dec. 10, 2001). On remand, the district court directed an entry of final judgment pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002) with respect to the claims involving rate area 7, and the municipalities perfected this timely appeal.

ASSIGNMENTS OF ERROR

The municipalities assign that the district court erred in granting KNE's motion for summary judgment, denying their motion for new trial, and denying their motion to set for trial.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002); *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002); *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (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 benefit of all reasonable inferences deducible from the evidence. *Finch v. Farmers Ins. Exch.*, 265 Neb. 277, 656 N.W.2d 262 (2003).

[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *In re Change of Name of Davenport*, 263 Neb. 614, 641 N.W.2d 379 (2002); *Newman v. Rehr*, 263 Neb. 111, 638 N.W.2d 863 (2002).

ANALYSIS

[4-7] The authority of the municipalities to regulate rates charged by KNE is derived solely from the MNGRA. The issue presented in this case is whether, as a matter of law, the adoption of the 1998 resolutions by Ord and/or Broken Bow precluded the 1999 initiation of rate reviews in rate area 7, which resulted in the challenged ordinances. The pertinent provision of the MNGRA is the first sentence of § 19-4618(1), which provides: "Once in any thirty-six-month period, one or more municipalities in each rate area may initiate a proceeding for a review and possible adjustment in rates to conform such rates to the standards of section 19-4612 by the introduction of a resolution for such purpose." In applying this statute, we are guided by certain general principles. Statutes granting powers to municipalities are to be strictly construed. *Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998). 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. *American Legion v. Nebraska Liquor Control Comm.*, 265 Neb. 112, 655 N.W.2d 38 (2003); *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Henderson v. Henderson*, 264 Neb. 916, 653 N.W.2d 226 (2002). It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002).

Under the clear and unambiguous language of § 19-4618(1), a municipality initiates "a proceeding for a review and possible adjustment in rates . . . *by the introduction of a resolution for such purpose.*" (Emphasis supplied.) The municipalities argue that the resolutions adopted by Ord and Broken Bow in 1998 did not operate to initiate rate reviews because they were contingent upon the participation of other municipalities. The municipalities' argument as to the Ord resolution is that because the

70-percent participation was never achieved, the resolution never became operative. The district court acknowledged that the contingent language in Ord's resolution *may* not have initiated a review proceeding. Unlike the Ord resolution, however, the resolution adopted by Broken Bow in 1998 was not contingent upon the participation of any other municipality. That resolution states only that "the City of Broken Bow, Nebraska, will contact other municipalities in the rate area to determine whether they are interested in cooperative efforts."

Broken Bow clearly had statutory authority to initiate a rate review of its own accord, in that § 19-4618(1) authorizes "one or more municipalities in each rate area" to initiate a review. The municipalities urge us to view the language of the 1998 Broken Bow resolution in the light most favorable to them. They argue that while the 1998 Broken Bow resolution did not use the express contingency language of the 1998 Ord resolution, it did state that Broken Bow intended to contact the Nebraska Energy Office to seek funding from the Municipal Natural Gas Regulation Revolving Loan Fund (Fund). Section 19-4618(2) provides in relevant part:

> If appropriate resolutions are adopted by municipalities representing *seventy percent or more* of the customers in the rate area initiating a proceeding for review and possible adjustment of natural gas rates, the applicant representing the largest number of customers *shall* be given a loan for such purposes upon the terms of section 19-4617.

(Emphasis supplied.) The municipalities contend that the intent of the 1998 Broken Bow resolution was to determine whether or not sufficient interest existed among the other rate area 7 municipalities in order to ensure that Broken Bow would receive a loan from the Fund before it decided whether to initiate a review. No such intention, however, can be reasonably inferred from the language used by Broken Bow. The resolution unequivocally stated that Broken Bow would (1) review gas rates pursuant to § 19-4618, (2) contact other municipalities about cooperating in this effort, and (3) contact the Nebraska Energy Office to seek funding. None of these undertakings were stated as being contingent upon another, or upon any other event or occurrence. Accordingly, we agree with the district court that

the 1998 Broken Bow resolution initiated a rate review proceeding pursuant to § 19-4618(1).

The municipalities argue that if the 1998 Broken Bow resolution is so construed, the rate ordinance subsequently adopted by Broken Bow on April 25, 2000, should be deemed to relate back to the 1998 resolution. This argument would require us to ignore the existence of a 1999 Broken Bow resolution initiating the rate proceeding which resulted in the adoption of its 2000 rate ordinance. We agree with the district court that to construe the 2000 ordinance as relating back to the 1998 resolution, as the municipalities urge, would circumvent the clear and unambiguous language of § 19-4618(1), which authorizes a municipality to initiate rate review proceedings only "[o]nce in any thirty-six-month period."

Finally, the municipalities contend that the 1998 Broken Bow resolution cannot operate to invalidate the rate ordinances adopted by other municipalities in rate area 7 pursuant to rate reviews initiated in 1999. They argue for a construction of § 19-4618(1) which would permit *each* municipality in a rate area to initiate one rate review proceeding in any 36-month period. The Legislature could have so provided, but it did not. By providing that "[o]nce in any thirty-six-month period, one or more municipalities in each rate area" may initiate a rate review proceeding, the Legislature clearly and unambiguously stated that there could be no more than one rate review proceeding in each rate area in any 36-month period, regardless of whether such proceeding was initiated by one, some, or all of the municipalities in the rate area.

The municipalities argue that this reading of the statute produces an unfair result for other municipalities in rate area 7 in view of the fact that Broken Bow did not conduct a "substantive review" pursuant to its 1998 resolution. Brief for appellants at 18. Where, as here, a statutory grant of regulatory authority to a municipality is clear and unambiguous, it is not our role to assess the fairness of that directive. Section 19-4618(1) imposes a limit on the frequency with which rate review proceedings may be initiated without regard to the outcome of any such proceeding. We have no basis upon which to alter that aspect of the regulatory structure created by the MNGRA.

[8] We do not reach the municipalities' argument that § 19-4618(1) is unconstitutional. The municipalities did not challenge the constitutionality of § 19-4618(1) in their answer to the operative third amended petition, and the issue was therefore not considered by the district court. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002).

CONCLUSION

For the reasons discussed herein, we conclude that the district court did not err in determining that the rate proceedings initiated in 1999 by municipalities in rate area 7, including Ansley, Broken Bow, Burwell, Loup City, Ord, and Ravenna, were unlawful under § 19-4618(1) because they were initiated within 36 months of the 1998 proceeding initiated by Broken Bow. Accordingly, the district court did not err in declaring the resulting rate ordinances to be void and permanently enjoining their enforcement.

AFFIRMED.

HENDRY, C.J., and CONNOLLY, J., not participating.

GAYLIENE MARIE LONGO, APPELLEE AND CROSS-APPELLANT, V. DEAN JAY LONGO, APPELLANT AND CROSS-APPELLEE.

663 N.W.2d 604

Filed June 20, 2003. No. S-02-394.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Divorce: Property Division: Armed Forces: Pensions.** Federal law does not preempt the power of a state court to treat the future nondisability pension entitlement of a spouse currently on active military duty as a marital asset in a dissolution proceeding.
4. ____: ____: ____: ____. Neb. Rev. Stat. § 42-366(8) (Reissue 1998) requires that a nonvested military pension be treated as marital property in a dissolution proceeding.

5. **Divorce: Property Division: Armed Forces: Pensions: Alimony.** While a Nebraska court may not include service-connected disability benefits awarded to a military retiree as a part of a marital estate, it may consider such benefits and the corresponding waiver of retirement pension benefits required by federal law in determining whether there has been a material change in circumstances which would justify modification of an alimony award.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Carll J. Kretsinger, P.C., for appellant.

Eileen Reilly Buzzello and Brandie M. Fowler, of Holthaus Law Offices, for appellee.

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

STEPHAN, J.

Dean Jay Longo appeals from an order of the district court for Sarpy County dissolving his marriage to Gayliene Marie Longo. He contends that the court erred in awarding Gayliene (1) an interest in his future military pension benefits and (2) alimony of $1 per year modifiable only upon a potential reduction to his future military pension by a potential future disability offset. Gayliene cross-appeals, arguing that the award of alimony was inadequate and that the property division was inequitable.

I. FACTS

The parties married on August 15, 1991. At all times during the marriage, Dean was a commissioned officer on active duty in the U.S. Air Force. At the time of trial, he held the rank of lieutenant colonel and had served on active duty for 18 years. Dean testified that he could remain at his present rank until retirement. However, he had no guarantee of being permitted to continue his service as a commissioned officer, as his service was at the pleasure of the President of the United States.

Dean testified that neither he nor the U.S. government contributed on a monthly basis to a pension fund for his benefit. Instead, after 20 years of active duty, Dean will become eligible to apply for retirement status and receive a monetary pension if his application is approved. Dean understood that if he served

20 years and then retired, his pension would be calculated on the basis of a percentage of his salary at the highest rank achieved. Dean testified that it was his intention to eventually retire from the Air Force.

Gayliene resided in California at the time of trial. She was employed there as an assistant manager of a department store at a base salary of $1,200 per month, plus commissions. Gayliene was employed outside the home at various times during the marriage, but at other times, she stayed home with the parties' two minor children. It was difficult for her to obtain consistent employment due to the frequent moves necessitated by Dean's military career. Following dissolution of the marriage, Gayliene intended to return to school for 2 years and obtain her teaching credentials. She requested alimony of $1,000 a month for 5 years. She also requested a portion of Dean's future retirement, based on their 10 years of marriage during his military service.

On April 1, 2002, the district court entered a decree of dissolution. The court concluded that it had jurisdiction over the parties and awarded sole custody of the two minor children to Dean, with rights of visitation to Gayliene. Dean was awarded the marital home subject to its mortgages, for a net equity of approximately $10,000, and each party was awarded certain personal property. The marital debts were also divided.

With respect to Dean's military pension, the court found that the parties were married for 10 of the years that Dean had been on active military duty. The court determined that Dean would continue his military career until retirement and that there was a "substantial likelihood" that Dean would receive his pension. Therefore, "based upon the years of marriage [and] years overlapping in service," the court awarded Gayliene

> $690.68 of [Dean's] net disposable non-disability military pension commencing on the first day of the first month during which [Dean] is entitled to receive and is in receipt of same; and, on the first day of each month thereafter for so long as [Dean] shall be entitled to receive such or until the death of [Gayliene], whichever event should occur first.

The court also awarded Gayliene alimony in the sum of $1 per year for life, "to be modifiable only upon [Gayliene's] portion of [the] military pension being reduced by a portion of said pension

being received as disability." Dean filed this timely appeal, and Gayliene cross-appealed.

II. ASSIGNMENTS OF ERROR

Dean assigns, restated and summarized, that the trial court erred in (1) awarding Gayliene an interest in his future military retirement benefits and (2) awarding Gayliene alimony of $1 per year for life modifiable only upon a future reduction to the military pension by a disability offset.

On cross-appeal, Gayliene assigns, restated, that the trial court erred in (1) awarding only $1 per year in alimony, (2) tying the alimony award to the property division, and (3) making an inequitable property division.

III. STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002); *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002); *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001).

[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. *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003); *Hartman v. City of Grand Island*, 265 Neb. 433, 657 N.W.2d 641 (2003).

IV. ANALYSIS

1. Division of Future Military Pension Benefits

The primary issue on appeal is whether the district court was legally authorized to award Gayliene a portion of any military pension which Dean may receive in the future. Dean contends that this was impermissible because he was not receiving or eligible to receive such pension at the time of the decree and that thus there was no asset to be divided. He bases this argument on both federal and state law.

(a) Federal Law

Prior to 1981, division of military pensions in dissolution actions was governed exclusively by state law. In that year, however, the U.S. Supreme Court decided *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), in which it held that federal law precluded a state court from dividing military nondisability retired pay pursuant to state law. The Court reasoned that then-existing federal law clearly intended that all retirement benefits be enjoyed by only the service member. After reaching its conclusion and noting the harsh result such conclusion could impose, the Court noted that "Congress may well decide . . . that more protection should be afforded a former spouse of a retired service member." 453 U.S. at 235-36.

Congress responded by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1401 et seq. (2000). Initially, this legislation was viewed as a complete grant of authority to the states to divide military nondisability retirement pay pursuant to state law. See *Bullock v. Bullock*, 354 N.W.2d 904 (N.D. 1984) (citing cases). This interpretation, however, was limited by the U.S. Supreme Court in *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989). In that case, the Court addressed the issue of whether the USFSPA authorized state courts to treat military retirement pay waived by the retiree in order to receive veterans' disability benefits as property divisible upon divorce. Before directly addressing the issue, the Court found:

> Because pre-existing federal law, as construed by this Court, completely pre-empted the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property.

Mansell, 490 U.S. at 588. In a footnote, the Court noted that it used the phrase "community property" only because the case at hand involved such law and that both its decision in *Mansell* and the USFSPA were equally applicable to equitable property division states. 490 U.S. at 584 n.2. Thus, according to *Mansell*, the USFSPA must affirmatively grant a state the power to

divide a military pension, or the preemptive effects of *McCarty* remain applicable.

Dean's primary argument on appeal is largely based on *Mansell*. He argues that the current form of the USFSPA provides in relevant part:

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

§ 1408(c)(1). Section 1408(a)(4) defines "disposable retired pay" to mean "the total monthly retired pay to which a member is *entitled*," less certain identified amounts. (Emphasis supplied.) Dean contends that because he has not yet served on active duty for 20 years, he is not presently "entitled" to a pension benefit, and that therefore the district court lacked the authority to divide his future military pension. He argues that *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), prohibited state courts from dividing any military pensions and that states now possess only that authority to divide pensions that is expressly granted to them by the subsequent enactment of the USFSPA.

In *Mansell, supra*, the U.S. Supreme Court acknowledged that "domestic relations are preeminently matters of state law" and that federal legislation is rarely intended "to displace state authority in this area." 490 U.S. at 587. The Court noted its prior cases holding that federal preemption in this area would not be found in the absence of a showing that it is positively required by direct enactment. Based upon the "plain and precise language" of the definitional section of the USFSPA, the Court concluded that Congress precluded the states from treating as marital property retirement pay waived by a service member in order to receive disability benefits. 490 U.S. at 589. Thus, the question presented here is whether use of the word "entitled" in § 1408(a)(4) is a plain and precise prohibition of any division of military pension benefits to which a spouse may become entitled in the future.

Reading this language in the context of other provisions of the USFSPA, we conclude that the language cannot be so construed. For example, § 1408(d)(1) states in relevant part:

> In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. *In the case of a member not entitled to receive retired pay on the date of the effective service of the court order*, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay.

(Emphasis supplied.) This statutory language indicates that a court can order division of pension benefits which a service member will receive in the future. In addition, § 1408(c)(3) provides: "This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section." Although Dean argues that this provision supports his interpretation that the USFSPA authorizes disposition only of retirement pay currently being received, it can also be reasonably interpreted as applying to pension benefits which a spouse currently on active military duty will receive upon future retirement. If the USFSPA were construed to permit a court to order division of a military pension only after a service member had retired, this provision would be superfluous.

[3] Neither the parties' briefs nor our research has disclosed any case construing the USFSPA as preempting the power of a state court to treat a future military pension entitlement as a marital asset in a dissolution proceeding. Dean relies upon two cases in which the Supreme Court of Arkansas held that a share of future military pension benefits could not be awarded in a dissolution proceeding, but both of these cases are based upon an interpretation of state law and do not address federal preemption. See, *Christopher v. Christopher*, 316 Ark. 215, 871 S.W.2d 398 (1994); *Durham v. Durham*, 289 Ark. 3, 708 S.W.2d 618 (1986). Similarly, other state courts considering whether it is permissible to treat a future military pension entitlement as a marital asset have relied upon state law to resolve the issue. See, *In re Marriage of Hunt*, 909 P.2d 525 (Colo. 1995) (finding under state law future military pension is divisible asset); *Bullock v. Bullock*, 354 N.W.2d 904 (N.D. 1984) (finding under state law future military pension is divisible asset); *Southern v.*

Glenn, 677 S.W.2d 576 (Tex. App. 1984) (finding under state law future military pension is divisible). See, also, Mark E. Sullivan, *Military Pension Division: Crossing the Minefield*, 31 Fam. L.Q. 19 (1997). We conclude that federal law does not preempt the power of a state court to treat the future nondisability pension entitlement of a spouse currently on active military duty as a marital asset in a dissolution proceeding. We therefore turn to the issue of whether such treatment is permissible under Nebraska law.

(b) Nebraska Law

Neb. Rev. Stat. § 42-366(8) (Reissue 1998) provides in relevant part that the marital estate which is subject to equitable division in a dissolution proceeding includes "any pension plans, retirement plans, annuities, and other deferred compensation benefits *owned by either party*, whether vested or not vested." (Emphasis supplied.) Dean argues that because he has no guarantee of receiving a military pension in the future, he has no ownership interest under this statutory provision. This argument, however, runs contrary to our decisions involving the treatment of military pension benefits in dissolution proceedings.

For example, in *Rockwood v. Rockwood*, 219 Neb. 21, 360 N.W.2d 497 (1985), the husband had served on active duty for 15 years at the time of the divorce decree. We noted that § 42-366(8) requires a court to include any pension and retirement plans in the marital estate, but does not require that each pension be divided between the parties. We therefore concluded that the trial court did not abuse its discretion in awarding the husband his interest in the military pension and the wife the entire value of the marital home in lieu of any interest in the pension. Although this case did not involve the division of a nonvested military pension, it supports the proposition that a military pension which has not vested because the service member is not yet eligible to retire is nevertheless properly considered as a part of the marital estate under § 43-366(8).

Similarly, in *Anderson v. Anderson*, 222 Neb. 212, 382 N.W.2d 620 (1986), the husband had been on active military duty for 16 years prior to the dissolution decree. We concluded that sixteen-twentieths of the amount the husband would receive

each month in military retirement pay was acquired during the marriage and that the district court therefore did not abuse its discretion in awarding the husband all interest in his pension, subject to the condition that he pay his wife $500 per month at the time he began to receive such benefits.

The military spouse in *Ray v. Ray*, 222 Neb. 324, 383 N.W.2d 752 (1986), had served on active military duty for 17 years prior to the dissolution. The district court awarded him sole interest in his military pension and awarded the wife $500 a month in alimony " 'to compensate her for an interest in the Air Force pension.' " *Id.* at 328, 383 N.W.2d at 754. We noted that under § 42-366(8), "any pension benefits may be considered as marital property, and thus divisible in a dissolution of marriage action, whether or not the pension is vested." *Id.* at 327-28, 383 N.W.2d at 754. We further concluded that the court did not abuse its discretion in considering the pension as the source of the funds for the award of alimony. One concurring judge wrote separately to emphasize that the court was considering a military pension that was not yet vested as part of the marital estate, noting that this approach was "logical" under § 42-366(8). *Ray*, 222 Neb. at 330, 383 N.W.2d at 755 (Brodkey, J., concurring).

[4] We agree with Justice Brodkey's observation that § 42-366(8) logically requires that a nonvested military pension be treated as marital property in a dissolution proceeding. While military personnel do not make monetary investments in a pension plan, they invest time and personal sacrifice in order to qualify for a nondisability military pension. Spouses of such personnel share in this investment to the extent that the duration of the marriage coincides with the period of military service. As one court has noted, the future retirement pay of a career military service member who is not yet eligible to retire "is a contractual right, subject to a contingency, and is a form of property." *Jackson v. Jackson*, 656 So. 2d 875, 877 (Ala. Civ. App. 1995). Because § 42-366(8) specifically requires the inclusion of retirement benefits "whether vested or not vested" in the marital estate, we conclude that the district court did not err in awarding Gayliene a share of Dean's future nondisability military pension entitlement, payable only if and when such benefits become payable to Dean.

Dean also argues that the trial court erred in its division of his military pension because the trial court contemplated future increases beyond the termination of the marital estate. Dean does not, however, specifically challenge the court's calculation of the future pension benefits. The court noted in the decree that its division of the pension benefits was "based upon the years of marriage [and] years overlapping in service." Although no calculations are included in the record, this language indicates that the trial court considered only the years in which the marriage coincided with Dean's military service in determining Gayliene's share of pension benefits. We find no abuse of discretion in this regard.

2. Alimony

The trial court awarded Gayliene alimony in the sum of $1 per year for life, "to be modifiable only upon [Gayliene's] portion of [the] military pension being reduced by a portion of said pension being received as disability." Both Dean and Gayliene contest this award of alimony.

[5] Dean essentially contends that the award of alimony was an improper attempt to circumvent the limitations of *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989). As noted, *Mansell* held that that portion of military retired pay waived in order for a member to receive disability benefits is not divisible under the USFSPA. Because of this holding, if a former spouse is awarded a certain percentage of military retirement benefits in a divorce decree and the member spouse subsequently voluntarily reduces his or her military retirement pay in order to receive disability benefits, the "pie" from which the former spouse's percentage is taken is reduced, thus reducing the total monthly payment to the former spouse. See *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997). However, we held in *Kramer*, 252 Neb. at 546, 567 N.W.2d at 113, that

> while a Nebraska court may not include service-connected disability benefits awarded to a military retiree as a part of a marital estate under *Mansell* [citation omitted], it may consider such benefits and the corresponding waiver of retirement pension benefits required by federal law in determining whether there has been a material change in

> circumstances which would justify modification of an alimony award . . . .

In this case, the award of nominal alimony modifiable only upon a change in the nature of Dean's future pension benefits is consistent with our holding in *Kramer* and does not constitute an abuse of discretion.

In her cross-appeal, Gayliene argues that the award of alimony in the sum of $1 per year was inadequate and that the award was improperly tied to the property division. She contends that alimony is to be considered separate from property division and that the record demonstrates that Dean's earning power has exceeded and will continue to exceed her earning capacity. Specifically, she argues that she chose to forgo additional education in order to assist Dean with his military career and that an award of alimony is necessary to correct the economic imbalance of the parties.

A review of the record indicates a definite economic imbalance between the parties, although it is not as significant as Gayliene contends. Gayliene's earnings of approximately $12,000 in 2001 were derived from approximately 6 months' employment after she moved from Nebraska to California in June of that year. On an annual basis, therefore, she could anticipate earnings of at least $24,000. Moreover, Gayliene's argument that she chose to forgo additional education in order to further Dean's military career is not supported by the record. In fact, Gayliene testified that she did go to school periodically during the marriage. Although she did not have outside employment during a 2-year period when she chose to stay home with the children, during other times, she was employed and earned approximately $25,000 per year. The record further indicates that Gayliene voluntarily left the marital home and her family on two separate occasions and obtained employment sufficient to support herself.

Dean's 2001 W-2 form indicates that he earned approximately $5,500 per month. The district court calculated Dean's total monthly income for purposes of child support calculations at $7,500. Thus, while there is a disparity in the earning power of the parties, we conclude that in the absence of evidence that Gayliene chose to forgo a career or education because of the

marriage, the award of nominal alimony was not an abuse of discretion.

3. Property Division

On cross-appeal, Gayliene also argues that the property division was inequitable, as she received only a few items of personal property, while Dean received all items in the family home and the home itself. The trial court valued the home at $135,000, but also assigned Dean all debt on the home, with a resulting equity award of approximately $10,000. Gayliene received her clothing, a table, her automobile, a bedroom set, a television, a DVD player, and some miscellaneous personal property, all of which she had taken with her when she moved to California. She contends that while the marital debts were divided evenly, the assets were not.

Gayliene's argument that the marital debts were divided evenly is not well founded. As noted above, Dean was assigned all of the debt on the marital home, which totaled approximately $125,000. In addition, the decree specifically assigned him debts totaling approximately $19,000. Gayliene was assigned debts totaling approximately $8,000. There is therefore a significant disparity in the division of marital debt, and the district court did not abuse its discretion in awarding Dean slightly more marital assets to account for some of this disparity.

V. CONCLUSION

Federal law does not prohibit and state law specifically permits the district court's inclusion of Dean's future nondisability military retirement benefits in the marital estate and its award of a portion of such benefits to Gayliene. We find no abuse of discretion in this or any other aspect of the property division or the alimony award in this case. The judgment of the district court is affirmed.

Affirmed.

GREGORY S. POOR, D.C., APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

663 N.W.2d 109

Filed June 20, 2003. No. S-02-472.

1. **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.
2. **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.
3. **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.
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. **Disciplinary Proceedings: Health Care Providers: Proof.** The allegations made in disciplinary proceedings against a licensed health care professional must be proved by clear and convincing evidence.
6. **Disciplinary Proceedings: Heath Care Providers: Licenses and Permits.** Whether undisputed conduct falls within the statutorily defined grounds for discipline of a licensed professional is an issue of law.
7. **Statutes.** Absent anything to the contrary, statutory language is to be given its plain and ordinary meaning.
8. **Disciplinary Proceedings: Health Care Providers.** The criteria to be considered in determining an appropriate professional disciplinary sanction include the following: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the profession 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 the profession.

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

K.C. Engdahl, of Raynor, Rensch & Pfeiffer, for appellant.

Don Stenberg, Attorney General, and James D. Smith for appellee.

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

STEPHAN, J.

Gregory S. Poor, D.C., appeals from an order of the district court for Lancaster County which affirmed the revocation of his license to practice chiropractic medicine by the Nebraska Department of Health and Human Services Regulation and Licensure. We affirm.

BACKGROUND

Poor received his chiropractic training between January 1992 and May 1995, and has been a licensed chiropractor in the State of Nebraska since July 1995. In an eight-count federal indictment filed in Omaha, Nebraska, in May 1998, Poor was charged with conspiracy to distribute gamma hydroxybutyrate (GHB), introducing GHB into interstate commerce with the intent to defraud and mislead, and witness tampering. Poor entered a plea agreement on March 10, 2000, in which he agreed to plead guilty to one count of conspiracy to manufacture and distribute a misbranded substance, GHB, in violation of 18 U.S.C. § 371 (2000). The plea agreement further provided:

> Although not entering a plea of guilty to Counts II through VII of the Indictment, GREGORY POOR admits the conduct set forth in those Counts and further agrees and stipulates that Counts II through VII inclusive will be considered as relevant conduct when computing the appropriate sentencing guidelines range as though pleas of guilty had been entered.

Counts II, III, and IV alleged that Poor introduced misbranded drugs into interstate commerce on July 17 and October 26 and 28, 1995. Counts V, VI, and VII alleged that Poor introduced adulterated drugs into interstate commerce on the same three occasions.

In exchange for Poor's admission of the underlying conduct, the United States agreed to dismiss counts II through VII as well as count VIII, which alleged witness tampering. Poor entered a guilty plea to count I and on May 31, 2000, was sentenced to 4 months' imprisonment, 3 years' supervised release, and a $2,000 fine. He was ordered to surrender for service of his sentence before 2 p.m. on June 30, 2000.

On June 9, 2000, after his conviction and sentencing but before he surrendered for service of his sentence, Poor was

arrested in Overland Park, Kansas, for driving under the influence. On January 26, 2001, following his release from prison, Poor was convicted of this charge.

In this disciplinary proceeding, the State alleged four "Causes of Action." The first cause of action alleged that on or about May 29, 1999, Poor illegally possessed cocaine, and that such possession constituted a violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1998), of the Uniform Controlled Substances Act, and was a ground for discipline under Neb. Rev. Stat. § 71-147(17) (Cum. Supp. 1998). The second cause of action listed examples of Poor's conduct which the State alleged "separately and cumulatively, constitute grossly immoral or dishonorable conduct evidencing unfitness," thus constituting grounds for discipline pursuant to § 71-147(2) (Reissue 1996). Specifically, the State accused Poor of the following acts:

> a. Lying to a Department investigator during the course of an official investigation on September 9, 1999;
>
> b. Conspiring to manufacture and distribute a misbranded substance in violation of Federal law, as alleged in the May 1998 Federal indictment;
>
> c. Tampering with a witness to hinder a pending federal investigation of the Defendant in violation of federal law as alleged in the May 1998 Federal indictment;
>
> d. Introducing misbranded drugs into interstate commerce as alleged in the May 1998 Federal indictment; and,
>
> e. Failure to warn his companions regarding the dangers of ingesting GHB either in isolation, or in combination with alcohol.

In the third and fourth causes of action, the State alleged that Poor's felony conviction and his misdemeanor driving under the influence conviction are both rationally connected to Poor's fitness or capacity to practice chiropractic medicine and thus constitute grounds for discipline under § 71-147(4).

An administrative hearing was conducted by a hearing officer on June 20, July 16, and August 27, 2001. Poor testified that he used GHB from 1992 until 1995. Poor denied experiencing adverse physical effects from GHB use, but admitted that he was hospitalized and subsequently released without treatment following GHB use in 1994. Despite the admissions in his plea

agreement, Poor denied that he engaged in any of the underlying conduct charged in counts II through VII of the indictment. Poor testified that he signed the plea agreement on the advice of counsel and denied that he had ever transported GHB across state lines.

Jeffrey Noble, a deputy sheriff for Pottawattamie County, Iowa, testified regarding the allegation that Poor had knowingly possessed cocaine. Noble testified that he encountered Poor on or about May 30, 1999, while Noble was working as a private security officer at an Omaha bar. Noble observed Poor drop a small bag containing a white substance as he was extracting some cash from his pocket. Poor tried to cover the bag with his foot. Suspecting that the bag contained cocaine, Noble asked Poor if it was his, and Poor did not respond. Noble placed handcuffs on Poor and enlisted the aid of another officer outside the bar. During a custodial search, Noble found a second bag containing a white substance in Poor's pocket. Subsequent testing confirmed that the white substance in both bags was cocaine. Poor was arrested and charged with possession of cocaine, but the charges were subsequently dismissed for reasons which are not apparent from the record.

Kevin Davis, D.C., a licensed chiropractor who served on the state Board of Chiropractic from 1995 through 2000, testified as an expert. Based on his training and experience, Davis testified that Poor's felony conviction violated the "basic premise" of chiropractic medicine, which is "a form of drugless, nonsurgical treatment of the human body." Davis also stated that Poor's distribution of GHB showed poor professional judgment and constituted unsound ethical practice that would not fit within the guidelines of the American Chiropractic Association's ethical code. Davis stated that Poor's lack of sound judgment reflects on his honesty, which is the foundation of treating any health care problem.

Also testifying for the State was Gregory Nieto, a special agent with the Food and Drug Administration's office of criminal investigation in Lenexa, Kansas. In 1995, Nieto became involved in an investigation concerning a death suspected to have been caused by GHB use. Nieto's investigation eventually led to Poor's indictment in May 1998, although no evidence ever

connected Poor to the death. In March 2000, following his plea of guilty, Poor spoke with Nieto and verified that he had transported GHB to Council Bluffs, Iowa, in a gallon jug on October 28, 1995. On cross-examination, Nieto testified that GHB was not illegal as a controlled substance in 1995 and that people generally were not being prosecuted for possession of GHB at that time. However, Nieto testified that in 1995, the Food and Drug Administration was prosecuting persons involved in the manufacturing and distribution of GHB because of known overdose situations around the country.

Rodger Green, an investigator with the Nebraska Department of Health and Human Services Regulation and Licensure's division of investigations, was the final witness to testify on behalf of the State. Green was assigned to investigate Poor on May 26, 1998. Green interviewed Poor twice regarding this case, once on June 23, 1998, and once on September 9, 1999. On June 23, 1998, Green and Poor discussed GHB. Poor identified nausea and vomiting as the only side effects of GHB use and denied that he ever sold the substance. On September 9, 1999, following interviews with other parties, Green conducted a followup interview with Poor for purposes of clarifying certain points. In this interview, Poor again denied ever giving or selling GHB to anyone and also denied ever having possessed cocaine. Poor did admit that he had been hospitalized in connection with GHB use and agreed to give Green a release of information. Following the conclusion of the State's case, seven affidavits from Poor's patients were offered and received into evidence in his behalf and the proceedings were concluded.

As a consequence of the hearings, the chief medical officer of the Nebraska Department of Health and Human Services Regulation and Licensure entered an order on November 13, 2001, revoking Poor's license to practice as a chiropractor in the State of Nebraska effective 30 days from the date of the entry of the order. Generally, the chief medical officer found that the felony conviction and the underlying facts of the conviction constituted grossly immoral or dishonorable conduct evidencing unfitness to practice one's profession and that such conduct was rationally connected to Poor's fitness or capacity to practice his profession pursuant to § 71-147(2) and (4). The chief medical

officer dismissed the first and fourth causes of action, finding that the allegations of illegal possession of cocaine were not proved by clear and convincing evidence and that Poor's driving under the influence conviction was not clearly and convincingly rationally connected to Poor's fitness or capacity to practice his profession.

Poor filed a petition for review in Lancaster County District Court on December 7, 2001, and proceedings, in which arguments were made by counsel but no witnesses were called, were held on March 20, 2002. Contrary to Poor's previous testimony, Poor's attorney conceded that "[Poor] did the things that were alleged in terms of transportation of the [GHB]." Poor's attorney argued that Poor had made a mistake of youth; that no one really understood the potential risks of using GHB in 1995; and that suspension, not revocation, would be an appropriate sanction.

On April 3, 2002, the district court affirmed the chief medical officer's order revoking Poor's license. The court found, however, that the chief medical officer's conclusion that Poor had tampered with a witness was clearly erroneous because the charge had been dismissed, Poor never admitted the charge, and no evidence in the record supported such a finding. In affirming the chief medical officer's decision, the district court stated:

> This court concurs with the conclusion of the Chief Medical Officer that the facts underlying the federal felony conviction constitute grossly immoral or dishonorable conduct evidencing his unfitness to practice his profession as a chiropractor. The court further finds by clear and convincing evidence that Poor knowingly possessed cocaine on May 30, 1999 and that this constitutes grossly immoral or dishonorable conduct evidencing unfitness to practice his profession. Although not sufficient standing alone to constitute grossly immoral or dishonorable conduct, the June 9, 2000, driving while intoxicated offense, having occurred when it did, is relevant in determining the appropriate sanction. The federal felony conviction, and the acts included therein, and the possession of cocaine, are rationally connected to Poor's fitness or capacity to practice his profession.

Poor filed this appeal pursuant to Neb. Rev. Stat. § 84-918 (Reissue 1999) on April 29.

ASSIGNMENTS OF ERROR

Poor assigns, restated and consolidated, that the district court erred (1) in concluding that he engaged in grossly immoral or dishonorable conduct evidencing unfitness to practice his profession, (2) in concluding that his criminal convictions were rationally connected to his fitness and capacity to practice his profession, (3) in relying upon his possession of cocaine as a ground for discipline, and (4) in determining license revocation to be the appropriate sanction.

STANDARD OF REVIEW

[1] 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. *Forgét v. State*, 265 Neb. 488, 658 N.W.2d 271 (2003); *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002).

[2] 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. *Forgét v. State, supra*; *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *American Legion v. Nebraska Liquor Control Comm.*, 265 Neb. 112, 655 N.W.2d 38 (2003).

[3] 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. *Forgét v. State, supra*; *Hass v. Neth, supra*; *American Legion v. Nebraska Liquor Control Comm., supra.*

[4] 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. *Forgét v. State, supra*; *American Legion v. Nebraska Liquor Control Comm., supra.*

ANALYSIS

Nebraska law provides at § 71-147, in relevant part, that a license to practice a health care profession may be revoked when the licensee is guilty of any of the following acts or offenses:

> (2) Grossly immoral or dishonorable conduct evidencing unfitness or lack of proficiency sufficient to meet the standards required for practice of the profession in this state;
>
> . . . .
>
> (4) Conviction of a misdemeanor or felony under state law, federal law, or the law of another jurisdiction and which, if committed within this state, would have constituted a misdemeanor or felony under state law and which has a rational connection with the applicant's, licensee's, certificate holder's, or registrant's fitness or capacity to practice the profession[.]

See, also, 172 Neb. Admin. Code, ch. 29, § 009.03(2) and (4) (2001).

[5] The allegations made in disciplinary proceedings against a licensed health care professional must be proved by clear and convincing evidence. *Davis v. Wright*, 243 Neb. 931, 503 N.W.2d 814 (1993). The district court found, inter alia, that the following facts were proved by clear and convincing evidence: (1) Poor engaged in a conspiracy to manufacture and distribute a misbranded substance in violation of 18 U.S.C. § 371; (2) Poor introduced into interstate commerce misbranded and adulterated drugs with the intent to defraud and mislead in violation of 21 U.S.C. §§ 331(a) and 333(a)(2) (1994); (3) Poor was arrested in Overland Park, Kansas, on June 9, 2000, for driving under the influence and was convicted of that offense on January 26, 2001; and (4) Poor did knowingly possess cocaine on May 30, 1999. In this appeal, Poor concedes that these factual determinations "find evidentiary support in the record" and "are understood as beyond dispute." Brief for appellant at 19.

Poor disputes the district court's conclusion that these facts amount to "grossly immoral or dishonorable conduct evidencing his unfitness" under § 71-147(2) and that Poor's felony conviction and its underlying conduct were "rationally connected" with Poor's fitness or capacity to practice chiropractic medicine under § 71-147(4). Poor argues that the State was required not only to present clear and convincing evidence that the factual allegations were true, but, in addition, to prove by clear and convincing evidence that any proven facts constitute grounds for revocation of his license.

[6] Contrary to Poor's contention, the question of whether his undisputed conduct falls within the statutorily defined grounds for discipline is not an issue of fact, but, rather, an issue of law. 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. *Forgét v. State*, 265 Neb. 488, 658 N.W.2d 271 (2003); *American Legion v. Nebraska Liquor Control Comm.*, 265 Neb. 112, 655 N.W.2d 38 (2003).

Grossly Immoral or Dishonorable Conduct Evidencing Unfitness

In determining whether Poor's conduct warranted the discipline imposed, we must first determine the meaning and scope of the phrase "[g]rossly immoral or dishonorable conduct evidencing unfitness" under § 71-147(2). This phrase is not defined by the statutes governing revocation of professional licenses and certificates. See § 71-147 and Neb. Rev. Stat. §§ 71-147.01 through 71-161.20 (Reissue 1996 & Cum. Supp. 2002). We considered similar language in *Clarke v. Board of Education*, 215 Neb. 250, 338 N.W.2d 272 (1983), which presented the question of whether a teacher's use of racial slurs directed against his students constituted "immorality" within the meaning of a statute relating to teacher discipline. Acknowledging the inherent difficulty in judicial determination of "the limits of a term such as 'immoral,' " *id.* at 254, 338 N.W.2d at 274, we stated:

> There is no question that the task presented to us would be made much easier if the Legislature had defined "immorality" as it did "insubordination," when it adopted § 79-1260. Undoubtedly, it did not define the term because, as we have difficulty, so too did it have difficulty in prescribing a limited definition. It is for that reason that we wish to make it clear that our decision here today is not intended to provide an all-inclusive, broad, and general definition of the term "immorality," either generally or within the meaning of § 79-1260, but, rather, only to determine whether, under the facts in this case, Clarke's action was in fact immoral within the meaning of § 79-1260. In

> attempting to arrive at that answer we must take into account the specific facts presented to us in this case.

215 Neb. at 255, 338 N.W.2d at 274-75. Likewise, in this case, our objective is to determine whether the undisputed facts fall within the statutory grounds for discipline.

[7] Absent anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Henderson v. Henderson*, 264 Neb. 916, 653 N.W.2d 226 (2002). Many jurisdictions have been confronted with the need to define terms such as "grossly immoral" and "dishonorable" within the context of statutes authorizing discipline of health care professionals. See, *Heinmiller v. Dep't of Health*, 127 Wash. 2d 595, 903 P.2d 433 (1995); *Betts v. Dept. of Registration & Educ.*, 103 Ill. App. 3d 654, 431 N.E.2d 1112 (1981); *Buhr v. Bd. of Chiropractic Examiners*, 261 Ark. 319, 547 S.W.2d 762 (1977); *Kansas State Board of Healing Arts v. Foote*, 200 Kan. 447, 436 P.2d 828 (1968); *State ex rel. Lentine v. State Board of Health*, 334 Mo. 220, 65 S.W.2d 943 (1933); 61 Am. Jur. 2d *Physicians, Surgeons, and Other Healers* § 77 (2002). An overview of these and other cases led to the following synopsis:

> "Unprofessional," "dishonorable," or "immoral" conduct in connection with the practice of medicine or the particular branch or system of medicine in which the licensee in question is engaged is specified as grounds for revocation in many of the statutes, and the validity of such statutes has been sustained by the courts in almost every instance. These quoted words, and other similar ones that are sometimes used in the statutes, are general, but are construed to mean that which, by common understanding and general opinion, is considered to be grossly immoral, dishonorable, or disreputable in connection with the practice of medicine. It has been held that a statute authorizing revocation for "immoral," "dishonorable," or "unprofessional" acts or conduct contemplates conduct that shows that the person guilty of it either is intellectually or morally incompetent to practice the profession or has committed an act or acts of a nature likely to jeopardize the interest of the public; it does not authorize revocation

> for trivial reasons or for a mere breach of the generally accepted ethics of the profession.

61 Am. Jur. 2d, *supra* at 200-01.

In this case, it is undisputed that Poor conspired to manufacture and distribute GHB and introduced misbranded and adulterated drugs into interstate commerce. Clearly, the district court's determination that Poor had engaged in "grossly immoral or dishonorable conduct" was not based on "trivial reasons." We find that Poor's conduct clearly falls within the plain and ordinary meaning of "[g]rossly immoral or dishonorable conduct" for the purposes of § 71-147(2).

In order to be in violation of § 71-147(2), however, Poor's conduct must also evidence his unfitness to practice chiropractic medicine in Nebraska. In its order finding Poor to be unfit, the district court relied in part on Poor's denial of the conduct underlying his felony conviction. The court stated: "Poor's denial now, after taking advantage of the plea bargain, that he committed any of the acts he admitted to in the United State[s] District Court is disturbing and is not consistent with the integrity and acceptance of responsibility expected by persons engaged in a professional occupation."

Davis, a chiropractor and former member of the state Board of Chiropractic, testified that Poor's felony conviction violated the "basic premise" of chiropractic medicine, which he identified as "a form of drugless, nonsurgical treatment of the human body." See, also, Neb. Rev. Stat. § 71-177 (Reissue 1996) (defining chiropractic medicine as practice "without the use of drugs"). The record also includes a "Statement of Reasons for Sentence" in Poor's federal criminal proceeding, wherein the sentencing judge found that Poor had obtained large quantities of GHB for distribution over a substantial period of time, that Poor "was aware of the risk associated with ingestion of GHB[,] and that his conduct in distributing GHB constituted a reckless risk of serious bodily injury."

We have no difficulty in concluding from this record that Poor's possession, use, and unlawful distribution of potentially dangerous drugs, as well as his lack of candor, are competent evidence of his unfitness to practice a health care profession which

holds as a "basic premise" the "drugless, nonsurgical treatment of the human body." There is no merit to Poor's contention that the district court erred in concluding that he committed "[g]rossly immoral or dishonorable conduct evidencing unfitness" within the meaning of § 71-147(2).

We note Poor's argument that the district court erred in considering his cocaine possession as a part of such conduct was not alleged as such in the operative petition for disciplinary action. We need not address this issue because other evidence, specifically Poor's involvement in the unlawful interstate distribution of GHB coupled with his lack of candor, is more than sufficient to establish this statutory ground for discipline.

Rational Connection

Under § 71-147(4), a license may be revoked if a licensee has been convicted of a misdemeanor or felony which has a "rational connection" with the licensee's "fitness or capacity to practice the profession." It is undisputed that, pursuant to § 71-161.01, Poor's felony conviction is a conviction within the meaning of § 71-147(4). Therefore, we need only determine whether the district court erred in finding a "rational connection" between Poor's conviction and his fitness or capacity to practice chiropractic medicine.

Chiropractic medicine is a regulated health care profession. Patients necessarily rely upon the chiropractor's honesty, integrity, sound professional judgment, and compliance with applicable governmental regulations. The record shows that Poor introduced misbranded and adulterated drugs into interstate commerce "*with the intent to defraud and mislead.*" In addition, subsequent to his admission of the underlying conduct in counts II through VII of the federal indictment, Poor denied the same conduct at the hearing held before the chief medical officer. Poor argues that "[t]here is absolutely no testimony or evidence to the effect that anything which . . . Poor did constituted a threat of harm to his patients." Brief for appellant at 35. However, as noted above, his criminal conduct was determined by the sentencing judge to evidence a "reckless risk of serious bodily injury." We find that the record contains sufficient competent evidence to support the determination of the district court

that Poor's federal felony conviction and conduct upon which it was based are rationally connected to Poor's fitness or capacity to practice his profession.

APPROPRIATE SANCTION

Poor contends that the district court erred in determining that license revocation was an appropriate sanction. He argues that "[a] suspension, short of revocation, would be sufficient for purposes of punishing [Poor] and deterring others from engaging in similar activity." Brief for appellant at 35.

[8] The criteria to be considered in determining an appropriate professional disciplinary sanction were outlined by this court in *State ex rel. NSBA v. Brown*, 251 Neb. 815, 821, 560 N.W.2d 123, 129 (1997), and include:

> (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the [profession] 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 [the profession].

Although *Brown* involved a disciplinary action against an attorney who was convicted of a drug offense, we see no reason not to apply this same test in assessing the severity of a disciplinary sanction imposed upon a health care professional. See *Davis v. Wright*, 243 Neb. 931, 503 N.W.2d 814 (1993) (finding no basis for differentiating between disciplinary proceedings against attorneys and physicians with respect to burden of proving allegations by clear and convincing evidence). Based on the seriousness of Poor's felony conviction and its underlying conduct, Poor's subsequent lack of candor with respect to that conduct, and Poor's lack of sound judgment demonstrated by the driving under the influence conviction, we conclude that revocation of Poor's license was an appropriate sanction.

CONCLUSION

Based upon the facts which were established by clear and convincing evidence, and for the reasons stated above, we conclude that the district court did not err in affirming the revocation of Poor's license to practice chiropractic medicine in Nebraska. Finding no error on the record, we affirm.

AFFIRMED.

NEMATOLLAH SABERZADEH, APPELLANT, V.
JASON SHAW, APPELLEE.
663 N.W.2d 612

Filed June 20, 2003. No. S-02-810.

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.** Failure to file a reply controverting a new allegation raised in an answer to a petition results in the allegation's being taken as true.
3. **Pleadings: Waiver.** An admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues.
4. **Pleadings: Trial.** A party may at any time invoke the language of the pleading of his adversary on which the case is tried on a particular issue as rendering certain facts indisputable.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Reversed and remanded with directions.

Cletus W. Blakeman, of Domina Law, P.C., L.L.O., for appellant.

Daniel P. Chesire and Raymond E. Walden, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Nematollah Saberzadeh appeals from a judgment of the district court for Douglas County. After a jury trial, Saberzadeh's award of damages was reduced in proportion to his degree of fault for not wearing an available and operational seatbelt during an automobile accident. He now argues that the appellee, Jason Shaw, failed to prove an element of Shaw's "seatbelt" defense, namely, that a seatbelt was available and operational in the vehicle.

BACKGROUND

On October 5, 1996, in Scottsdale, Arizona, Saberzadeh was a passenger in an automobile driven by Shaw. Shaw failed to stop at an intersection, and as the vehicle entered the intersection, it collided with another vehicle and struck a concrete block wall. Saberzadeh sustained injuries as a result of the accident.

Saberzadeh brought this negligence action against Shaw in the district court. Shaw admitted he was negligent in his operation of the automobile and that his negligence was the proximate cause of the accident. However, Shaw alleged in his amended answer that Saberzadeh was negligent in that Saberzadeh "failed to wear an available seatbelt which was unreasonable under the circumstances and the failure to wear the available seatbelt contributed to injuries to [Saberzadeh] which would not have occurred had the restraint been used or enhanced injuries that did occur." Saberzadeh did not reply to Shaw's amended answer.

The case proceeded to trial, where the evidence established that Saberzadeh was not wearing a seatbelt. Saberzadeh was asked on cross-examination whether a seatbelt was available in the car, to which Saberzadeh replied, "I didn't look for no seat belt." Saberzadeh offered a photograph of an automobile "similar" to the one involved in the accident. The photograph clearly shows a shoulder belt on the passenger side of the vehicle. At the conclusion of the evidence, Saberzadeh moved for a directed verdict, arguing that Shaw had failed to prove an element of his "seatbelt" defense because he offered no evidence that the automobile had an available and operational seatbelt. The motion was overruled.

Applying Arizona's substantive law, the jury was instructed, with regard to Shaw's "seatbelt" defense, that Shaw had the burden to prove, among other things, that Saberzadeh did not use an available and operational seatbelt. There were no objections by either party to any of the jury instructions. The jury returned a verdict in favor of Saberzadeh and against Shaw in the amount of $292,465. The jury also found that Saberzadeh was at fault for failing to wear an available and operational seatbelt and fixed Saberzadeh's percentage of fault at 50 percent. Accordingly, judgment was entered for Saberzadeh in the amount of $146,232.50. Thereafter, Saberzadeh filed a motion to set aside judgment or, in

the alternative, motion for new trial. The motion was denied, and Saberzadeh appealed.

ASSIGNMENTS OF ERROR

Saberzadeh assigns that the district court erred in (1) denying his motion for directed verdict; (2) denying his motion to set aside judgment or, in the alternative, motion for new trial; (3) instructing the jury on the elements and permissive reduction of his damages associated with Shaw's "seatbelt" defense; (4) reducing his damage award by 50 percent for his failure to wear an available seatbelt; and (5) not being present, in court, during times when evidence was being presented to the jury via videotape.

STANDARD 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. *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003).

ANALYSIS

Saberzadeh's first four assignments of error present a single issue: whether there was any evidence that the automobile driven by Shaw had an available and operational seatbelt for use by Saberzadeh. Arizona, whose substantive law was applied in this case, allows a jury to consider evidence of a plaintiff's nonuse of a seatbelt, under a theory of comparative fault, to reduce damages otherwise recoverable by the plaintiff. *Law v. Superior Court of State of Ariz.*, 157 Ariz. 147, 755 P.2d 1135 (1988). The Arizona Supreme Court has said that "[t]he defendant must establish several factual predicates before seat belt nonuse may be presented to the jury." *Id.* at 156, 755 P.2d at 1144, citing *Insurance Co. of North America v. Pasakarnis*, 451 So. 2d 447 (Fla. 1984). One of the factual predicates a defendant must prove is that " 'the plaintiff did not use an available and operational seat belt.' " *Law*, 157 Ariz. at 154, 755 P.2d at 1142, quoting *Insurance Co. of North America, supra*. Thus, to establish his "seatbelt" defense under

Arizona law, Shaw had the burden of proving that Saberzadeh did not use an available and operational seatbelt.

Shaw argues that he was relieved of the burden of producing evidence on this issue. Shaw's amended answer alleged, as a new matter, that Saberzadeh failed to wear an available seatbelt. Saberzadeh did not file a reply. For that reason, Shaw argues that his allegation stands admitted and that he was no longer required to produce evidence that a seatbelt was available for Saberzadeh's use.

[2] For purposes of this action, Neb. Rev. Stat. § 25-842 (Reissue 1995) (repealed operative January 1, 2003) provided in part that "every material allegation of new matter in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true." We have said that the failure to file a reply controverting a new allegation raised in an answer to a petition results in the allegation's being taken as true. *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999); *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989).

[3,4] However, we have also stated that an admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy *so far as the adverse party desires to take advantage of it*, and therefore is a limitation of the issues. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998). A party may at any time invoke the language of the pleading of his adversary on which the case is tried on a particular issue as rendering certain facts indisputable. *Lange Building & Farm Supply, Inc. v. Open Circle "R", Inc.*, 210 Neb. 201, 313 N.W.2d 645 (1981). While Saberzadeh's failure to reply to Shaw's amended answer may have served as a judicial admission of Saberzadeh's nonuse of an available seatbelt, the record does not indicate that Shaw sought to take advantage of that admission by invoking it at trial. In fact, despite Shaw's contention that he was relieved of his burden of producing evidence on the issue, the jury was still instructed, in two different instructions (Nos. 2 and 16), that Shaw had the burden of proving that Saberzadeh did not use an available and operational seatbelt. Shaw did not request the court to instruct the jury that Saberzadeh's failure to file a reply constituted a judicial admission on Saberzadeh's part

that the automobile had an available and operational seatbelt for Saberzadeh's use. For that reason, Shaw was not relieved of the burden of producing evidence in support of his allegation.

With no admission by Saberzadeh that he failed to wear an available seatbelt, we must consider if Shaw produced any evidence to support that allegation. A review of the record discloses that he did not. Saberzadeh was asked on cross-examination whether a seatbelt was available in the vehicle. He replied, "I didn't look for no seat belt." Shaw testified that Saberzadeh was not wearing a seatbelt, but was never asked whether the vehicle had a seatbelt available for Saberzadeh's use. There was no testimony from any other witness on the topic of available seatbelts in the vehicle. The record contains a photograph of an automobile which, in Shaw's words, was "similar" to the one Shaw was driving on the day of the accident. The photograph clearly shows a shoulder belt on the passenger side of the automobile. We cannot say that this photograph is competent evidence that the vehicle involved in the accident contained an available and operational seatbelt for Saberzadeh's use. Thus, the district court erred in denying Saberzadeh's motion for directed verdict on Shaw's seatbelt defense. Having reached this conclusion, we need not address his remaining assignment of error.

CONCLUSION

We conclude that the district court erred in denying Saberzadeh's motion for a directed verdict. At trial, Shaw had the burden of proving that Saberzadeh did not use an available and operational seatbelt. Shaw was not relieved of this burden when Saberzadeh failed to reply to Shaw's amended answer because Shaw did not take advantage of Saberzadeh's admission. Furthermore, Shaw did not produce evidence that the automobile involved in the accident had a seatbelt available for Saberzadeh's use.

The jury returned a verdict in favor of Saberzadeh in the amount of $292,465, but reduced that award in proportion to his degree of fault for failing to wear an available and operational seatbelt. Because Shaw failed to prove an element of his defense, we reverse the judgment entered by the district court

and remand the cause with directions to enter judgment in favor of Saberzadeh in the amount of $292,465.

REVERSED AND REMANDED WITH DIRECTIONS.

DUKHAN IQRAA JIHAD MUMIN, APPELLANT, AND ABDUL ALI AL'AMIN AND BASHIR WALI ABDUL-RAHMAN, APPELLEES, V. RICK DEES AND KSRZ FM/STAR 104.5 RADIO STATION, APPELLEES.

663 N.W.2d 125

Filed June 20, 2003. No. S-02-967.

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. **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.
3. **Final Orders: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1902 (Reissue 1995), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
4. ____: ____. To be a final order under the first category of reviewable orders set forth in Neb. Rev. Stat. § 25-1902 (Reissue 1995), an order must leave nothing for further consideration by the court.
5. **Actions: Final Orders.** A special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995) includes every special statutory remedy which is not in itself an action.
6. **Judgments: Final Orders.** A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
7. **Actions: Final Orders.** For purposes of Neb. Rev. Stat. § 25-1902 (Reissue 1995), a special proceeding which affects a substantial right is, by definition, not part of an action.
8. **Default Judgments: Final Orders.** An order overruling a motion for default judgment is not a final, appealable order for purposes of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
9. **Supreme Court: Courts: Appeal and Error.** Upon further review from a judgment of the Nebraska Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and HANNON and MOORE, Judges, on appeal thereto from the District Court for Douglas County, SANDRA L. DOUGHERTY, Judge. Judgment of Court of Appeals affirmed.

Dukhan Iqraa Jihad Mumin, pro se.

No appearance for appellees.

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

HENDRY, C.J.

FACTUAL BACKGROUND

In October 2001, appellant, Dukhan Iqraa Jihad Mumin, together with two other plaintiffs (collectively plaintiffs), filed a petition against appellees, Rick Dees and the KSRZ FM/Star 104.5 radio station. Mumin's petition, brought pursuant to the "Nebraska [l]ibel, slander, and invasion of privacy statutes," alleged appellees made several malicious, slanderous, and "very inflammatory" comments with respect to members of the Islamic faith. The petition claimed such comments incited violence against Muslims in the United States and endangered the lives of plaintiffs and of plaintiffs' families. Plaintiffs sought declaratory and injunctive relief, as well as $150 million each in damages.

Summons was served on appellees at the KSRZ FM radio station. However, neither appellee filed a responsive pleading or otherwise appeared. The KSRZ FM radio station returned the summons along with a letter to the clerk of the Douglas County District Court. The letter stated, inter alia, that Dees was not an employee of the radio station. Thereafter, Mumin filed a motion for default judgment.

The district court overruled the motion for default judgment, stating that pursuant to *State on behalf of Yankton v. Cummings*, 2 Neb. App. 820, 515 N.W.2d 680 (1994), a plaintiff is not entitled to default judgment if the allegations of the petition fail to state a cause of action. Citing *Norris v. Hathaway*, 5 Neb. App. 544, 561 N.W.2d 583 (1997), the district court concluded that Mumin's petition failed to allege facts sufficient to show "a false

and defamatory statement concerning the plaintiff." The district court explained that

> [w]hen the defamed individual is not named in the publication, he or she must allege facts that show that the defamatory matter was spoken of him or her. [Citation omitted.] In the case at bar, the alleged statements concerned Muslims in general. Mumin has not asserted, nor do the facts show that Mumin was intended by alleged defamatory statements made by Defendant Dees and broadcast by Defendant Star 104.5.

Having determined that Mumin's petition failed to state a cause of action, the district court overruled the motion for default judgment by order entered March 14, 2002.

On March 21, 2002, Mumin filed a pleading styled "Motion for Reconsideration." In his motion, Mumin claimed his petition stated a cause of action and asked the court to reconsider its March 14 order. By order entered July 23, the district court overruled Mumin's "Motion for Reconsideration." There is no indication in the record that Mumin's petition was dismissed by the district court. Mumin filed his notice of appeal on July 31.

The Nebraska Court of Appeals dismissed Mumin's appeal by docket entry which read: "Appeal dismissed for lack of jurisdiction pursuant to Rule 7A(2). Appellant's notice of appeal was not filed within 30 days of the March 14, 2002, order overruling appellant's motion for default judgment." *Mumin v. Dees*, 11 Neb. App. lxi (No. A-02-967, Oct. 31, 2002).

Mumin petitioned this court for further review, which we granted.

ASSIGNMENT OF ERROR

Mumin assigns that the Court of Appeals erred in dismissing his appeal for lack of jurisdiction.

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. *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003); *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002).

ANALYSIS

Mumin assigns that the Court of Appeals erred in dismissing his appeal for lack of jurisdiction. Specifically, Mumin claims that pursuant to *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002), decided by this court prior to the Court of Appeals' docket entry, his "Motion for Reconsideration" constituted a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002). Mumin argues that such motion, having been filed within 10 days of the district court's order overruling his motion for default, "terminated" his 30-day time limitation pursuant to Neb. Rev. Stat. § 25-1912(3)(b) (Cum. Supp. 2002). Thus, according to Mumin, his appeal was timely in that it was filed within 30 days of the district court's July 23, 2002, order overruling his "Motion for Reconsideration."

[2] Before considering whether Mumin's appeal was timely under our holding in *Bellamy, supra*, we must first determine whether the order overruling Mumin's motion for default judgment from which the appeal was taken was a final, appealable order. 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. *Bailey, supra.*

[3] Pursuant to Neb. Rev. Stat. § 25-1902 (Reissue 1995), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. *Bailey, supra.* Had the district court granted Mumin's motion for default judgment, every material allegation of the petition would have been taken as true against appellees except allegations of value and amount of damages. See *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999). See, also, Neb. Rev. Stat. § 25-842 (Reissue 1995) (repealed by 2002 Neb. Laws, L.B. 876). Accordingly, for purposes of this appeal, we assume, without deciding, that the order overruling the motion for default judgment affected a substantial right of Mumin.

[4] We turn then to consider whether the order overruling Mumin's motion for default judgment fits within any of the three categories of final orders set forth in § 25-1902. To constitute a

final, appealable order under the first category of § 25-1902, the case must involve an order which affects a substantial right in an action and which determines the action and prevents a judgment. *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

> To be a "final order" under the first type of reviewable order, an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court, and thus, the order is final when no further action of the court is required to dispose of the pending cause; however, if the cause is retained for further action, the order is interlocutory.

Rohde v. Farmers Alliance Mut. Ins. Co., 244 Neb. 863, 868-69, 509 N.W.2d 618, 623 (1994). Accord *O'Connor, supra*. The district court overruled Mumin's motion for default judgment on the ground that Mumin's petition failed to state a cause of action. There is no indication in the record, however, that the district court took the additional step of dismissing Mumin's petition. Without an order dismissing the petition, the pending cause was "retained for further action" by the district court. We therefore conclude that the order was interlocutory and did not determine the action and prevent a judgment. See, *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2000) (determining that granting of plea in abatement without order of dismissal is not final, appealable order); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998) (determining that sustaining of general demurrer not followed by judgment of dismissal terminating litigation does not constitute final, appealable order). This case does not fit within the first category of appealable orders pursuant to § 25-1902.

[5-7] We next consider whether the order fits within the second category of final orders made during a special proceeding. This court has stated that for purposes of § 25-1902, a special proceeding includes " ' "every special statutory remedy which is not in itself an action." ' " *Jarrett v. Eichler*, 244 Neb. 310, 313, 506 N.W.2d 682, 685 (1993) (quoting *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), and *Turpin v. Coates*, 12 Neb. 321, 11 N.W. 300 (1882)). A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding within the meaning of § 25-1902.

Keef v. State, 262 Neb. 622, 634 N.W.2d 751 (2001). A special proceeding which affects a substantial right is, by definition, not part of an action. *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996).

It is clear that the motion for default judgment, filed within the context of Mumin's action for "[l]ibel, slander, and invasion of privacy," was merely part of the action in which it was filed. In this respect, it was analogous to a motion for leave to amend pleadings, which is also filed within the context of the overall action and is not separate from the overall action. This court has held that an order overruling a motion for leave to file an amended pleading is interlocutory and not appealable. *Knoell Constr. Co., Inc. v. Hanson*, 208 Neb. 373, 303 N.W.2d 314 (1981). We therefore conclude that the order overruling Mumin's motion was a step or proceeding within the overall action and thus was not made in a special proceeding within the meaning of § 25-1902. See *Keef*, 262 Neb. at 630, 634 N.W.2d at 759 (determining that order granting partial summary judgment was not special proceeding within meaning of § 25-1902 because it "was merely a step or proceeding within the overall action"). This case does not fit within the second category of appealable orders pursuant to § 25-1902.

Finally, we consider whether the order fits within the third category of orders made on summary application in an action after judgment is rendered. Since at the time the order was entered, no judgment had been entered with respect to the merits of Mumin's action for "[l]ibel, slander, and invasion of privacy," we conclude that the order was not entered after a judgment in the overall action. See, *Charles Vrana & Son Constr. v. State*, 255 Neb. 845, 587 N.W.2d 543 (1998) (determining order granting partial summary judgment was not entered after judgment and, thus, was not made on summary application in action after judgment was rendered); *In re Interest of R.G.*, 238 Neb. at 413, 470 N.W.2d at 787 (determining that juvenile court orders placing infant in temporary custody of Nebraska Department of Social Services were not entered "after judgment" is rendered within the meaning of § 25-1902). This case does not fit within the third category of appealable orders pursuant to § 25-1902.

[8] In sum, we determine the order overruling Mumin's motion for default judgment is not a final, appealable order. Such determination is in accord with this court's previous holding in *Shedenhelm v. Shedenhelm*, 21 Neb. 387, 32 N.W. 170 (1887), that an order denying a motion for default against a defendant in a divorce action is not a final order.

CONCLUSION

[9] The order overruling Mumin's motion for default was not a final, appealable order. Upon further review from a judgment of the Court of Appeals, this court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). For reasons different from those stated by the Court of Appeals, we conclude that the Court of Appeals was without appellate jurisdiction to consider the merits of Mumin's purported appeal. The judgment of the Court of Appeals dismissing Mumin's purported appeal is affirmed.

AFFIRMED.

WENDY OLSON, APPELLANT, V. PAUL S. SHERRERD, M.D., AND FAMILY EAR, NOSE AND THROAT CLINIC, P.C., APPELLEES.

663 N.W.2d 617

Filed June 27, 2003. No. S-02-185.

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. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
3. **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.
4. **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.
5. ____. The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission.

6. **Trial: Evidence: Appeal and Error.** When a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal.
7. **Pretrial Procedure: Evidence: Appeal and Error.** When a pretrial motion which seeks to exclude evidence as a discovery sanction is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal.
8. **Trial: Depositions: Appeal and Error.** An appellate court reviews a trial court's decision refusing to allow a party to take the deposition of a nonparty during trial for an abuse of discretion.
9. **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.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Daniel B. Cullan and Paul W. Madgett, of Cullan & Cullan Law, and Diana J. Vogt for appellant.

Mark E. Novotny and William R. Settles, of Lamson, Dugan & Murray, L.L.P., for appellees.

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

CONNOLLY, J.

Wendy Olson (Wendy) sued Paul S. Sherrerd, M.D., and the Family Ear, Nose and Throat Clinic, P.C. (the Clinic). She alleged that a medical assistant at the Clinic failed to meet the standard of care when she gave Wendy an injection of the steroid Aristocort. Following a trial, the jury found for Sherrerd and the Clinic. After the court denied Wendy's motion for a new trial, she appealed. Wendy claims that she is entitled to a new trial because the court erred in instructing the jury on causation, in overruling her motion for discovery sanctions, and in not allowing her to take the videotaped "trial" deposition of one of her treating physicians.

We conclude that Wendy failed to preserve her assignments of error addressing the causation instruction and her motion for discovery sanctions. Concerning the denial of the taking of the videotaped "trial" deposition, Wendy failed to show that the deposition would have been admissible at trial. Accordingly, we affirm.

FACTUAL BACKGROUND

Injection Procedure

In the spring of 1993, Wendy saw her family physician, complaining of a sore throat. Wendy's family physician referred her to Sherrerd, who practices at the Clinic. Wendy went to the Clinic on June 4. Sherrerd determined that Wendy was suffering from allergies and decided to treat the symptoms with an injection of Aristocort. Wilburta Barton, a medical assistant who worked for the Clinic, gave the injection into Wendy's left deltoid muscle.

Wendy alleges that Barton failed to meet the standard of care in administering the injection. Specifically, she claims that Barton should have given the injection in Wendy's hip rather than her shoulder. Alternatively, Wendy argues that even if it was appropriate to give the injection in the shoulder, Barton breached the standard of care by giving the injection in the posterior of the shoulder. Wendy further contends that she was not informed about the dangers of receiving the injection in the shoulder and that the Clinic failed to ensure that Barton had received proper training.

Sherrerd and the Clinic contend that an Aristocort injection into the shoulder meets the applicable standard of care. They deny that Barton gave the injection into the posterior of the shoulder and argue that Barton was properly trained and that they warned Wendy about the dangers of injecting Aristocort into the shoulder.

Subsequent Developments With Wendy's Shoulder

Wendy claims that shortly after the injection, she developed pain in her shoulder and a dimple appeared in her shoulder. The dimple eventually filled in, but Wendy continued to have pain.

Eventually Wendy was referred to Mark Franco, M.D., an orthopedic surgeon. Franco examined Wendy in December 1994. He did not notice any major atrophy of her deltoid or any damage to her axillary nerve, a major nerve running through the upper arm. He did, however, diagnose Wendy as having adhesive capsulitis.

Adhesive capsulitis, also called frozen shoulder, is a shoulder condition characterized by pain and a marked decrease in the range of motion for the shoulder. There are several different causes for adhesive capsulitis. The most common cause is a painful stimulus which results in a period of immobilization of the

arm. Although Franco could not say for certain the cause of Wendy's adhesive capsulitis, he testified that the injection "would most likely be the painful stimulus."

Franco referred Wendy to R. Michael Gross, M.D., an orthopedic surgeon specializing in shoulder injuries. Although Gross did not testify, the court admitted his records into evidence. His records showed that he examined Wendy for the first time in March 1995. At this time, he wrote that he suspected the injection had aggravated the axillary nerve and that this led to a pattern of pain resulting in the adhesive capsulitis.

Initially, Wendy showed improvement while under Gross' care, but by June 1995, he had concluded that she was not making sufficient progress. He decided to perform closed manipulation on Wendy's shoulder. Closed manipulation involves putting the patient under anesthetic and physically moving the arm to break up the adhesive capsulitis. No incision is involved.

Gross performed the closed manipulation in July 1995. Wendy showed some improvement, but she was unable to sustain her recovery, so Gross decided to perform arthroscopic surgery. Following the surgery, Wendy again showed improvement, but by December 1995, the shoulder was again showing signs of adhesive capsulitis.

Gross continued to see Wendy until August 1997. During this time, Wendy's shoulder showed signs of improvement, but then subsequently regressed. At an appointment in August 1996, Gross noticed that Wendy had major deltoid atrophy. In his records, he noted, "This is something that I have never noticed before and clearly I noticed it in a heartbeat today which I am sure that I did not overlook that." The atrophy led Gross to conclude that the axillary nerve in Wendy's left shoulder had suffered significant damage, and later tests conducted by neurologists confirmed Gross' suspicion.

One of the neurologists who conducted tests on Wendy was Edward Schima, M.D. Initially, Schima believed that the injection at the Clinic had injured the axillary nerve. At trial, however, he testified that one of the surgeries performed by Gross had probably caused the nerve injury. When asked why he had changed his opinion, he stated that he had based his original opinion primarily on the oral history given to him by Wendy, but

after reviewing the medical records of Franco and Gross, he had changed his opinion.

Since 1996, Wendy has been to multiple physicians. She has never completely recovered from the nerve injury, and portions of her deltoid continue to show severe atrophy. Further, her right shoulder has also developed adhesive capsulitis. Wendy's experts testified that this resulted from her right shoulder's compensating for her left shoulder. Sherrerd and the Clinic, however, presented evidence that the adhesive capsulitis in her right shoulder was the result of an injury Wendy suffered while diving into a swimming pool.

PROCEDURAL BACKGROUND

One week before trial, Wendy moved for a protective order. In the motion, she claimed that Mark Novotny, counsel for Sherrerd and the Clinic, had caused three of Wendy's treating physicians, Franco, Gross, and Schima, "to breach a confidential relationship between themselves and [Wendy]." Although the motion was labeled as one for a protective order, the motion was seeking discovery sanctions, and we will treat it as such. Specifically, Wendy requested that the court preclude Sherrerd and the Clinic from calling the three doctors as expert witnesses and limit their testimony to "the information contained in their medical records prior to said breach of [a] confidential relationship." She also asked the court to prohibit any further ex parte contacts by Sherrerd and the Clinic.

Before trial started, the court heard the pretrial motions filed by the parties, including Wendy's motion for a protective order. At the hearing, Wendy made oral motions in limine. Like her motion for a protective order, her motions in limine sought to prevent Franco, Gross, and Schima from testifying as experts for Sherrerd and the Clinic. In addition, she sought to limit their testimony to the information contained in their medical records before Novotny allegedly caused the physicians to breach their confidential relationships. The court denied the motion for a protective order and the motions in limine.

During her case in chief, Wendy called Franco and Schima. During cross-examination by Novotny, both testified that they did not believe that either Sherrerd or the Clinic had breached the standard of care in administering the injection. Schima also

testified that he did not believe that the injection caused the damage to the axillary nerve. At no time during the testimony of either Schima or Franco did Wendy's counsel object on the grounds raised in her motion for a protective order and motions in limine.

Wendy also planned to call Gross during her case in chief, but she did not subpoena him. On the second day of the trial, Wendy served Sherrerd and the Clinic with notice that she intended to take the videotaped "trial" deposition of Gross the next day. Sherrerd and the Clinic moved to quash the deposition.

At the hearing on the motion to quash, Sherrerd and the Clinic argued that the notice constituted unfair surprise. They also argued that under *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992), the deposition was inadmissible because Gross was not unavailable to testify at trial within the meaning of Neb. Rev. Stat. § 27-804(1) (Reissue 1995). Wendy's counsel did not explain why Gross was unavailable. The court quashed the deposition and told Wendy's counsel, "Get him here." Gross did not testify during trial.

After the jury returned a verdict for Sherrerd and the Clinic, Wendy moved for a new trial. The court overruled the motion, and Wendy appealed.

ASSIGNMENTS OF ERROR

Wendy assigns, restated, that the court erred in (1) refusing to give her proposed jury instruction No. 14A; (2) failing to grant her motions for a protective order and in limine, limiting the testimony of Schima and Franco; (3) failing to allow her to take the deposition of Gross; and (4) denying her motion for a new trial.

STANDARD OF REVIEW

[1] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003).

[2] An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003).

ANALYSIS

JURY INSTRUCTION NO. 14A

Wendy claims that she is entitled to a new trial because the court erred in failing to give her proposed jury instruction No. 14A, which provided:

> If Defendants, Paul S. Sherrerd, M.D. and/or Family Ear, Nose, and Throat Clinic, P.C., is liable for Wendy['s] bodily injury, they are also subject to liability for any additional body [sic] harm resulting from the normal efforts of Dr. Michael Gross in rendering medical care and treatment which Wendy['s] injury reasonably required, irrespective of whether such medical care and treatment are done in a proper or a negligent manner.

However, because Wendy's counsel failed to object to the court's refusal to give this instruction at the jury instruction conference, we will not consider this assignment of error.

[3-5] To preserve an error related to the failure to give a proposed jury instruction, the party claiming error must object to the court's refusal to give the instruction at the jury instruction conference. *Farmers Mut. Ins. Co. v. Kment, supra.* In *Kment*, the appellants assigned as error the court's refusal to submit five of their proposed jury instructions. We refused to consider three of those instructions because, although the appellants submitted the three instructions to the court, they did not object at the jury instruction conference to the court's refusal to give them. *Id.* We stated:

> 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. . . . 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. . . . The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission.

(Citations omitted.) 265 Neb. at 659, 658 N.W.2d at 666-67. See, also, *Haumont v. Alexander*, 190 Neb. 637, 211 N.W.2d 119 (1973).

Wendy submitted jury instruction No. 14A to the court, but at the jury instruction conference, she did not object to the court's refusal to submit the instruction. Instead, when the court asked her counsel if he had comments or objections concerning the court's proposed instructions, he responded, "I would — no, Your Honor. I think they are okay." As a result, Wendy failed to preserve her claim that the court erred in not giving her proposed jury instruction No. 14A.

Discovery Sanctions and Motions in Limine

Wendy claims that Novotny engaged in inappropriate ex parte contacts with three of her treating physicians, Franco, Gross, and Schima. Before trial, she moved for discovery sanctions and filed two motions in limine, all three of which sought to limit the testimony of the three physicians. Wendy claims that she is entitled to a new trial because the court erred when it denied these motions.

[6,7] We have not yet decided whether one party can, without permission, meet ex parte with an opposing party's treating physician. Nor need we do so because Wendy failed to preserve the issue for appellate review. A motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury. It is not the purpose of such a motion to obtain a final ruling upon the ultimate admissibility of the evidence. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). Rather, its purpose is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself. *Id.* Thus, when a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). This same rule applies when a trial court overrules a pretrial motion that seeks to exclude evidence as a sanction for discovery abuses. If the movant does

not object when the evidence is offered at trial, the issue is not preserved for appellate review.

Here, the motions in limine and the motion for discovery sanctions sought to preclude Franco, Gross, and Schima from testifying as experts and to limit their testimony to what they had stated in their medical records before Novotny had contacted them. At trial, only Franco and Schima testified. In fact, Wendy called them during her case in chief. Wendy did not object to the physicians' testifying as experts for Sherrerd and the Clinic, nor did she attempt to limit their testimony to what they had stated in their medical records before Novotny had contacted them. As a result, we will not consider whether the court committed error in refusing to limit the testimony of Franco and Schima.

Gross' "Trial" Deposition

Finally, Wendy claims that she is entitled to a new trial because the court erred in quashing her proposed videotaped "trial" deposition of Gross.

[8,9] A trial court has broad discretion to determine whether to allow a party to take the deposition of a nonparty during trial. Accordingly, we review the trial court's decision quashing the deposition of Gross for an abuse of discretion. Cf. *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997). 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. *In re Interest of J.K.*, 265 Neb. 253, 656 N.W.2d 253 (2003).

The trial court did not abuse its discretion in refusing to allow Wendy to take the "trial" deposition of Gross. The sole purpose of the deposition was to present Gross' videotaped testimony to the jury instead of his live testimony. Wendy, however, failed to show that the deposition would have been admissible at trial. The deposition, as Wendy planned to use it, was hearsay. Wendy claims that Gross' deposition would have been admissible because he was unavailable to testify. See § 27-804(2)(a). But at the hearing on the motion to quash, Wendy did not show why Gross was

"unavailable" within the meaning of § 27-804(1). Instead, in response to the court's inquiry as to why the deposition was admissible, Wendy's counsel asserted that "[i]t may be that he's unavailable" for trial. Without a showing as to why Gross was unavailable to present live testimony, the court was under no obligation to allow Wendy to take his "trial" deposition. Cf. *Maresh v. State*, 241 Neb. at 507, 489 N.W.2d at 308 ("burden to establish the declarant's unavailability is on the party seeking to introduce evidence, pursuant to § 27-804").

CONCLUSION

Wendy did not preserve her assignments of error addressing the court's failure to give proposed jury instruction No. 14A and the court's refusal to sanction Sherrerd and the Clinic for discovery abuses. Further, the court did not abuse its discretion when it refused to allow Wendy to take the deposition of Gross during trial. As a result, the court did not abuse its discretion in denying Wendy's motion for a new trial.

AFFIRMED.

IRENE CORNETT, APPELLEE AND CROSS-APPELLANT, V. THE CITY OF OMAHA POLICE AND FIRE RETIREMENT SYSTEM, APPELLANT AND CROSS-APPELLEE.

664 N.W.2d 23

Filed June 27, 2003. No. S-02-984.

1. **Administrative Law: Appeal and Error.** In reviewing the decision of an administrative board on a petition in error, both the district court and the appellate court review the decision of the board to determine whether it acted within its jurisdiction and whether the decision of the board is supported by sufficient relevant evidence.
2. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
3. **Employer and Employee: Workers' Compensation: Pensions.** Under circumstances where an employee is paid while attending work-related training, the employee is acting in the line of duty and any injury which may occur arises out of the immediate or direct performance or discharge of that duty.
4. **Actions: Attorney Fees: Words and Phrases.** In the context of Neb. Rev. Stat. § 25-824 (Reissue 1995), a frivolous action is one in which a litigant asserts a legal

position wholly without merit, that is, without rational argument based on law and evidence to support the litigant's position.

5. **Attorney Fees: Words and Phrases.** The term "frivolous," as used in Neb. Rev. Stat. § 25-824(2) (Reissue 1995), connotes an improper motive or legal position so wholly without merit as to be ridiculous.
6. **Actions.** Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Jo A. Cavel, Assistant Omaha City Attorney, for appellant.

Thomas F. Dowd, of Dowd & Dowd, for appellee.

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

CONNOLLY, J.

The City of Omaha Police and Fire Retirement System (Retirement System) appeals from an order of the district court determining that the appellee, Irene Cornett, was entitled to a disability pension. Cornett alleges she suffered a disability while acting in the line of duty with the Omaha Police Department and was entitled to a disability pension. Cornett cross-appeals from the court's denial of her motion for attorney fees under Neb. Rev. Stat. § 25-824(2) (Reissue 1995). We affirm.

BACKGROUND

Cornett was employed by the Omaha Police Department beginning in 1992. On October 21, 2000, she injured her knee during an 8-hour class entitled "Takedowns and Ground Control for Law Enforcement" that was held at a privately owned health club. The class was taught by off-duty police officers. The police department did not require Cornett to attend the class. Instead, she described the class as "optional training," and she used her own funds to pay a $65 fee to enroll. But Cornett also attended the class on "special duty status." The record, however, does not define the meaning of "special duty status." A workers' compensation document, however, states that Cornett began work on the day of the injury at 8 a.m. A box on the form is checked next to the statement "Full pay for DOI [date of injury]." Another

workers' compensation document describes the injury as an "On Duty Injury."

Cornett injured her knee during the class while attempting a leg sweep maneuver. She went to the hospital and called a sergeant to inform him that she was being treated for an on-duty injury. Because of the injury, she underwent 4 weeks of physical therapy, had surgical reconstruction of her left anterior cruciate ligament, and was restricted to sedentary work duties. In early 2001, she had more physical therapy, which was interrupted by a pregnancy. In October 2001, she again began physical therapy. Cornett received workers' compensation benefits because of the injury.

In April 2002, Cornett again had surgery. One of her physicians stated that he thought she would experience dramatic benefits from the second surgery, but he also stated that the risk of Cornett's susceptibility to reinjure her knee was "definitely permanent." As a result, the physician believed that Cornett would require different permanent work restrictions. Another physician agreed with the restrictions. Cornett requested an available accommodation from the police department to allow her to keep working, but was refused.

Cornett filed for a service-connected disability pension. The Retirement System board of trustees denied the request without explaining its reasoning. She then filed a petition in error in district court seeking review of the board's decision. She also sought attorney fees under § 25-824(2), arguing that the denial of her claim was frivolous. The district court determined that Cornett met her burden of proof establishing that she suffered a permanent work-related injury, disabling in nature, while on duty with the police department. The court concluded that the board's denial of the pension was arbitrary and capricious. The court reversed the board's decision. The court denied the request for attorney fees. The Retirement System appeals. Cornett cross-appeals the denial of her motion for attorney fees.

ASSIGNMENTS OF ERROR

The Retirement System assigns, rephrased, that the district court erred in determining that the board acted arbitrarily and capriciously and in reversing the denial of the pension. On

cross-appeal, Cornett assigns that the court erred in failing to award her attorney fees.

STANDARD OF REVIEW

[1,2] In reviewing the decision of an administrative board on a petition in error, both the district court and the appellate court review the decision of the board to determine whether it acted within its jurisdiction and whether the decision of the board is supported by sufficient relevant evidence. See *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000). The evidence is sufficient, as a matter of law, if an administrative board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. See *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559 N.W.2d 448 (1997).

ANALYSIS

The Retirement System contends that Cornett did not sustain permanent injuries while acting in the line of duty. Thus, it argues that the district court erred when it reversed the determination of the board.

Omaha Mun. Code, ch. 22, art. III, § 22-78(a) (1996), provides:

> Any member of the system who, while in the line of duty, has sustained or shall sustain injuries or sickness, arising out of the immediate or direct performance or discharge of his/her duty, which immediately or after a lapse of time permanently unfit such annuitant for active duty in his/her department, shall receive a monthly accidental disability pension as long as such annuitant remains unfit for active duty in such member's department . . . .

The board failed to provide any findings of fact or state its reasons for denying Cornett a disability pension. Thus, we are left to speculate about the board's reasoning. Because of the requirements of § 22-78, it appears that the board believed either that Cornett was not injured in the line of duty or that the disability was not permanent. Thus, we discuss both possibilities. In the future—to provide a meaningful appellate review—the board should provide findings of fact and reasoning when denying disability pensions.

The Retirement System argues that Cornett failed to show that she sustained her injury in the line of duty and that it arose out of the immediate or direct performance or discharge of her duty. The Retirement System argues that Cornett did not sustain her injury in the line of duty because the training session was held on private property, she paid for it, and she was not required to attend it. The Retirement System also notes that the record does not define "'special duty status'" and argues that the district court found that Cornett was not paid for the training. Brief for appellant at 9.

[3] We agree that the record does not define the term "special duty status." The record, however, shows that Cornett was paid while attending the training. A workers' compensation form states that she received "Full pay for DOI" and lists the time her shift started. Cornett also received workers' compensation for the injury. In addition, the police department approved Cornett's request to attend the training, which would presumably be of assistance to her job as a police officer. Under these circumstances, when an employee is paid while attending work-related training, we determine that the employee is acting in the line of duty and that any injury which may occur arises out of the immediate or direct performance or discharge of that duty. We conclude that any decision of the board that Cornett was not acting in the line of duty was unreasonable.

The Retirement System next contends that Cornett failed to show that she was permanently unfit for duty. Under § 22-78, a police officer's injury must render him or her permanently unfit for active duty in his or her department. Here, a physician stated that the risk of Cornett's susceptibility to reinjure her knee was permanent and believed she would require a list of permanent work restrictions after her second surgery. When Cornett sought an accommodation from the police department, none was provided and she was unable to continue in her employment. The Retirement System provided no evidence to dispute Cornett's need for work restrictions. Thus, the record supports a conclusion that her disability is permanent and lacks any substantive evidence that it is not. Under these circumstances, it would have been unreasonable for the board to determine that the disability was not permanent.

It would be unreasonable for the board to conclude that Cornett was not permanently disabled from an injury sustained in the line of duty that arose out of the immediate or direct performance or discharge of that duty. The district court was correct when it reversed the board's decision.

Cornett contends on cross-appeal that the district court erred when it failed to award her attorney fees under § 25-824. Section 25-824(2) provides:

> [I]n any civil action commenced or appealed in any court of record in the state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

[4-6] In the context of § 25-824, a frivolous action is one in which a litigant asserts a legal position wholly without merit, that is, without rational argument based on law and evidence to support the litigant's position. *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998). We have said that the term "frivolous," as used in § 25-824(2), connotes an improper motive or legal position so wholly without merit as to be ridiculous. *Daily v. Board of Ed. of Morrill Cty.*, 256 Neb. 73, 588 N.W.2d 813 (1999). We have also said that any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question. *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000).

Here, although we view the board's determination of the facts as unreasonable, we cannot say that the action was taken in bad faith or that the Retirement System's position was so wholly without merit as to be ridiculous. We determine that the district court was correct when it denied Cornett's motion for attorney fees.

CONCLUSION

We conclude that the district court correctly reversed the decision of the board. We further conclude that the court correctly denied Cornett's motion for attorney fees. Accordingly, we affirm.

AFFIRMED.

LAWRENCE PRIBIL, APPELLANT, V. BARTON AND SANDRA KOINZAN, HUSBAND AND WIFE, ET AL., APPELLEES.

665 N.W.2d 567

Filed July 3, 2003. No. S-01-251.

1. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from instructions given or refused, an appellate court must read the instructions 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. **Damages: Evidence: Proof.** A plaintiff's evidence of damages may not be speculative or conjectural and must provide a reasonably certain basis for calculating damages. The general rule is that uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss.
4. ____: ____: ____. A plaintiff's burden of offering evidence sufficient to prove damages cannot be sustained by evidence which is speculative and conjectural, but proof of damages to a mathematical certainty is not required; the proof is sufficient if the evidence is such as to allow the trier of fact to estimate actual damages with a reasonable degree of certainty and exactness.
5. **Jury Instructions: Damages: Evidence: Proof.** When a plaintiff seeks prospective damages, such as recovery for future pain and suffering or loss of earning capacity, the jury is to be instructed, when the evidence warrants, that the damages must be proved with "reasonable certainty," and the jury is to award such damages only where the evidence shows that the future earnings or pain and suffering for which recovery is sought are "reasonably certain" to occur.
6. **Crops: Damages.** The measure of damages for the destruction of an unmatured growing crop is the value the crop would have had if it had matured, minus any savings to the plaintiff in the costs of producing, harvesting, and transporting the crop to market. Damages based upon the value of an unmatured crop are analogous to profits lost and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness.
7. ____: ____. The measure of damages for the destruction of a mature crop is the difference between the value of the mature crop if there had been no injury and the value of the actual crop harvested, less the necessary costs of harvesting and transporting the crop to market.
8. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
9. **Jury Instructions: Trial.** A party's right to a fair trial may be substantially impaired by jury instructions that contain inconsistencies or confuse or mislead the jury.

10. **Jury Instructions: Appeal and Error.** Conflicting instructions are erroneous unless it appears that the jury was not misled.
11. **Jury Instructions: Proof: Appeal and Error.** A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous.
12. **Appeal and Error.** A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and HANNON and INBODY, Judges, on appeal thereto from the District Court for Holt County, WILLIAM B. CASSEL, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

David J. Partsch and Thomas H. DeLay, of Jewell, Collins, DeLay & Gray, for appellees Barton and Sandra Koinzan.

Kathleen Koenig Rockey, of Copple & Rockey, P.C., for appellees Terry Held and Genevieve Shaw.

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

GERRARD, J.

BACKGROUND

Lawrence Pribil sued Barton and Sandra Koinzan, Terry Held, and Genevieve Shaw (collectively the defendants) for damages that the Koinzans' cattle inflicted on Pribil's mature corn and soybean crops on several quarter sections of irrigated land. The Koinzans' cattle escaped from Shaw's land and went onto Pribil's neighboring fields. A summary judgment on the issue of liability was granted, and liability is not disputed in this appeal. In Pribil's operative petition, he sought $164,079.42 in damages, but the jury returned a verdict for $34,920.60. Pribil appealed, and the Nebraska Court of Appeals affirmed the judgment of the district court. See *Pribil v. Koinzan*, 11 Neb. App. 199, 647 N.W.2d 110 (2002). Pribil petitioned for further review, which we granted.

ASSIGNMENT OF ERROR

Pribil's three assignments of error on further review combine to advance one claim: The Court of Appeals erred in its analysis

of the district court's jury instruction No. 8C, which dealt with damages.

STANDARD OF REVIEW

[1] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

ANALYSIS

The factual details of the case are set forth in the opinion of the Court of Appeals, and most of the facts need not be repeated here, except those that give context to the issue on further review. Pribil is a 70-year-old farmer with many years' experience growing corn and soybeans on irrigated land southwest of O'Neill, Nebraska. The land is irrigated by center-pivot irrigation systems. These systems work by pivoting a suspended pipe with sprinklers on it around the center of a quarter section, which is usually 160 acres. Thus, each system irrigates only about 130 acres of each quarter section. The irrigated portion of each quarter section is commonly called a circle. In 1996, Pribil raised corn and soybeans on 13 circles. The cattle trespassed upon only five circles that were adjacent to Shaw's land and to each other. It is undisputed that between September 23 or 25 and the end of October, cattle for which the defendants were legally responsible escaped and got into and damaged or destroyed the corn and soybeans on these five circles.

Pribil computed his lost yield to be 26,311 bushels of corn and 2,153 bushels of soybeans on the five circles. Although there was testimony that some of the corn had been damaged and replanted in May 1996, prior to the damage inflicted by the Koinzans' cattle, the evidence indicated that the replanted corn had "caught up" with the remaining corn by September 25 and was fully mature at that time. Pribil testified that the beans were ready to harvest and that he had stopped watering the corn and was waiting for it to dry prior to harvest. In short, the record establishes beyond reasonable dispute that the corn and beans were mature crops by the time they were damaged by the Koinzans' cattle.

The sole issue presented by Pribil's petition for further review concerns the instructions given to the jury with respect to the measure of damages and Pribil's burden of proof. Jury instruction No. 8C, given over objection, provided that "[t]he evidence must establish the amount of any item of damage with reasonable certainty or that item of damage cannot be recovered." Pribil argues that this instruction is in conflict with the standard jury instruction regarding damages, instantiated in this case by instruction No. 6A(3), which provides that "[b]efore [Pribil] can recover against the defendants on [Pribil's] claim, [Pribil] must prove, by the greater weight of the evidence, the nature and extent of the damage to the corn and soybean crops." See NJI2d Civ. 2.12A. Pribil contends, in essence, that "reasonable certainty" is a different burden of proof for plaintiffs' damages than "the greater weight of the evidence."

The Court of Appeals rejected Pribil's argument. The Court of Appeals stated:

> We believe that *Worth v. Schillereff*, 233 Neb. 628, 447 N.W.2d 480 (1989), is the case which controls the issue presented by instruction No. 8C. *Worth* was a suit for personal injuries sustained in an automobile accident. The plaintiff sought special and general damages, including future damages . . . . The court instructed the jury that future damages must be " 'reasonably certain.' " *Id.* at 630, 447 N.W.2d at 482. The plaintiff appealed, arguing that the trial court erred in so instructing the jury " 'when the standard which has been recognized in this state since 1981 is "reasonably probable".' " *Id.* at 630, 447 N.W.2d at 483. The plaintiff in *Worth* argued essentially the same point as Pribil argues in this case.
>
> In addition, in holding that an instruction almost identical to the one given by the trial court in this case in instruction No. 8C was not error, the *Worth* court stated: "This court has said that 'reasonable certainty' and 'reasonable probability' are one and the same thing." 233 Neb. at 633, 447 N.W.2d at 484, citing *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981). With this statement and holding by the Nebraska Supreme Court, we conclude there is nothing further to discuss. We believe the *Worth* court

> clearly held that "reasonable certainty" and "reasonable probability" mean the same thing and that it is not error for a trial court to instruct that damages must be proved by the plaintiff with reasonable certainty, notwithstanding that the plaintiff's burden of proof is by the greater weight of evidence.

Pribil v. Koinzan, 11 Neb. App. 199, 213-14, 647 N.W.2d 110, 121 (2002).

Pribil argues that the Court of Appeals missed the point and that *Worth v. Schillereff*, 233 Neb. 628, 447 N.W.2d 480 (1989), is distinguishable because it dealt with prospective damages. See, e.g., NJI2d Civ. 4.01. Pribil's contention is that instructing the jury that damages must be proved with "reasonable certainty" is proper only when the damages at issue are future or contingent damages and the issue is whether or not certain contingencies are likely to come to pass in the future. Pribil argues that there are no future contingencies to consider once a crop is mature; the measure of damages for the destruction of a mature crop is the difference between the value of the crop if there had been no injury and the value of the actual crop harvested. Pribil contends that under these circumstances, "the greater weight of the evidence" is the only burden of proof on which the jury should be instructed.

[2] In reviewing a claim of prejudice from instructions given or refused, an appellate court must read the instructions 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. See *Nauenburg v. Lewis*, 265 Neb. 89, 655 N.W.2d 19 (2003). We conclude that instruction No. 8C was not a correct statement of the law, given the evidence that Pribil's crops were mature at the time of the damage or destruction, and that the judgments of the Court of Appeals and the district court must be reversed.

[3,4] We have often stated that a plaintiff's evidence of damages may not be speculative or conjectural and must provide a reasonably certain basis for calculating damages. The general rule is that uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not if the evidence furnishes a reasonably certain factual basis

for computation of the probable loss. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000). A plaintiff's burden of offering evidence sufficient to prove damages cannot be sustained by evidence which is speculative and conjectural, but proof of damages to a mathematical certainty is not required; the proof is sufficient if the evidence is such as to allow the trier of fact to estimate actual damages with a reasonable degree of certainty and exactness. See *III Lounge, Inc. v. Gaines*, 227 Neb. 585, 419 N.W.2d 143 (1988).

We have consistently framed the question whether the evidence of damages is "reasonably certain" as a question of law, and not as a matter to be decided by the trier of fact. See, e.g., *Sack Bros., supra*; *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000); *Gagne v. Severa*, 259 Neb. 884, 612 N.W.2d 500 (2000); *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000); *Union Ins. Co. v. Land and Sky, Inc.*, 253 Neb. 184, 568 N.W.2d 908 (1997); *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996); *Evergreen Farms v. First Nat. Bank & Trust*, 250 Neb. 860, 553 N.W.2d 728 (1996); *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996); *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996); *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994); *Bakody Homes & Dev. v. City of Omaha*, 246 Neb. 1, 516 N.W.2d 244 (1994); *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988); *III Lounge, Inc., supra*; *Shadow Isle, Inc. v. Granada Feeding Co.*, 226 Neb. 325, 411 N.W.2d 331 (1987); *Sesostris Temple Golden Dunes v. Schuman*, 226 Neb. 7, 409 N.W.2d 298 (1987); *Lis v. Moser Well Drilling & Serv.*, 221 Neb. 349, 377 N.W.2d 98 (1985); *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984); *Knoell Constr. Co., Inc. v. Hanson*, 209 Neb. 461, 308 N.W.2d 356 (1981); *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980); *Tyler v. Olson Bros. Mfg. Co., Inc.*, 201 Neb. 79, 266 N.W.2d 216 (1978); *Shotkoski v. Standard Chemical Manuf. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975); *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 197 N.W.2d 646 (1972); *Frank H. Gibson, Inc. v. Omaha Coffee Co.*, 179 Neb. 169, 137 N.W.2d 701 (1965); *State v. Dillon*, 175 Neb. 350, 121 N.W.2d 798 (1963); *Wischmann v. Raikes*, 168 Neb. 728, 97

N.W.2d 551 (1959); *Patrick v. City of Bellevue*, 164 Neb. 196, 82 N.W.2d 274 (1957); *Selig v. Wunderlich Contracting Co.*, 160 Neb. 215, 69 N.W.2d 861 (1955); *Ricenbaw v. Kraus*, 157 Neb. 723, 61 N.W.2d 350 (1953); *Faught v. Dawson County Irrigation Co.*, 146 Neb. 274, 19 N.W.2d 358 (1945); *Snyder v. Platte Valley Public Power and Irrigation District*, 144 Neb. 308, 13 N.W.2d 160 (1944); *James Poultry Co. v. City of Nebraska City*, 136 Neb. 456, 286 N.W. 337 (1939); *Meister v. Krotter*, 134 Neb. 293, 278 N.W. 483 (1938); *Gledhill v. State*, 123 Neb. 726, 243 N.W. 909 (1932); *Gilbert v. Rothe*, 106 Neb. 549, 184 N.W. 119 (1921); *Wade v. Belmont Irrigating Canal & Water Power Co.*, 87 Neb. 732, 128 N.W. 514 (1910).

In other words, the initial question of law for the trial court is whether the evidence of damages provides a basis for determining damages with reasonable certainty, i.e., the evidence of damages is not speculative or conjectural. If the evidence does provide such a basis, the issue of damages can be submitted to the jury. The jury, however, is not charged with the duty of determining whether the evidence of damages is reasonably certain; rather, the jury is instructed that the plaintiff must prove the nature and extent of damages by the greater weight of the evidence. See, e.g., NJI2d Civ. 2.12A.

[5] The one context in which we have held that the jury is to be instructed that damages must be proved with "reasonable certainty" is when the plaintiff seeks prospective damages, such as recovery for future pain and suffering or loss of earning capacity, and the evidence warrants such an instruction. In those cases, we have held that the jury is to award such damages only where the evidence shows that the future earnings or pain and suffering for which recovery is sought are "reasonably certain" to occur. See, e.g., *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000); *Worth v. Schillereff*, 233 Neb. 628, 447 N.W.2d 480 (1989); *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 431 N.W.2d 617 (1988); *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984); *Bassinger v. Agnew*, 206 Neb. 1, 290 N.W.2d 793 (1980); *LeMieux v. Sanderson*, 180 Neb. 311, 142 N.W.2d 557 (1966); *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W.2d 835 (1964); *Bresley v. O'Connor Inc.*, 163 Neb. 565, 80 N.W.2d 711 (1957); *Remmenga*

v. Selk, 152 Neb. 625, 42 N.W.2d 186 (1950); *Jensen v. Omaha & C. B. Street R. Co.*, 127 Neb. 599, 256 N.W. 65 (1934); *Schwarting v. Ogram*, 123 Neb. 76, 242 N.W. 273 (1932); *Garrison v. Everett*, 112 Neb. 230, 199 N.W. 30 (1924); *Morfeld v. Weidner*, 99 Neb. 49, 154 N.W. 860 (1915); *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, 148 N.W. 145 (1914); *Svetkovic v. Union P. R. Co.*, 95 Neb. 369, 145 N.W. 990 (1914); *Johnson v. Johnson*, 81 Neb. 60, 115 N.W. 323 (1908); *Nixon v. Omaha & C. B. Street R. Co.*, 79 Neb. 550, 113 N.W. 117 (1907); *City of South Omaha v. Sutliffe*, 72 Neb. 746, 101 N.W. 997 (1904); *Chicago, R. I. & P. R. C. v. McDowell*, 66 Neb. 170, 92 N.W. 121 (1902); *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27, 57 N.W. 767 (1894). See, also, *Dorsey v. Yost*, 151 Neb. 66, 69, 36 N.W.2d 574, 576 (1949) (recovery of damages to mother for wrongful death of daughter limited to monetary benefits that would with " 'reasonable certainty' " have resulted to mother from continued life of daughter), *overruled on other grounds, Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998).

When the plaintiff seeks prospective damages, the contingent nature of the damages claimed inherently requires consideration of future events that can only be reasonably predicted, but not conclusively proved, at the time of trial. In such instances, the jury should be instructed, when the evidence warrants, that the plaintiff may recover damages for injuries "reasonably certain" to be incurred in the future. See, e.g., NJI2d Civ. 4.01.

[6] Applying these principles to crop damage cases, we note that the measure of damages for the destruction of an *unmatured* growing crop is the value the crop would have had if it had matured, minus any savings to the plaintiff in the costs of producing, harvesting, and transporting the crop to market. *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996). See, *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991); *Pulliam v. Miller*, 108 Neb. 442, 187 N.W. 925 (1922). We have explained that damages based upon the value of an unmatured crop are analogous to profits lost and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness. *Bristol, supra*; *Romshek, supra*. As a result, this court has listed several factors that may assist the trier of fact in determining the value of an unmatured crop at the time of its injury or

destruction, including the nature of the land; the type of crop planted; the kind of season, whether wet or dry; the yield of crops growing in such a season; the average yield of crops on neighboring land; the development of the crop at the time of destruction; the yield of a similar crop not injured; the market value of the crop as injured; the market value of the probable crop without injury; the time of the injury; the expense that would have been incurred if the crop had not been injured; the circumstances which surrounded the crop which may have resulted in the crop's not maturing; and other circumstances illustrated by the evidence tending to establish such value. See *id.* Proof on these factors assists a trier of fact to determine with some reasonable degree of certainty the value of a crop had it fully matured.

[7] On the other hand, we long ago established that the measure of damages for the destruction of a *mature* crop is the difference between the value of the mature crop if there had been no injury and the value of the actual crop harvested, less the necessary costs of harvesting and transporting the crop to market. Thus, when a mature crop is destroyed, damages may be proved by showing the market value of the crop, less the necessary costs of finishing, harvesting, and transporting the crop to market. See, *id.*; *Kula v. Prososki*, 228 Neb. 692, 424 N.W.2d 117 (1988); *Pulliam, supra*. This is so because proving the value of a destroyed mature crop, while not subject to absolute mathematical certainty, does not suffer from the same type of uncertainty or remoteness as proving the value of a crop damaged prior to maturity. The measure of damages of a mature crop is not analogous to profits lost—the trier of fact need not be concerned with the crop's rate of growth, the weather, or other factors which might have contributed to or detracted from the crop's maturation during the course of a growing season. Those types of uncertainty are absent; the crop is mature at the time of the damage.

In this case, Pribil sought compensation for the damages inflicted on his *mature* corn and soybean crops. The damages sought by Pribil were not based on any future contingency; the crops were mature at the time of the destruction, and the damages were fully incurred at the time of trial. Consequently, the Court of Appeals erred in relying on *Worth v. Schillereff*, 233 Neb. 628, 447 N.W.2d 480 (1989), a prospective damages case, as a basis

for affirming the judgment in the instant case. Instead, because Pribil sought only present damages to fully mature crops, the appropriate instruction on Pribil's burden of proof on the issue of damages was instruction No. 6A(3): that Pribil was required to prove the nature and extent of his damages by the greater weight of the evidence. The district court erred in giving instruction No. 8C, which was not a correct statement of the law under these circumstances and had the practical effect of unintentionally elevating Pribil's burden of proof or, at a minimum, confusing the jury on the required quantum of proof.

[8-11] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Nauenburg v. Lewis*, 265 Neb. 89, 655 N.W.2d 19 (2003). Here, the jury was given two separate, and not entirely consistent, instructions on what Pribil was required to prove in order to recover the same measure of damages. A party's right to a fair trial may be substantially impaired by jury instructions that contain inconsistencies or confuse or mislead the jury. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998). Conflicting instructions are erroneous unless it appears that the jury was not misled. *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996). A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous. *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996). In this case, we conclude that the potential for confusion created by instruction No. 8C establishes sufficient prejudice to require reversal of the district court's judgment on the issue of damages.

[12] We note, for the sake of completeness, that three opinions of this court discuss jury instructions in which the jury was informed that the plaintiffs, seeking past and present damages, were nonetheless required to establish damages with "reasonable certainty." See, *Colvin v. Powell & Co., Inc.*, 163 Neb. 112, 77 N.W.2d 900 (1956); *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550, 188 N.W. 239 (1922); *Russell v. Horn, Brannen & Forsyth Mfg. Co.*, 41 Neb. 567, 59 N.W. 901 (1894). In those cases, however, the defendants had appealed from verdicts and judgments entered in favor of the plaintiffs. Whether

the "reasonable certainty" language of the instructions was correct was neither presented to nor decided by this court. See *id.* A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court. *Mach v. County of Douglas*, 259 Neb. 787, 612 N.W.2d 237 (2000).

CONCLUSION

The Court of Appeals erred in affirming the judgment of the district court with respect to the issue of damages, because the district court's instruction that Pribil's evidence must establish the amount of damages with "reasonable certainty" was not warranted by the evidence in this case and was prejudicial to Pribil. Pribil did not seek further review of the other determinations of the Court of Appeals, so those issues are not before us and, on remand, stand as decided. See *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999). The judgment of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to reverse the judgment of the district court and remand the cause to the district court for a new trial on the issue of damages.

REVERSED AND REMANDED WITH DIRECTIONS.

GUY DAVIS, APPELLANT, V. DEAN SETTLE, EXECUTIVE DIRECTOR, LANCASTER COUNTY COMMUNITY MENTAL HEALTH CENTER, AND KIM ETHERTON, PROGRAM SUPERVISOR, CRISIS CENTER, APPELLEES.

665 N.W.2d 6

Filed July 3, 2003. No. S-01-1214.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
2. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
3. ____. As a general rule, a moot case is subject to summary dismissal.

4. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Appeal dismissed.

Dennis R. Keefe, Lancaster County Public Defender, Dorothy A. Walker, and John C. Jorgensen, Senior Certified Law Student, for appellant.

Gary E. Lacey, Lancaster County Attorney, and Michael E. Thew for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This appeal arises from an order of the district court for Lancaster County interpreting the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-312, 83-318, 83-337, 83-351, and 83-1001 to 83-1080 (Reissue 1999 & Cum. Supp. 2000). Appellant, Guy Davis, filed a petition for a writ of habeas corpus alleging that he was unlawfully detained by appellees, Dean Settle, executive director of the Lancaster County Community Mental Health Center, and Kim Etherton, program supervisor of the Crisis Center. Appellees filed a motion to quash, and the district court sustained their motion.

ASSIGNMENTS OF ERROR

Davis assigns, rephrased, that the district court erred in (1) determining that § 83-1027, which requires that a civil commitment hearing be fixed within 7 days "after the subject has been taken into protective custody," was inapplicable in this case and in determining that § 83-1028 was controlling; (2) denying habeas corpus relief to Davis; and (3) upholding the grant of continuance to the state by the Lancaster County Mental Health Board.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

BACKGROUND

In 1991, Davis was convicted of sexually assaulting his two stepsons and sentenced to 10 to 20 years' imprisonment. He was scheduled to be released from the Omaha Correctional Center on September 19, 2001. On August 14, Mark E. Weilage, Ph.D., a clinical psychologist at the Omaha Correctional Center, acting pursuant to § 83-1024, sent a letter to the Douglas County Attorney's office recommending that Davis be referred to the Douglas County Mental Health Board for possible postincarceration commitment.

On September 13, 2001, the Douglas County Attorney's office acted upon that notification by filing a petition. The petition claimed that Davis was mentally ill and that "mental-health-board-ordered treatment" was the least restrictive means for addressing the issue. The petition also alleged that immediate custody of Davis was required to prevent the occurrence of the harm described in § 83-1009.

On September 13, 2001, the Douglas County Mental Health Board issued a custodial order. The order placed Davis in the custody of Dr. Weilage at the Omaha Correctional Center for "up to a period of 7 days from the date of this order unless you receive further instructions from this Board." On the same day, the case was transferred to the district court for Lancaster County and the Lancaster County Mental Health Board. Sometime between September 13 and 24, Davis was transported to Lancaster County and placed at the Crisis Center operated by the Lancaster County Community Mental Health Center under the direction of appellees. On September 21, which would be the eighth day after the September 13 order, the Lancaster County Attorney's office issued to Davis a summons for a hearing to be held on September 25, before the Lancaster County Mental

Health Board (Lancaster Board) to determine whether Davis was mentally ill. The return on the summons indicated that service was made on September 24.

On September 25, 2001, Davis, represented by counsel, appeared before the Lancaster Board and moved to dismiss the petition on the grounds that he was denied a hearing within 7 days as required by statute and that the petition failed to state a cause of action. The county attorney moved to continue the hearing based upon an earlier communication between representatives of the county attorney's office and the public defender's office that "the case . . . would not be tried today." The Lancaster Board overruled Davis' motion to dismiss and granted the county attorney a 7-day continuance, rescheduling the final hearing for October 2.

On September 27, 2001, Davis filed a writ of habeas corpus. He alleged that his continued detention at the Crisis Center was illegal because he had not received a hearing within 7 days after being taken into custody as required by § 83-1027. He further alleged that the Lancaster Board lacked the authority to grant a continuance to the county attorney. In response, appellees filed a motion to quash. After a hearing on October 1, the district court entered an order sustaining appellees' motion to quash and vacating Davis' writ of habeas corpus. From that order, Davis has perfected this appeal.

ANALYSIS

Section 83-1027 provides:

> Upon the filing of the petition provided by sections 83-1025 and 83-1026 stating the county attorney's belief that the immediate custody of the subject is not required for the reasons provided by sections 83-1025 and 83-1026, the clerk of the district court shall cause a summons fixing the time and place for a hearing to be prepared and issued to the sheriff for service. . . . The summons shall fix a time for the hearing within seven days after the subject has been taken into protective custody.

In his first assignment of error, Davis argues that § 83-1027 requires that a hearing be held within 7 days of the time that the subject is taken into protective custody. He claims that his hearing was held more than 7 days after he was taken into protective

custody and that thus, the Lancaster Board should have dismissed his petition. However, we decline to address the merits of this assignment of error because the record presented shows, as Davis argued at the writ of habeas hearing, that after September 20, 2001, the Lancaster Board had no authority to keep Davis in protective custody.

The September 13, 2001, custodial order giving the Douglas County Mental Health Board custody of Davis provided that the "patient is to be held in [Dr. Weilage's] custody in [the] Omaha Correctional Center for care and treatment up to a period of 7 days from the date of this order unless you receive further instructions from this Board." Nothing in the record shows further instructions from the Douglas County Mental Health Board for any other action that would extend the time period beyond 7 days. Because Davis' prison sentence ended on September 19 and the custodial order expired on September 20, all legal custody expired by September 21. The Lancaster Board did not have authority to retain custody of Davis after September 20.

[2-4] In spite of the above, there is no relief to be granted to Davis because he is no longer in appellees' custody. We, therefore, conclude that this case is moot. A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003). As a general rule, a moot case is subject to summary dismissal. *Id.* An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002); *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001). Because we find the expiration of the custodial order unique to Davis' case and unlikely to be repeated, we refuse to apply the public interest exception.

CONCLUSION

For the above-stated reasons, we conclude that this appeal is moot.

APPEAL DISMISSED.

CONNOLLY, J., dissenting.

I respectfully dissent. On the record presented to us, I am unsure if this case is moot. Therefore, I would remand the cause for further factual findings.

A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Green v. Lore*, 263 Neb. 496, 640 N.W.2d 673 (2002). The majority opinion, as I understand it, holds that this case is moot because the respondents named in Davis' petition no longer have Davis in their custody, making it impossible for the court to grant any meaningful relief.

At the time that Davis filed his petition, appellees were holding him. The parties now tell us that appellees have released Davis from custody, and they agree that this fact renders the case moot, although Davis argues that the public interest exception to the mootness doctrine should apply. The record is unclear, and the parties do not tell us, however, if appellees released Davis back into the community or transferred him into the custody of another state official or agency.

I agree that the case would be moot if Davis has been released back into the community. But the implication of the majority's opinion is that the case would be moot even if appellees only transferred Davis into the custody of another state official or agency. I do not agree. The state should not be able to avoid appellate review of habeas proceedings by shifting the custody of the petitioner from the named respondent to another state official or agency. See *McGee v. Johnson*, 161 Or. App. 384, 984 P.2d 341 (1999).

Because it is unclear if this case is moot, I would remand the cause to the district court with directions to determine whether Davis has been released or has only been transferred to the custody of another state official or agency. See 13A Charles Alan Wright et al., Federal Practice and Procedure § 3533.10 at 440 (1984) ("[i]f the appellate court is unsure of the facts, it

is common to remand for consideration of mootness by the lower courts").

GERRARD, J., joins in this dissent.

DAVID H. ANDERSEN, APPELLANT, V.
A.M.W., INC., APPELLEE.
665 N.W.2d 1

Filed July 3, 2003. No. S-02-756.

1. **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.
2. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the trial court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
3. **Limitations of Actions.** The period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
4. ____. Where an obligation is payable by installments, the statute of limitations runs against each installment individually from the time it becomes due.

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

John A. Sellers, of Gilroy & Sellers, L.L.P., for appellant.

David E. Copple and David J. Feeney, of Copple, Rockey & McGough, P.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

David H. Andersen brought this breach of contract action against A.M.W., Inc. (AMW), alleging that AMW had failed to pay commissions due Andersen. A bifurcated trial was held on the issue of whether the action was barred by the applicable statute of limitations. The trial court found that a cause of action accrued when Andersen did not receive his first commission

payment (sometime after July 31, 1992) and that he had a right to institute suit when this breach occurred. The court concluded that the commencement of suit on January 12, 2001, was beyond the 5-year statute of limitations and that, therefore, the action was time barred. The court dismissed Andersen's petition, and he timely appealed.

SCOPE OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Morello v. Land Reutil. Comm. of Cty. of Douglas*, 265 Neb. 735, 659 N.W.2d 310 (2003).

FACTS

On or about August 9, 1991, Andersen entered into an agency agreement with AMW. The agreement provided that AMW would pay commissions to Andersen at specified rates based on insurance policies sold by Andersen. Andersen would earn an initial commission when the first premium was paid on an insurance policy that had been sold by him. A renewal commission would be earned each time an insured made subsequent premium payments, which could be monthly, quarterly, semiannually, or annually. AMW was to pay these commissions 30 to 60 days after it received the premiums from the insured.

Under the terms of the agreement, Andersen's right to receive commissions was vested for the duration of his life. Upon Andersen's death, the commissions were payable to his wife for 24 months. The agreement could be terminated for good cause, which included "[t]he loss, termination or revocation of [Andersen's insurance] license." An amendment to the agreement provided as follows:

> Commissions provided for in this Agreement shall be paid for as long as the policy remains in force . . . . Should you at any time either before or after termination of this Agreement wrongfully withhold funds due an applicant, policyholder or the Companies, no renewal commissions shall be payable under this Agreement.
>
> After this Agreement terminates we will not pay commissions after any calendar year in which the total commission owed or paid to you is less than $200.00.

Andersen was notified by letter dated September 15, 1992, that the agency agreement had been terminated effective July 31 of that year. AMW explained that the agreement was terminated because Andersen had not renewed his license.

The record includes Internal Revenue Service forms 1099 for 1992 to 1997 which indicate nonemployee compensation from AMW to Andersen in the total amount of $177,729.63. However, Andersen did not receive any commission payments from AMW after June 29, 1992.

On January 12, 2001, Andersen filed a petition against AMW, alleging breach of contract for unpaid commissions. Andersen contended that AMW breached its contract and continued to be in breach of contract by failing to pay Andersen his vested commissions and amounts in what he described as his "'hold account.'" Andersen alleged that the breach of contract began on April 1, 1992, and continued through the time the petition was filed.

After a bifurcated trial on the statute of limitations, the trial court held that the action was time barred and dismissed the petition. The court concluded that Andersen had the right to commence suit when the breach first occurred (sometime between July 31, 1992, and 1994) and that, therefore, the commencement of suit on January 12, 2001, was beyond the 5-year statute of limitations. Andersen appeals.

ASSIGNMENTS OF ERROR

Andersen claims that the trial court erred (1) by barring all of his claims, because each sequential breach by AMW tolled the 5-year statute of limitations, and (2) by barring those claims which arose within 5 years prior to the commencement of the action.

ANALYSIS

The issue is whether Andersen's cause of action for breach of contract is time barred by the applicable statute of limitations. Neb. Rev. Stat. § 25-205(1) (Cum. Supp. 2002) provides in part: "Except as provided in subsection (2) of this section, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment, can only be brought within five years."

The trial court found that the contract was terminated on or about September 15, 1992, effective July 31 of that year, and that

no commissions were paid by AMW to Andersen after June 29. The court determined that Andersen had the right to institute his suit when the first breach occurred, which the court found was when Andersen did not receive his first commission payment, sometime between July 31, 1992, and 1994. It concluded that the commencement of suit on January 12, 2001, was beyond the 5-year period required by § 25-205(1) and that, therefore, the action was time barred.

[2,3] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the trial court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). The period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002). This case presents the question of whether each failure of AMW to pay a commission constituted an independent cause of action or whether there was one cause of action which accrued upon the failure of AMW to pay the first commission after termination of the agreement between the parties.

Andersen argues that the agreement created a continuing obligation on the part of AMW to pay commissions to him during his lifetime. He asserts that each time AMW failed to pay a commission, a breach of the agreement occurred. He claims that because the agreement was a continuing obligation, the statute of limitations began anew with each successive breach and that, therefore, he is entitled to all of the commissions that were not paid.

In the alternative, Andersen asserts that each breach of the agreement created a new cause of action and that he is entitled to recover all commissions not paid after January 12, 1996, which would be within 5 years of the time that the action was commenced on January 12, 2001.

AMW argues that Andersen failed to meet his burden of proof to allege facts that tolled the statute of limitations. AMW asserts that Andersen's cause of action is barred because it accrued when Andersen first had the right to institute and maintain a lawsuit. AMW claims that the cause of action accrued on July 31, 1992, which was the effective date for termination of the agreement,

and that it became incumbent upon Andersen to file suit within 5 years of that date. Also, AMW claims that the cause of action accrued on the first date when a commission was due and was not paid by AMW. It argues that a new liability is not created day to day or month to month simply because the liability to an agent is to be discharged by monthly payments for the remainder of the life of the agent. AMW asserts that its actions following termination of the agreement were consistent with or natural consequences of the termination.

In the alternative, AMW argues that the statute of limitations bars all of Andersen's claims which accrued more than 5 years prior to commencement of the action. It argues that when an obligation is payable via installments, the statute of limitations runs against each installment individually from the time it becomes due.

The trial court relied on *Cavanaugh v. City of Omaha*, 254 Neb. 897, 580 N.W.2d 541 (1998), in arriving at its decision to dismiss Andersen's petition. In *Cavanaugh*, the city was required by ordinance to maintain an eligibility list of candidates qualified for promotion within the Omaha Police Division. The eligibility list for promotion to the rank of lieutenant was to expire April 7, 1990. The collective bargaining agreement (CBA) between the city and its police union required that the examination for establishment of a new list be commenced on or before February 7 and that notice of the examination be posted on November 7, 1989. The city failed to comply with the terms of the CBA when it posted notice of the examination on January 8, 1990, and administered the examination on April 13. As a result of the city's actions, an otherwise ineligible sergeant was allowed to take the lieutenant examination and ultimately was promoted. Cavanaugh also took the examination but was not promoted.

On February 22, 1995, Cavanaugh commenced a breach of contract action against the city. The district court determined that even if the CBA was breached, the breaches occurred (1) on November 7, 1989, when notice was to be posted pursuant to the CBA; (2) on February 7, 1990, when the examination was to be administered pursuant to the CBA; and (3) on January 8, 1990, when the notice was actually posted. The district court concluded

that Cavanaugh's action was barred by the applicable 5-year statute of limitations.

The Nebraska Court of Appeals reversed, holding that the district court failed to identify a breach on April 13, 1990, which brought the action within the limitations period. See *Cavanaugh v. City of Omaha*, 5 Neb. App. 827, 567 N.W.2d 592 (1997). The Court of Appeals relied upon *Singer Co. v. BG&E*, 79 Md. App. 461, 558 A.2d 419 (1989), in which a utility company had a contractual obligation to supply continuous electricity to its customer. In that case, the court found that each time there was a power outage, the utility company breached its obligation and a new statute of limitations began to run. The Court of Appeals compared the CBA to the utility company's contract for continuing performance over a period of time where each successive breach began the running of the statute of limitations. The Court of Appeals found that not only had the breaches of the CBA occurred at the three points in time identified by the district court, but that a breach also occurred on April 13, 1990, when the examination was actually administered and an otherwise ineligible sergeant was allowed to sit for the examination.

We reversed the decision of the Court of Appeals, concluding that it had incorrectly applied the rule for determining when a cause of action for breach of contract occurred. We stated: "While we do not pass on the correctness of the *Singer Co.* decision, we find that the Court of Appeals misapplied the rationale in *Singer Co.* to the facts of the instant case in its application of the occurrence rule." *Cavanaugh v. City of Omaha*, 254 Neb. 897, 902, 580 N.W.2d 541, 545 (1998). We explained:

> [I]t is error to characterize [the City's] subsequent acts or omissions as separate breaches, each beginning a new statute of limitations period. This is not a case like *Singer Co., supra*, where there was an ongoing, contractual duty to supply electricity that was subject to sequential breaches each time there was a power outage. Instead, the City had one duty that is at issue in this case, the administration of the examination in conformance with the specific terms of the CBA. The City failed to perform that duty when, on November 7, 19[89], it did not post notice of the examination as required. The actions that followed, including the

> late examination administration and the admission of [the otherwise ineligible sergeant], were natural consequences of the November 7 breach.

Cavanaugh, 254 Neb. at 902-03, 580 N.W.2d at 545. We held that it was the nonperformance of a specific affirmative duty contained in the CBA which constituted the breach in *Cavanaugh*, not the actions taken by the city subsequent to the breach and as a result thereof.

When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Morello v. Land Reutil. Comm. of Cty. of Douglas*, 265 Neb. 735, 659 N.W.2d 310 (2003). Although the trial court did not err when it determined that the statute of limitations began to run when AMW first failed to pay the commissions, it erred as a matter of law when it concluded that the statute of limitations barred a suit to collect those commissions which accrued within 5 years of commencement of the action. The court's reliance upon *Cavanaugh* was misplaced.

The case at bar involves an ongoing contractual obligation. The agreement between Andersen and AMW provided that AMW would pay Andersen commissions for his lifetime and would pay such commissions to his spouse for 24 months after his death. Each time periodic premiums were paid on the policies originally sold by Andersen, AMW was obligated to pay him a commission. The record contains Internal Revenue Service forms 1099 from 1992 to 1997 indicating that nonemployee compensation had accrued during that time in the amount of $177,729.63.

[4] Unlike *Cavanaugh*, the case before us does not involve wrongful actions or damages flowing from a single breach of the contract. Each time AMW failed to pay Andersen, a separate breach of the agreement occurred. Therefore, a separate cause of action accrued at the time of each breach. AMW's obligation under the agreement is similar to an obligation payable by installments. Where an obligation is payable by installments, the statute of limitations runs against each installment individually from the time it becomes due. See *National Bank of Commerce v. Ham*, 256 Neb. 679, 592 N.W.2d 477 (1999). Each time AMW failed to pay Andersen a commission, the statute of limitations began to run as to that individual commission.

Contrary to Andersen's assertion, however, he is not entitled to recover all commissions that AMW has failed to pay since 1992. Andersen can recover only such commissions that were owed to him within the 5-year period prior to the time this suit was commenced. We conclude that Andersen's breach of contract action was time barred for any alleged breaches of contract which accrued before January 12, 1996. Those breaches which accrued on or after January 12 are not time barred by the applicable statute of limitations.

CONCLUSION

Termination of the contract between Andersen and AMW did not negate AMW's obligation to pay commissions. AMW's subsequent failure to make payments to Andersen each time a commission accrued constituted breaches of the contract for which Andersen had a right to bring suit.

For the reasons stated herein, we determine that the trial court erred by barring Andersen's claims which arose within 5 years prior to the commencement of this action on January 12, 2001. We therefore reverse the judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
JOHN L. LOTTER, APPELLANT.
664 N.W.2d 892

Filed July 11, 2003. Nos. S-01-091 through S-01-093.

1. **Criminal Law: Judgments: Final Orders: Appeal and Error.** A criminal conviction is final for purposes of collateral review when the judgment of conviction is rendered, the availability of appeal is exhausted, and the time for petition for certiorari has lapsed.
2. **Constitutional Law: Criminal Law: Final Orders.** A new constitutional rule of criminal procedure will not be applied retroactively to a final judgment on collateral review unless it falls within one of two exceptions. The first exception encompasses new rules which place certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe. The second exception to the general rule of nonretroactivity is for watershed rules of criminal procedure which are implicit in the concept of ordered liberty.

3. ____: ____: ____. *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), announced a new constitutional rule of criminal procedure which does not fall within either of the *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), exceptions to the general rule that such changes in the law do not apply retroactively to final judgments.
4. **Postconviction: Proof: Appeal and Error.** A criminal defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.
5. **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.
6. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
7. **Rules of Evidence: Corroboration.** In determining whether there are corroborating circumstances which clearly indicate the trustworthiness of a statement tending to expose the declarant to criminal liability and offered to exculpate the accused pursuant to Neb. Rev. Stat. § 27-804(2)(c) (Reissue 1995), a court should examine all circumstances surrounding the making of the statement, as well as any other evidence which either supports or undermines its veracity.
8. **Due Process: Testimony.** The State's knowing use of perjured testimony violates a defendant's due process rights.
9. **Postconviction: Evidence: Proof.** In a postconviction proceeding, the burden is on the defendant to establish that the prosecution knowingly used false evidence in securing the conviction.
10. **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.
11. **Postconviction.** A postconviction proceeding is civil in nature.
12. **Constitutional Law: Witnesses: Self-Incrimination.** The Fifth Amendment privilege against compulsory self-incrimination extends not only to answers that would in themselves support a conviction but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant. It need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The inquiry is for the court; the witness' assertion does not by itself establish the risk of incrimination.
13. **Criminal Law: Appeal and Error.** The common-law writ of error coram nobis exists in this state under Neb. Rev. Stat. § 49-101 (Reissue 1998).
14. **Judgments: Evidence: Appeal and Error.** The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition.
15. ____: ____: ____. The writ of error coram nobis enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented.
16. **Convictions: Proof: Appeal and Error.** The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the plaintiff, and the alleged error of fact

must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result.

17. **Testimony: Appeal and Error.** The writ of error coram nobis cannot be invoked on the ground that an important witness testified falsely about a material issue in the case.
18. **Constitutional Law: Judges: Recusal.** The recusal rule as set forth in *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), which states that a judge, who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding, must recuse himself or herself from the proceedings when a litigant requests such recusal, is premised on evidentiary principles and judicial ethics and is not a constitutional right in and of itself.
19. **Postconviction.** For postconviction relief to be granted under Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), the claimed infringement must be constitutional in dimension.
20. **Effectiveness of Counsel: Proof.** In order to establish whether a defendant was denied effective assistance of counsel, he or she must ordinarily demonstrate that counsel was deficient; that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. Moreover, the defendant must make a showing that he or she was prejudiced by the actions or inactions of his or her counsel; that is, the defendant must demonstrate with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
21. ____: ____. 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.
22. **Criminal Law: Attorney and Client.** In determining whether counsel's performance was deficient, the standard is whether an attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the defense of a criminal case.
23. **Trial: Effectiveness of Counsel: Presumptions.** When considering whether a counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
24. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
25. **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.
26. **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.
27. ____: ____: ____. 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.

Appeals from the District Court for Richardson County: DANIEL BRYAN, JR., Judge. Affirmed.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, J. Kirk Brown, Marie Colleen Clarke, and, on briefs, Don Stenberg, former Attorney General, for appellee.

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

STEPHAN, J.

In 1995, John L. Lotter was convicted of three counts of first degree murder, three counts of use of a weapon to commit a felony, and one count of burglary. In 1996, a three-judge panel sentenced him to death on each count of first degree murder. He received sentences of incarceration on the burglary and use of a weapon convictions. On direct appeal, this court vacated the sentence on the burglary conviction but affirmed the convictions and sentences on all other charges. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999). In these consolidated cases, Lotter filed motions for postconviction relief, a new trial, and for writ of error coram nobis. All of these motions were denied by the district court for Richardson County, and Lotter perfected these appeals, which were consolidated for briefing and argument.

The consolidated appeals were under submission to this court when, on June 24, 2002, the U.S. Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Lotter then filed motions in this court requesting that his death sentences be vacated and the causes remanded to the district court for imposition of life sentences pursuant to *Ring*. The State resisted those motions. We ordered supplemental briefs and oral argument on the issues posed by *Ring* and additional supplemental briefs on the issues posed by the 2002 amendments to Nebraska's capital sentencing statutes enacted in response to that decision. See 2002 Neb. Laws, L.B. 1.

We deny Lotter's motions to vacate his death sentences based upon our determination that *Ring* does not apply to collateral

challenges to sentences which were final when *Ring* was decided. We affirm the order of the district court denying Lotter's motions for postconviction relief, new trial, and writ of error coram nobis.

I. BACKGROUND

Lotter's convictions relate to the deaths of Teena Brandon, Lisa Lambert, and Phillip DeVine in Richardson County, Nebraska, in December 1993. A detailed recitation of the facts underlying the convictions is set forth in *State v. Lotter, supra*, and only the facts relevant to our analysis of this postconviction proceeding will be repeated here.

Prior to Lotter's trial, Thomas M. Nissen, also known as Marvin T. Nissen, was convicted in a separate trial of first degree murder in the death of Brandon and second degree murder in the deaths of Lambert and DeVine. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997). Nissen did not testify at his trial. He had not yet been sentenced at the time of Lotter's trial. On Monday morning, May 15, 1995, prior to opening statements in Lotter's trial, the following exchange occurred outside the presence of the jury:

> THE COURT: . . . With regard to [Nissen's] Motion to Quash, I had a conversation last night with [Nissen's counsel] and defense counsel —
>
> . . . .
>
> . . . Or prosecution, yes. Excuse me. Now, I'm gonna let them explain to you what's goin' — what the nature of that was, because I think you're entitled to know, in view of your Motion [in Limine]. Okay.
>
> [Prosecution]: Uh — We're negotiating an agreement that would have him [Nissen] testify in this matter; it's not been finalized.
>
> THE COURT: It has not been finalized?
>
> [Prosecution]: No. Oh, yeah, that's right. The — And [Nissen's counsel], I think, agreed to continue his Motion to Quash until such time as Nissen would be called, I think that's the extent of it.

Lotter's counsel testified in these postconviction proceedings that this exchange was the first time he had any knowledge of an agreement that would secure Nissen's testimony at Lotter's trial. The agreement was finalized that evening. According to the terms

of the agreement, Nissen agreed to testify truthfully against Lotter and, in exchange, the State agreed not to pursue the death penalty against Nissen for the murder of Brandon. One term of the agreement referenced a meeting between Nissen's counsel and the trial judge, who also was the presiding judge at Lotter's trial. On May 17, Nissen testified that he and Lotter traveled to Lambert's farmhouse together on December 31, 1993, in search of Brandon in order to kill her and agreed that they would also kill anyone else they found there. Nissen testified that he stabbed Brandon but that Lotter fired the shots that killed all three victims.

Lotter testified in his own defense at trial. He denied any participation in either the planning or perpetration of the murders and stated that he was not present when they were committed. He testified that Nissen had not been truthful in his testimony regarding Lotter's involvement in the crimes and that other witnesses who gave incriminating testimony against him were either lying or mistaken.

In February 1996, a three-judge panel sentenced Lotter to death. We affirmed the murder convictions and capital sentences, as well as the convictions and sentences on the related weapons charges, on direct appeal. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999). Subsequently, on August 3, 1999, Lotter filed pro se verified motions for postconviction relief in each of the murder cases. In those motions, he alleged as grounds for relief (1) that the trial judge engaged in improper ex parte communication, (2) that this court on direct appeal had created a new duty on the part of trial counsel to move for the trial judge's recusal, (3) that his trial counsel was ineffective for failing to move for recusal of the trial judge, and (4) that trial counsel was ineffective for failing to make various evidentiary objections. Lotter requested the appointment of counsel on the same date.

On November 16, 1999, the district court conducted a "preliminary review" of the motions and concluded that Lotter was entitled to an evidentiary hearing on the third and fourth grounds, relating to ineffective assistance of counsel, but was not entitled to an evidentiary hearing on the other grounds. The court also appointed counsel to represent Lotter in the postconviction proceeding.

On December 9, 1999, Lotter, through his appointed counsel, moved to consolidate the three cases and filed an amended motion for postconviction relief in the consolidated proceeding, asserting three additional grounds. Two of the additional grounds were based upon an affidavit of Jeff Haley, who had at one time shared a cell with Nissen. Haley's affidavit was attached to the amended postconviction motion. Haley averred that while they were incarcerated together, Nissen told Haley that he, not Lotter, had fired the shots that killed all three victims. Lotter alleged that this evidence established that his convictions and sentences were obtained through the knowing use of false testimony and were therefore invalid. As an additional ground, Lotter alleged that death by electrocution is unconstitutional. At the same time that he filed his amended motion for postconviction relief, Lotter filed a motion for writ of error coram nobis in the consolidated proceeding, asserting that the statements made by Nissen to Haley were exculpatory both as to Lotter's guilt or innocence and as to his sentences. He also filed a motion for new trial in the consolidated proceedings, based upon the statements allegedly made by Nissen to Haley.

On December 16, 1999, the district court conducted a "preliminary review" of the amended postconviction motion. Noting that it had already made a finding on the first four grounds, the court held that Lotter was also entitled to an evidentiary hearing on the grounds based upon Haley's affidavit, but not upon the ground alleging that the death penalty was unconstitutional.

The evidentiary hearing commenced on October 26, 2000, and was completed on November 22. Lotter's motions for a writ of error coram nobis and for a new trial were joined for consideration at the hearing. Lotter's trial counsel was questioned and testified about the fact that he did not object to various evidentiary matters, which will be discussed in more detail in our analysis of Lotter's ineffective assistance of counsel claims. Trial counsel also testified that at the time of trial, he had no knowledge of an improper ex parte communication between the prosecution and the trial judge. Counsel testified that he interpreted the reference on the record to a communication with the judge regarding Nissen's testimony as merely a procedural matter. He further testified that he interpreted the provision in the State's agreement

with Nissen which referenced a meeting with the judge as referring to a meeting that would take place in the future, prior to Nissen's sentencing. Counsel testified that although the trial judge was generally ruling in Lotter's favor on many issues, he would have moved to recuse if he had known all of the facts regarding arrangements to secure Nissen's testimony against Lotter.

Haley's deposition, taken on October 18, 2000, was offered into evidence for substantive purposes under the penal interest exception to hearsay, Neb. Rev. Stat. § 27-804(2)(c) (Reissue 1995). The State objected to the admission of the evidence based upon relevancy, foundation, and hearsay. The objections were taken under advisement.

Haley testified in his deposition that he was Nissen's cellmate at the Lincoln Correctional Center in 1997. Nissen was reading a book at that time about the Brandon murder and was upset because he felt it contained lies. According to Haley, Nissen showed him the autopsy photographs of the victims and explained and demonstrated in detail how he had shot and killed all three victims. Nissen told Haley that while Nissen was shooting the victims, Lotter was "freaking out and running around," saying, "What are you doing? What are you doing?" According to Haley, Nissen stated that he should have shot Lotter as well, and then there would have been no witnesses.

Lotter attempted to depose Nissen and offer his testimony at the postconviction hearing. On October 23, 2000, Nissen refused to answer deposition questions without an attorney regarding his statements to Haley and his involvement in the murders. After Lotter filed a motion to compel, the district court held that Nissen had no right to an appointed attorney but could retain one at his own expense. The court further ruled that Nissen was bound to answer all questions unless he properly claimed a recognized privilege. On October 31, Lotter again attempted to depose Nissen. Nissen again refused to answer questions, stating that he was in the process of hiring an attorney. On November 14, Lotter attempted to depose Nissen for the third time. At that time, Nissen asserted his Fifth Amendment privilege against self-incrimination and refused to answer questions relating to his statements to Haley or his involvement in Lotter's trial and the murders. At the conclusion of the postconviction evidentiary hearing, Lotter made

an oral motion requesting the court to determine that Nissen had no basis for asserting the privilege and to compel Nissen to answer all questions.

On December 19, 2000, the district court entered its order in these proceedings. With respect to the postconviction claims, the court denied Lotter's ineffective assistance claim based upon trial counsel's failure to move for the recusal of the trial judge, reasoning that trial counsel's failure was based upon strategy and resulted in no prejudice. The court also denied Lotter's ineffective assistance of counsel claims based on the failure to make proper evidentiary objections, finding that Lotter was not prejudiced by any deficient performance of his trial counsel. The court determined that the statements made by Nissen to Haley did not fall within the Nebraska penal interest exception because there were no corroborating circumstances that clearly indicated the trustworthiness of the statements. Because it held that Haley's testimony was thus inadmissible, the court held that Lotter's claim alleging the improper use of Nissen's testimony lacked merit. The court also held that because Nissen could be exposed to a first degree murder charge if Lotter were to be executed on the basis of Nissen's alleged perjured testimony at Lotter's trial, there was a sufficient basis to honor Nissen's claim of Fifth Amendment privilege and he could not be compelled to answer the deposition questions. With respect to the motion for writ of error coram nobis, the court denied relief, concluding that Lotter had not shown that an alleged error of fact with respect to the identity of the actual shooter would have prevented Lotter's conviction. The district court also denied Lotter's motion for new trial.

Lotter then perfected these timely appeals. As noted above, *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), was decided while these appeals were under submission, and Lotter filed motions seeking relief pursuant to *Ring*.

II. ANALYSIS

1. Applicability of *Ring v. Arizona*

This is our second opportunity to address the impact of *Ring v. Arizona, supra*, on an appeal pending at the time of its decision. The first was *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604

(2003), a direct capital appeal in which the defendant had assigned as error the trial court's denial of his motion challenging the constitutionality of Nebraska's capital sentencing statutes as they then existed and requesting a jury determination of sentencing issues. After Gales' appeal was docketed but before it was briefed or argued, the U.S. Supreme Court held in *Ring* that its prior decisions in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), were irreconcilable and that *Walton* should therefore be overruled to the extent that it allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. The Court concluded that because Arizona's enumerated aggravating factors operate as " 'the functional equivalent of an element of a greater offense,' " the Sixth Amendment requires that the factors be found by a jury. *Ring v. Arizona*, 536 U.S. at 609, quoting *Apprendi v. New Jersey, supra*. In *State v. Gales, supra*, we held that under *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), the new constitutional rule announced in *Ring* was applicable because Gales had preserved the issue in the trial court and, due to the pending direct appeal, his conviction and sentence were not final when *Ring* was decided.

[1] This case reaches us in a different procedural posture. A criminal conviction is final for purposes of collateral review when the judgment of conviction is rendered, the availability of appeal is exhausted, and the time for petition for certiorari has lapsed. *Allen v. Hardy*, 478 U.S. 255, 106 S. Ct. 2878, 92 L. Ed. 2d 199 (1986); *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *vacated and remanded on other grounds, Reeves v. Nebraska*, 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990). Our decision in Lotter's direct appeal became final in January 1999, and his petition for writ of certiorari was denied on June 7, 1999. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999), *cert. denied* 526 U.S. 1162, 119 S. Ct. 2056, 144 L. Ed. 2d 222 (1999). Thus, Lotter's convictions were final more than a year before *Apprendi v. New Jersey, supra*, and more than 3 years before *Ring v. Arizona, supra*. Thus, assuming without deciding that Lotter

properly preserved a *Ring* Sixth Amendment issue in his trial and direct appeal and in this postconviction proceeding, the disposition of his motion for remand depends upon whether the holding in *Ring* applies to a conviction and sentence which were final when *Ring* was decided. The U.S. Supreme Court did not address this retroactivity issue in *Ring*.

Based upon the similarity of the Nebraska statutes under which Lotter was sentenced and the Arizona capital sentencing statutes which were declared unconstitutional in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), Lotter argues that his death sentences were void ab initio and entered without jurisdiction. This argument, however, ignores the existence of *Walton v. Arizona, supra*, in which the U.S. Supreme Court specifically upheld the constitutionality of the Arizona statutes which it subsequently held unconstitutional in *Ring*. *Walton* was the controlling constitutional precedent when Lotter was sentenced and when his convictions became final. By specifically overruling *Walton* "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty," the Court in *Ring* announced a new constitutional rule. *Ring v. Arizona*, 536 U.S. at 609. We must now decide whether the new rule applies to Lotter's final judgments.

[2] We were presented with a similar issue in *State v. Reeves, supra*, which, like this case, was a postconviction proceeding in a capital case. Reeves argued that the admission of a victim impact statement during the sentencing phase of his trial violated his Eighth Amendment rights, based upon the holding of *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), *overruled, Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), which was decided after his convictions and sentences became final. In determining whether *Booth* should be given retroactive application, this court applied the test which was first adopted by the U.S. Supreme Court in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), and later specifically extended to the capital sentencing context in *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), *abrogated on other grounds, Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

Under this test, a new constitutional rule of criminal procedure will not be applied retroactively to a final judgment on collateral review unless it falls within one of two exceptions. The first exception encompasses new rules which place certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe. *Teague v. Lane, supra.* The second exception to the general rule of nonretroactivity is for "watershed rules of criminal procedure" which are " ' "implicit in the concept of ordered liberty." ' " 489 U.S. at 311.

Lotter contends that the *Teague* test is inapplicable to this case because the new rule announced in *Ring* is not procedural, but, rather, substantive in nature. He argues that because *Ring* treats aggravating circumstances in a capital sentencing statute as the " 'functional equivalent of an element of greater offense,' " *Ring* redefines the elements of murder as a capital offense. *Ring v. Arizona*, 536 U.S. at 609. The Arizona Supreme Court recently considered and rejected a similar argument in *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003). The court noted a distinction between substantive rules which "determine the meaning of a criminal statute" and "address the criminal significance of certain facts or the underlying prohibited conduct" and procedural rules which "set forth fact-finding procedures to ensure a fair trial." *State v. Towery*, 204 Ariz. at 390, 64 P.3d at 832, citing *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); *Curtis v. U.S.*, 294 F.3d 841 (7th Cir. 2002); and *U.S. v. Sanders*, 247 F.3d 139 (4th Cir. 2001). The Arizona court reasoned that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), did not announce a new substantive rule because it was simply an extension of the procedural rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and

> changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the state's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt. Instead, [*Ring*] altered *who* decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings.

State v. Towery, 204 Ariz. at 391, 64 P.3d at 833. We conclude that this reasoning is both sound and consistent with our holding in *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003), that the amendments to Nebraska's capital sentencing statutes enacted in response to *Ring* constituted a procedural change in the law. In *Gales*, we reasoned that the amendments did not alter the substantive nature of the aggravating circumstances which must be proved beyond a reasonable doubt in order to establish death eligibility, but only changed the law to require that a jury, rather than a judge, make the determination of the existence of aggravating circumstances in the absence of a jury waiver by the defendant. Accordingly, we conclude that the new constitutional rule announced in *Ring* was procedural, not substantive. Whether that rule affects Lotter's death sentences therefore depends upon whether it fits within either of the two exceptions to the general rule of nonretroactivity established by *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

The first *Teague* exception is inapplicable because the rule announced in *Ring* clearly does not place any type of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe. In determining whether *Ring* falls within the second *Teague* exception, we note that the scope of that exception has been narrowly circumscribed by the U.S. Supreme Court as limited to " 'a small core of rules,' which not only seriously enhance accuracy but also 'requir[e] "observance of those procedures that . . . are implicit in the concept of ordered liberty." ' " *Tyler v. Cain*, 533 U.S. 656, 666 n.7, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001), quoting *Graham v. Collins*, 506 U.S. 461, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993). See, also, *O'Dell v. Netherland*, 521 U.S. 151, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997). The U.S. Supreme Court emphasized in *Tyler* that in order to fall within the second *Teague* exception, "[i]nfringement of the rule must 'seriously diminish the likelihood of obtaining an accurate conviction,' and the rule must ' " 'alter our understanding of the *bedrock procedural elements*' " ' essential to the fairness of a proceeding." (Emphasis in original.) *Tyler v. Cain*, 533 U.S. at 665, quoting *Sawyer v. Smith*, 497 U.S. 227, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990). The Court has noted that its "sweeping rule" establishing an affirmative right to counsel in all

felony cases announced in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), is an example of the type of watershed rule contemplated by the second *Teague* exception. *O'Dell v. Netherland*, 521 U.S. at 167. Accord *Saffle v. Parks*, 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990).

In *Sawyer v. Smith, supra*, the U.S. Supreme Court held that the new rule it announced in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that responsibility for determining the appropriateness of the death sentence rests elsewhere, was not retroactively applicable, under *Teague*, to a final judgment under collateral review in a federal habeas corpus proceeding. In *Tyler v. Cain, supra*, the Court held that the new rule announced in *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), *disapproved on other grounds, Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991), that a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt, was not made retroactive by the subsequent holding in *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), that the giving of such an instruction constitutes structural error. The Court in *Tyler* stated the "standard for determining whether an error is structural . . . is not coextensive with the second *Teague* exception, and a holding that a particular error is structural does not logically dictate the conclusion that the second *Teague* exception has been met." *Tyler v. Cain*, 533 U.S. at 666-67. The Court further noted its prior observations that it is unlikely that any " 'watershed' rules" which would fall within the second *Teague* exception have yet emerged. *Tyler v. Cain*, 533 U.S. at 666 n.7, quoting *O'Dell v. Netherland, supra.*

Our research indicates that two other state supreme courts have considered the question of whether the rule announced in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), falls within the second exception to the general rule of nonretroactivity established by *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). Both courts have concluded that it does not. In *State v. Towery*, 204 Ariz. 386, 64

P.3d 828 (2003), the Arizona Supreme Court determined that *Ring* has no effect on the determination of a defendant's guilt or innocence, but, rather, "prohibits a validly convicted defendant from being exposed to the death penalty unless a jury finds the existence of certain aggravating circumstances." *State v. Towery*, 204 Ariz. at 391, 64 P.3d at 833. The court reasoned that this new constitutional rule could not be viewed as enhancing the accuracy of the determination of aggravating circumstances, as required under the second *Teague* exception, because there was "no reason to believe that impartial juries will reach more accurate conclusions regarding the presence of aggravating circumstances than did an impartial judge." *State v. Towery*, 204 Ariz. at 392, 64 P.3d at 834. Noting that the U.S. Supreme Court in *Ring* stated that " '[t]he Sixth Amendment jury trial right . . . does not turn on the relative rationality, *fairness*, or efficiency of potential factfinders,' " *Towery* also concluded that *Ring* "does not involve a procedure so 'implicit in the concept of ordered liberty' as to constitute a watershed rule." *State v. Towery*, 204 Ariz. at 392, 64 P.3d at 834, quoting *Ring v. Arizona, supra*, and *Teague v. Lane, supra*.

The Nevada Supreme Court employed similar reasoning to reach the same conclusion in *Colwell v. State*, 59 P.3d 463 (Nev. 2002), a postconviction action which was pending when *Ring* was decided. Adopting a relaxed version of the *Teague* test which would permit retroactive application of a new constitutional rule if "it establish[es] a procedure without which the likelihood of an accurate conviction is seriously diminished," the court concluded that the rule established by *Ring* did not meet this standard because "the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances that supported [the defendant]'s death sentence." *Colwell v. State*, 59 P.3d at 472, 473.

The decision in *Cannon v. Mullin*, 297 F.3d 989 (10th Cir. 2002), further supports the view that *Ring* does not fall within the second *Teague* exception. In that case, the court denied an emergency stay of execution and request to file a second federal habeas corpus petition which sought to challenge Oklahoma's capital sentencing statutes under *Ring*. Prior to *Ring*, a direct appeal and first habeas corpus petition had been finally resolved against the

defendant. The court rejected a claim that *Ring* announced a new substantive rule which was not subject to a *Teague* analysis. Based upon its previous holding in *U.S. v. Mora*, 293 F.3d 1213 (10th Cir. 2002), that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), announced a new rule of criminal procedure, it concluded that the same was true of *Ring* because "*Ring* is simply an extension of *Apprendi* to the death penalty context." *Cannon v. Mullin*, 297 F.3d at 994.

Because, like other courts, we regard *Apprendi* as the jurisprudential source of the Sixth Amendment principle established by *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), we find further guidance from the manner in which other courts have resolved issues regarding the retroactive application of *Apprendi*. A clear majority of state and federal jurisdictions hold that *Apprendi* may not be applied retroactively to final judgments on collateral review. See, e.g., *Sepulveda v. U.S.*, 330 F.3d 55 (1st Cir. 2003); *Coleman v. U.S.*, 329 F.3d 77 (2d Cir. 2003); *U.S. v. Brown*, 305 F.3d 304 (5th Cir. 2002); *Goode v. U.S.*, 305 F.3d 378 (6th Cir. 2002); *Dellinger v. Bowen*, 301 F.3d 758 (7th Cir. 2002); *U.S. v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002); *Cannon v. Mullin, supra*; *U.S. v. Sanders*, 247 F.3d 139 (4th Cir. 2001); *U.S. v. Moss*, 252 F.3d 993 (8th Cir. 2001); *McCoy v. U.S.*, 266 F.3d 1245 (11th Cir. 2001); *State v. Sepulveda*, 201 Ariz. 158, 32 P.3d 1085 (Ariz. App. 2001); *People v. Bradbury*, 68 P.3d 494 (Colo. App. 2002); *Figarola v. State*, 841 So. 2d 576 (Fla. App. 2003); *People v. Gholston*, 332 Ill. App. 3d 179, 772 N.E.2d 880, 265 Ill. Dec. 509 (2002); *Whisler v. State*, 272 Kan. 864, 36 P.3d 290 (2001); *Meemken v. State*, 662 N.W.2d 146 (Minn. App. 2003); *State v. Tallard*, 816 A.2d 977 (N.H. 2003); *Teague v. Palmateer*, 184 Or. App. 577, 57 P.3d 176 (2002). The small minority of courts initially holding to the contrary have had such decisions reversed. See, *U.S. v. Murphy*, 109 F. Supp. 2d 1059 (D. Minn. 2000), *reversed* 268 F.3d 599 (8th Cir. 2001); *People v. Carter*, 332 Ill. App. 3d 576, 773 N.E.2d 1140, 266 Ill. Dec. 70 (2002), *vacated* 204 Ill. 2d 666, 790 N.E.2d 377, 274 Ill. Dec. 1 (2003).

Although the U.S. Supreme Court has not directly addressed the question of whether *Apprendi* can be applied retroactively under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed.

2d 334 (1989), its recent decision in *United States v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002), provides some indication as to whether the Court would regard its holding in *Apprendi*, and by logical extension its holding in *Ring*, as "watershed" rules. *Cotton* involved a direct appeal from a conviction for possession of cocaine with intent to distribute. Following a jury trial in which the defendants were found guilty, the trial judge made a finding as to the amount of cocaine in the defendants' possession, based upon the trial testimony, and pronounced an enhanced sentence dictated by the quantity pursuant to 21 U.S.C. § 841(b)(1)(A) (2000). *Apprendi* was decided during the pendency of the direct appeal, and although the defendants did not raise the issue at trial, the appellate court examined the *Apprendi* issue under the plain-error test of Fed. R. Crim. P. 52(b), which required a determination of whether the error affected the substantial rights of the defendants. The Court concluded that it need not resolve that question, because "even assuming [the defendants'] substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Cotton*, 535 U.S. at 632-33. The Court reasoned that in light of the "overwhelming and uncontroverted evidence that [the defendants] were involved in a vast drug conspiracy," a threat to the " 'fairness, integrity, and public reputation of judicial proceedings' " would occur if the defendants "were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial." 535 U.S. at 634. As one federal court of appeals has concluded from *Cotton*: "Given that an admitted *Apprendi* error can be excused if the evidence on the factor is overwhelming, it is difficult for us to conclude that *Apprendi* can be considered a watershed decision, representing rights fundamental to due process." *U.S. v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002).

[3] We conclude that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), announced a new constitutional rule of criminal procedure which does not fall within either of the *Teague* exceptions to the general rule that such changes in the law do not apply retroactively to final judgments. Therefore, we decline to apply *Ring* to the final judgments which are before us

for collateral review in this postconviction appeal and deny Lotter's motions filed in this court requesting that we vacate his death sentences and remand the causes to the district court with directions to resentence him to life imprisonment.

2. Postconviction Claims

(a) Standard of Review

[4] A criminal defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001); *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000).

[5] 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. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001).

[6] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003).

(b) Testimony of Marvin Nissen

Lotter alleged in the sixth and seventh grounds of his operative postconviction motion that Nissen testified falsely at Lotter's trial and that such testimony was relied upon by the three-judge sentencing panel which sentenced Lotter to death. Lotter alleged that in 1997, Nissen informed his then-cellmate Haley that Nissen had in fact shot all three murder victims. Lotter alleged that this evidence established that his conviction was invalid because the State knew or should have known that Nissen's testimony at Lotter's trial was false. Lotter further alleged that using Nissen's false testimony to support Lotter's death sentence violated the Eighth Amendment because Haley's testimony established that Lotter was not the principal and that he had no intent to kill. Lotter attempted to depose Nissen for purposes of the postconviction hearing, and Nissen refused to answer any questions relating to his communications with Haley or his testimony at Lotter's trial after pleading the Fifth Amendment. Lotter's motion for writ of error coram nobis also pertains to this issue, in that it alleges that the statements made by Nissen to Haley clearly establish that

Nissen testified falsely at Lotter's trial, and this factual information is material and exculpatory to Lotter both as to his guilt or innocence and sentencing. Lotter's motion for new trial is also based upon the statements allegedly made by Nissen to Haley.

Following the evidentiary hearing, the district court denied the postconviction relief sought with respect to Nissen's testimony and also denied the writ of error coram nobis and motion for new trial. Lotter has assigned five separate errors with respect to these rulings, which we address in turn.

(i) Assignment of Error A: Admission of Jeff Haley's Testimony

Lotter assigns, restated, that the district court erred when it refused to receive and consider the testimony of Haley regarding statements of Nissen under § 27-804(2)(c) and the decision in *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), and its progeny.

Haley's deposition was offered into evidence at the evidentiary hearing as substantive evidence pursuant to the hearsay exception for statements against penal interest, § 27-804(2)(c). The State objected on grounds of hearsay, relevancy, and foundation. The district court held that Haley's deposition testimony regarding statements made to him by Nissen was inadmissible hearsay that did not fall within § 27-804(2)(c).

Section 27-804 provides:

> (2) Subject to the provisions of [Neb. Rev. Stat. §] 27-403 [(Reissue 1995)], the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (c) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. *A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.*

(Emphasis supplied.) The district court found that Nissen was unavailable due to his assertion of his Fifth Amendment privilege and that the statements made by Nissen to Haley were against Nissen's penal interest. Nevertheless, it held that the statements were inadmissible under the last sentence of § 27-804(2)(c) because there were no corroborating circumstances clearly indicating their trustworthiness.

This court has not previously addressed the nature of the "corroborating circumstances" which would be required to "clearly indicate the trustworthiness" of a hearsay statement under § 27-804(2)(c). However, in *State v. Craig*, 192 Neb. 347, 349, 220 N.W.2d 241, 243 (1974), we noted that the possibility of fabrication of such a statement, "perhaps by a confederate who has nothing to lose, would seem to require care in the admission of such evidence."

The district court defined "corroborating circumstance" in this context as "any separate operative facts, direct or circumstantial that substantiate the trustworthiness of the facts contained in the hearsay statement and are not purely collateral facts dealing with credibility generally." In this regard, the district court examined the testimony offered at Lotter's trial and found nothing to corroborate Nissen's purported statements to Haley. The court also examined Lotter's trial testimony and the general evidence relating to Nissen's credibility and concluded that no corroborating circumstances were present. While we agree that it was proper to consider the trial evidence in determining whether there were corroborating circumstances which would indicate the trustworthiness of Nissen's subsequent hearsay statements to Haley, we conclude that the circumstances under which the proffered statements against penal interest were made are also pertinent to this inquiry.

[7] In *Chambers v. Mississippi*, 410 U.S. 284, 300, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), the U.S. Supreme Court held that due process requires that a criminal defendant be permitted to offer, in his defense, the hearsay statements of a third party confessing to the crime with which the defendant was charged where the statements "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." In assessing the reliability of the inculpatory hearsay statements at issue, the Court considered

the circumstances in which they were made, i.e., "spontaneously to a close acquaintance shortly after the murder had occurred" and further considered the fact that the inculpatory statements were "corroborated by some other evidence in the case." *Id.* Other courts interpreting language similar or identical to § 27-804(2)(c) have held that in addition to independent corroborating evidence, a court may look to the circumstances surrounding the making of the inculpatory hearsay statement by a third party, including such factors as spontaneity, relationship between the accused and the declarant, whether the statement was subsequently repudiated, whether or not it was in fact against the penal interests of the declarant, and whether the declarant had a motive to falsify. See, *U.S. v. Garcia*, 986 F.2d 1135 (7th Cir. 1993); *Wilkerson v. State*, 139 Md. App. 557, 776 A.2d 685 (2001); *State v. Wardrett*, 145 N.C. App. 409, 551 S.E.2d 214 (2001). We conclude that in determining whether there are corroborating circumstances which clearly indicate the trustworthiness of a statement tending to expose the declarant to criminal liability and offered to exculpate the accused pursuant to § 27-804(2)(c), a court should examine all circumstances surrounding the making of the statement, as well as any other evidence which either supports or undermines its veracity.

Even when considered under this broader test, however, we conclude that the district court did not err in determining that there were no corroborating circumstances that clearly indicated the trustworthiness of Nissen's purported hearsay statements to Haley, his cellmate. The enhanced credibility normally given to a statement which incriminates the declarant is attenuated in this case by the fact that at the time he is alleged to have made the statements to Haley, Nissen was serving life sentences for the crimes for which *both* he and Lotter had been found guilty and convicted. The statements were apparently prompted by published accounts describing his and Lotter's respective roles in committing the crimes. Nissen's purported statements to his cellmate Haley, himself a convicted felon, were inconsistent with Nissen's sworn testimony at Lotter's trial. They are also inconsistent with Lotter's sworn trial testimony that he was not present when the murders were committed and had no knowledge of the crimes. Nissen's statements to Haley could represent the truth. It

is at least equally possible, however, that they are fabrications by a convicted felon with little or nothing to lose for the purpose of exaggerating his involvement in the crimes for the benefit of his cellmate, or to provide his former confederate with a contrived basis for seeking to avoid the death penalty. Because there are no circumstances which "clearly indicate the trustworthiness" of Nissen's statements to Haley, we conclude that the district court did not err in determining that the statements were inadmissible under § 27-804(2)(c).

In addition to his statutory argument, Lotter contends that under *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), he had a due process right to present Nissen's statements to Haley. As we have noted, *Chambers* held that due process may require admission of a third party's statements against penal interest exculpating the accused where the statements were made under circumstances that provided considerable assurance of their reliability. Since *Chambers*, many states, including Nebraska, have codified the exculpatory penal interest exception. The requirement in § 27-804(2)(c) that there be corroborating circumstances which clearly indicate the trustworthiness of the proferred hearsay is substantially identical to the *Chambers* requirement of "considerable assurance of . . . reliability." See 410 U.S. at 300. For this reason, we conclude that the due process analysis is encompassed within the statutory analysis and that Lotter's due process rights are protected by the statute and need not be examined independently.

(ii) Assignment of Error B: Knowing Use of Nissen's False Testimony at Trial

Lotter assigns, restated, that the district court erred when it failed to vacate the convictions because the State knew or reasonably should have known that Nissen's immunized testimony was false, in violation of the Due Process Clauses of the 5th and 14th Amendments to the U.S. Constitution and the decisions in *Naupe v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), and *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), and their progeny.

[8,9] Our case law establishes that it is only the State's knowing use of perjured testimony that violates a defendant's due

process rights. *State v. Howard*, 182 Neb. 411, 155 N.W.2d 339 (1967). See, also, *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *United States v. Agurs, supra.* In a postconviction proceeding, the burden is on the defendant to establish that the prosecution knowingly used false evidence in securing the conviction. *State v. Huffman*, 186 Neb. 809, 186 N.W.2d 715 (1971). Based upon our determination that the trial court properly excluded Nissen's purported hearsay statements to Haley, such statements cannot form the basis of any claim that Nissen's trial testimony was perjured.

[10] Nevertheless, Lotter argues that while the statements to Haley constituted "the final, and most complete, piece of the puzzle that established Nissen to be a liar," there were other circumstances reflecting adversely on Nissen's credibility which were known to the State at the time of trial. Reply brief for appellant at 6. However, such evidence would have been equally known to Lotter at the time of trial and on direct appeal. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002).

In summary, we conclude that there is no competent evidence to support Lotter's postconviction claim that the State knowingly used perjured testimony against him at trial. This assignment of error is without merit.

(iii) Assignment of Error C: Knowing Use of Nissen's False Testimony at Sentencing

Lotter assigns, restated, that the district court erred when it failed to vacate the death sentences because the State knew or reasonably should have known that Nissen's testimony was false and should not be relied upon to impose death in violation of the 8th and 14th Amendments to the U.S. Constitution, and the decisions in *Johnson v. Mississippi*, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988), *Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979), and their progeny.

For the reasons discussed above, we conclude that there is no evidence that the State used perjured evidence against Lotter at his trial or sentencing hearing. Accordingly, this assignment of error is without merit.

(iv) Assignment of Error E: Nissen's Fifth Amendment Privilege

Lotter next assigns, restated, that the district court erred when it failed to order Nissen to testify when Nissen had no criminal exposure under either the Double Jeopardy Clause of the 5th and 14th Amendments or the terms of the original sentencing deal in violation of Lotter's right under the 6th and 14th Amendments and the decision in *Brown v. Walker*, 161 U.S. 591, 16 S. Ct. 644, 40 L. Ed. 819 (1896), and its progeny.

Nissen was subpoenaed as a witness in this postconviction action but refused to answer deposition questions relating to his conversations with Haley and his testimony at Lotter's trial, invoking his privilege against self-incrimination. When the transcript of Nissen's deposition was offered at the evidentiary hearing, Lotter made an oral motion requesting that the district court compel Nissen to answer all questions that he had refused to answer. Lotter argued that Nissen could not in good faith claim the Fifth Amendment privilege because the agreement he made with the State prior to testifying at Lotter's trial remained in force and required him to testify at this proceeding. The State argued that Lotter had previously attacked the legality of its agreement with Nissen and that we held on direct appeal that since Lotter was not a party to the agreement, he lacked standing to challenge it. In addition, the State argued that the agreement obligated Nissen to testify truthfully only at any criminal proceeding and thus was not applicable to a civil postconviction proceeding.

In its order denying postconviction relief, the district court did not directly address the applicability of Nissen's sentencing agreement with the State. Rather, the court reasoned that the fact that Nissen could be exposed to a separate murder charge pursuant to Neb. Rev. Stat. § 28-303(3) (Reissue 1995) if he willfully lied at Lotter's trial was enough of a real risk to Nissen to honor his claim of Fifth Amendment privilege in this postconviction proceeding. The court thus refused to order Nissen to answer the deposition questions.

[11] On appeal, Lotter argues that the agreement Nissen made with the State prior to testifying at Lotter's trial extends him immunity in this proceeding, and thus he has no " 'reasonable cause to apprehend danger from a direct answer.' " Brief for appellant at

46, quoting *Ohio v. Reiner*, 532 U.S. 17, 121 S. Ct. 1252, 149 L. Ed. 2d 158 (2001). Essentially, Lotter argues that Nissen cannot assert a Fifth Amendment privilege because the agreement he made with the State prior to testifying at Lotter's trial is still applicable. Assuming without deciding that Lotter has standing to assert this position, it is without merit. The agreement provides:

> Nissen will agree to testify against John L. Lotter or any other individual when requested to do so by the State *in any criminal proceedings* which concern the events which occurred on or about December 24, 1993 through and including December 31, 1993. He will give complete and truthful testimony and answer all prosecution inquiries to the best of his ability and the State agrees that no testimony or other information or any information directly or indirectly derived from such testimony or other information may be used against . . . Nissen in any criminal case except in prosecution for perjury or giving a false statement.

(Emphasis supplied.) The agreement expressly requires Nissen to give testimony only in "any criminal proceedings." A postconviction proceeding is civil in nature. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000). The agreement therefore does not apply to this action.

[12] The Fifth Amendment privilege against compulsory self-incrimination extends not only " 'to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant.' " *Ohio v. Reiner*, 532 U.S. at 20, quoting *Hoffman v. United States*, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). " '[I]t need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' " 341 U.S. at 20-21, quoting *Hoffman v. United States, supra*. The "inquiry is for the court; the witness' assertion does not by itself establish the risk of incrimination." *Ohio v. Reiner*, 532 U.S. at 21.

Here, the district court reasoned:

> Nissen is exposed to a separate first degree murder charge pursuant to *Neb. Rev. Stat. § 28-303 (3)*, if he by willful and

> corrupt perjury or subordination of the same, purposely procures the conviction and execution of an innocent person. This real risk to Nissen alone is sufficient to honor his claim of privilege.

(Emphasis in original.) We find no error in this reasoning and therefore conclude that this assignment of error is without merit.

(v) Assignment of Error D: Writ of Error Coram Nobis

Lotter assigns, restated, that the district court erred when it failed to grant a writ of error coram nobis when (1) Lotter obtained newly discovered evidence that Nissen's trial testimony was false, (2) Nissen refused to testify when confronted with the new evidence, and (3) Nissen was permitted to claim a Fifth Amendment right to remain silent.

[13-17] The common-law writ of error coram nobis exists in this state under Neb. Rev. Stat. § 49-101 (Reissue 1998), which adopts English common law to the extent that it is not inconsistent with the Constitution of the United States, the organic law of this state, or any law passed by our Legislature. *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000). The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. *Id.* It enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented. *Id.* The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the plaintiff, and the alleged error of fact must be such as would have prevented a conviction. *Id.* It is not enough to show that it might have caused a different result. *Id.* The writ cannot be invoked on the ground that an important witness testified falsely about a material issue in the case. *Hawk v. State*, 151 Neb. 717, 39 N.W.2d 561 (1949).

Lotter sought a writ of error coram nobis on the basis of what he contended to be Nissen's "perjured" trial testimony. In denying the writ, the district court concluded that it was not procedurally barred, but that Lotter had not met his burden of proof that there had been an error of fact which would have prevented

his convictions. Assuming without deciding that the motion for writ of coram nobis was not procedurally barred, we conclude that the district court did not err in concluding that it was without substantive merit. Lotter did not prove that Nissen testified falsely at his trial, and even if he had, this fact would not entitle him to a writ of error coram nobis. See *Hawk v. State, supra.*

(c) Ex Parte Communication

Lotter alleged in the first ground of his operative postconviction motion that the trial court engaged in improper ex parte communication with the prosecution. His motion explicitly recognizes that this issue was presented to this court on direct appeal. Lotter alleged, however, that it was the trial judge's obligation to disclose the ex parte communication and that the judge failed to do so. He contends that we incorrectly decided the issue on direct appeal by placing the discovery obligation upon trial counsel.

In our opinion resolving Lotter's direct appeal, we set out the May 15, 1995, exchange that occurred on the record prior to the commencement of Lotter's trial referencing a meeting between the prosecution and the court regarding Nissen's testimony. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 597 N.W.2d 673 (1999). Noting that Lotter's counsel obtained a copy of Nissen's written sentencing agreement by at least May 18, the third day of trial, we also set forth the contents of that agreement. Part of the agreement provided:

> "Prior to the finalizing of any agreement, the State will be party to a meeting between attorneys and [the trial judge] wherein the State will inform the judge of no need for the convening of a three judge panel or the preparation of a presentencing report that may contain evidence of aggravating circumstances. . . ."

Id. at 465, 586 N.W.2d at 605. Based on this evidence, we concluded that the communication between the trial judge and the prosecution regarding Nissen's testimony at Lotter's trial was ex parte.

After reaching such conclusion, we cited the rule of *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), that a judge who initiates, invites, or considers an ex parte communication

concerning a pending or impending proceeding before the judge must recuse himself or herself from the proceedings when a litigant requests such recusal. We concluded, "Although it appears that the ex parte communication at issue in the instant case might have posed a threat to the trial judge's impartiality . . . we need not determine whether the trial judge should have recused himself, since Lotter did not request the judge's recusal . . . ." *State v. Lotter*, 255 Neb. at 475, 586 N.W.2d at 610. In a supplemental opinion, we addressed Lotter's contention that his due process right to an impartial trial judge was violated by the ex parte communication. *State v. Lotter*, 255 Neb. 889, 587 N.W.2d 673 (1999). Finding that Lotter was never personally apprised of the communication, we held that his due process claim was not waived. We concluded:

> "After evaluating Lotter's due process claim, we find it to be without merit. While the threat to the impartiality of the trial judge in this case, as noted above, would be sufficient under Nebraska law to require the judge's recusal upon request, it is not sufficient, under the Due Process Clause, to suggest that the trial judge 'had such a strong personal or financial interest in the outcome of the trial that he was unable to hold the proper balance between the state and the accused.'. . .
>
> "Moreover, our comprehensive review of the record in this case reveals no evidence of actual bias on the part of the trial court. Absent an instance of actual bias on the part of the trial court, we determine that Lotter's due process right to a fair and impartial judge was not violated. . . ."

Id. at 892, 587 N.W.2d at 675.

In this postconviction appeal, Lotter asserts two assignments of error with regard to the district court's disposition of his postconviction claims relating to the prosecutors' ex parte communications with the trial judge. We address each assignment in turn.

(i) Assignment of Error F: Ex Parte Communications

Lotter assigns, restated, that the district court erred when it failed to grant an evidentiary hearing and vacate the convictions based on the improper ex parte communications between the trial judge and the prosecution that were conducted in violation

of the Nebraska Code of Judicial Conduct and the 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution.

The district court held that an evidentiary hearing was not required on Lotter's postconviction claim that his constitutional rights were violated by ex parte communications at his trial, because the issue was decided by this court on direct appeal and therefore not subject to relitigation in a postconviction proceeding. Lotter concedes that this issue was raised and decided on direct appeal, but contends that our analysis was incorrect. He argues that we failed to recognize that the trial judge was required to disclose the ex parte communication pursuant to Neb. Code of Jud. Cond., Canon 3E(3) (rev. 2000), and that it was not the duty of Lotter's counsel to discover it.

[18,19] We are not persuaded by Lotter's argument that we incorrectly decided this issue on direct appeal. Moreover, we subsequently clarified that the *Barker* recusal rule, which states that " 'a judge, who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding, must recuse himself or herself from the proceedings when a litigant requests such recusal,' " "is premised on evidentiary principles and judicial ethics" and "is not a constitutional right in and of itself." *State v. Ryan*, 257 Neb. 635, 651-52, 601 N.W.2d 473, 486-87 (1999), quoting *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988). For postconviction relief to be granted under Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), the claimed infringement must be constitutional in dimension. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). In our supplemental opinion in Lotter's direct appeal, we specifically considered whether the ex parte communications relating to the Nissen sentencing agreement violated Lotter's constitutional rights and concluded that they did not. Upon review, we conclude that this determination was correct. Accordingly, the district court did not err in denying postconviction relief without an evidentiary hearing as to this issue which was considered and resolved against Lotter in his direct appeal.

(ii) Assignment of Error G: Duty to Move for Trial Judge's Recusal

Lotter assigns, restated, that the district court erred when it failed to grant an evidentiary hearing and vacate the convictions

based on the Nebraska Supreme Court's creation and retroactive application of a duty to move for the trial judge's recusal because of ex parte communications, in violation of the right to proper notice of the law provisions of the Due Process Clause of the 14th Amendment and the decisions in *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964), and *Rogers v. Tennessee*, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001), and their progeny.

In Lotter's direct appeal, we did not reach the issue of whether the trial judge was required to recuse himself because Lotter did not request recusal. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999). Lotter claimed in the second ground of his operative postconviction motion that his constitutional rights were violated because our opinion "creat[ed] a duty on the part of trial counsel to move for the trial judge's recusal . . . when then existing statutory and case law imposed no such duty on a litigant or his counsel." The district court denied this postconviction claim without an evidentiary hearing.

The basic premise of Lotter's claim that we created a "new duty" in his direct appeal is simply incorrect. The rule we applied in the direct appeal was clearly stated in at least two prior opinions involving the issue of recusal of a trial judge in a criminal case based upon ex parte communications with the prosecution. That rule, first articulated in *State v. Barker*, 227 Neb. at 847, 420 N.W.2d at 699, provides that "a judge, who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding, must recuse himself or herself from the proceedings *when a litigant requests such recusal.*" (Emphasis supplied.) We reiterated this rule in *State v. Jenson*, 232 Neb. 403, 440 N.W.2d 686 (1989), holding that recusal was not required in that case because the record did not establish that an ex parte communication had taken place and that even if it had, the defendant made no request for recusal. With respect to the lack of a request, we cited the well-established principle that "[o]ne cannot know of improper judicial conduct, gamble on a favorable result by remaining silent as to that conduct, and then complain that he or she guessed wrong and does not like the outcome." *State v. Jenson*,

232 Neb. at 405, 440 N.W.2d at 688. We cited and relied upon *Barker* and *Jenson* in Lotter's direct appeal and thus clearly did not create a "new rule" with constitutional implications.

Moreover, as noted, the *Barker* rule does not confer a constitutional right in and of itself. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). In our supplemental opinion in Lotter's direct appeal, we specifically determined that Lotter's constitutional rights were not impaired by virtue of the fact that the trial judge did not recuse himself. *State v. Lotter*, 255 Neb. 889, 587 N.W.2d 673 (1999). For these reasons, this assignment of error is without merit.

(d) Ineffective Assistance of Counsel

Lotter alleged in the third and fourth grounds of his operative postconviction motion that he received ineffective assistance of trial counsel in violation of his rights under the 6th and 14th Amendments to the U.S. Constitution and article 1, § 11, of the Nebraska Constitution. After conducting an evidentiary hearing on these allegations, the district court denied postconviction relief.

[20] In order to establish whether a defendant was denied effective assistance of counsel, he or she must ordinarily demonstrate that counsel was deficient; that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. Moreover, the defendant must make a showing that he or she was prejudiced by the actions or inactions of his or her counsel; that is, the defendant must demonstrate with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002); *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002); *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001). Lotter's assignment of error with respect to the resolution of his ineffective assistance of counsel claims by the district court is divided into two subparts, which we consider in turn.

(i) Assignment of Error H.1.: Failure to Move for Trial Judge's Recusal

Lotter assigns, restated, that the district court erred when it failed to vacate the convictions and sentences of death based on

the ineffective assistance of trial counsel in violation of the 6th and 14th Amendments to the U.S. Constitution because trial counsel failed to move for the recusal of the trial judge following the trial judge's improper ex parte communications with the prosecution.

Lotter argues that if his trial counsel was required to move for recusal of the trial judge in order to preserve the issue of improper ex parte communications, discussed above, counsel was ineffective in not doing so. If counsel had moved for recusal under *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), and the motion had been granted, a different judge would have presided over the trial. If the motion had been made and denied, the trial would have proceeded exactly as it did. In any event, the failure to move for recusal was prejudicial to Lotter only if it can be shown that the presiding trial judge was biased, thereby depriving Lotter of a fair trial.

[21] 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. *State v. Harrison*, 264 Neb. 727, 651 N.W.2d 571 (2002); *State v. Long, supra.* In our supplemental opinion in Lotter's direct appeal, we wrote:

> "While the threat to the impartiality of the trial judge in this case . . . would be sufficient under Nebraska law to require the judge's recusal upon request, it is not sufficient, under the Due Process Clause, to suggest that the trial judge 'had such a strong personal or financial interest in the outcome of the trial that he was unable to hold the proper balance between the state and the accused.'. . .
>
> "Moreover, our comprehensive review of the record in this case reveals no evidence of actual bias on the part of the trial court. Absent an instance of actual bias on the part of the trial court, we determine that Lotter's due process right to a fair and impartial judge was not violated. . . ."

(Citations omitted.) *State v. Lotter*, 255 Neb. 889, 892, 587 N.W.2d 673, 675 (1999). This determination necessarily leads to the conclusion that Lotter could not have been prejudiced by any failure on the part of his trial counsel to move for the recusal of

the trial judge. The fact that no motion for recusal was made therefore cannot serve as the basis of a claim that trial counsel was constitutionally ineffective. This assignment of error is without merit.

(ii) Assignment of Error H.2.: Failure to Make Proper Motions and Objections

Lotter assigns, restated, that the district court erred when it failed to vacate the convictions and sentences of death based on the ineffective assistance of trial counsel, in violation of the 6th and 14th Amendments to the U.S. Constitution, because trial counsel failed to make proper objections and motions for mistrial following offers of inadmissible evidence, misconduct by the prosecution, and improper arguments by the prosecution.

In his postconviction motion, Lotter asserts seven instances in which his trial counsel allegedly failed to interpose the appropriate objection or motion during trial. Several of these instances were the basis of assignments of error on direct appeal which we rejected on the ground of waiver because no timely objection or motion had been made. Lotter now argues that "trial counsel's inaction resulted [in] prejudice when . . . Lotter's case was affirmed on direct appeal." Brief for appellant at 54. However, in order to establish that counsel was *ineffective* in not making a motion or objection at trial, Lotter must first establish that the motion or objection would have been meritorious. Assuming as we must that the trial court would have sustained a meritorious objection or motion, the correct prejudice analysis is then whether there is a reasonable probability that but for counsel's allegedly deficient performance, i.e., the failure to object or move for mistrial, the result of the trial would have been different. See, *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002); *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

a. Questioning About "[S]tormy [R]elationship"

Rhonda McKenzie testified for the State at Lotter's trial. McKenzie was Lotter's girl friend at the time of the homicides. During recross-examination, Lotter's counsel asked, "Now, you and [Lotter] have had kind of a stormy relationship, and you've had your arguments. He's yelled at you. Right?" McKenzie responded "Correct." Lotter's counsel then asked if Lotter had

gotten mad at her because he did not think she was telling the truth, to which McKenzie also responded affirmatively. On redirect, the State asked, "Now, this stormy relationship is a nice euphemism for the physical abuse he's inflicted on you . . . isn't it?" Lotter's counsel immediately objected that the comment was improper, prejudicial, and irrelevant, and the trial judge immediately sustained the objection.

In his direct appeal, Lotter assigned that the above question relating to physical abuse by Lotter constituted prosecutorial misconduct that should result in a mistrial. Noting that Lotter's counsel did not move for a mistrial, we held that he had waived the right to assert on appeal that the trial court erred in not declaring a mistrial. Lotter now asserts that the failure to move for a mistrial was ineffective assistance of counsel.

At the evidentiary hearing, trial counsel testified that he had not moved for a mistrial after the "stormy relationship" question because he did not regard the question itself as damaging at that point in his trial strategy. He admitted that he did move for a mistrial at other times during the trial and was aware of the importance of making the motion, but he noted that to continually move for a mistrial in circumstances where the motion was unlikely to be granted "is sometimes counterproductive."

[22-24] In determining whether counsel's performance was deficient, the standard is whether an attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the defense of a criminal case. *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002). When considering whether a counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *State v. Al-Zubaidy, supra.* Trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Al-Zubaidy, supra.*

The district court determined that Lotter's trial counsel made a sound tactical decision not to move for a mistrial in this circumstance, because it was improbable that a mistrial would have been granted and the motion would have highlighted the comment further from the jury's perspective. We agree with this

analysis and conclude that the decision not to move for a mistrial at this juncture of the trial did not constitute deficient performance on the part of defense counsel.

b. Cross-Examination About Witnesses "[L]ying"

While cross-examining Lotter at trial, the prosecutor repeatedly asked questions relating to the credibility of various prosecution witnesses. The prosecutor asked Lotter several times whether another witness was lying when he or she testified in a manner that conflicted with Lotter's testimony. Lotter's trial counsel did not object to this line of questioning. On direct appeal, we held that the absence of an objection precluded Lotter from asserting that the trial court erred in admitting the testimony.

At the evidentiary hearing in this postconviction proceeding, Lotter's trial counsel explained that he did not object in part because of "some ethical considerations as to how far I could go in assisting Mr. Lotter in those responses" and also because Lotter was handling the prosecutor's questions well. In its analysis of this issue, the district court found that counsel was deficient for not objecting, as it is improper under Nebraska law for a party to ask a witness to comment on whether another witness is lying or telling the truth. See Neb. Rev. Stat. § 27-608 (Reissue 1995). The court held, however, that Lotter was not prejudiced by this cross-examination.

Lotter now argues that "[t]he district court was in error in examining the trial record when the question is whether the failure was prejudicial to . . . Lotter's appeal." Brief for appellant at 57. As noted above, the prejudice analysis conducted by the district court correctly focused upon whether there was a reasonable probability that the failure of trial counsel to object to these questions affected the outcome of the trial. We agree with its conclusion that it did not.

c. Prosecutor's Statements During Closing Argument

Lotter contends that during the State's closing argument at trial, the prosecutor improperly argued the terms of Nissen's agreement and referred to Lotter as "evil." During his argument, the prosecutor noted with respect to Nissen that "[t]here's no evidence that he's gonna get out in six months" and referred to

Nissen's testimony that he was going to spend the rest of his life in prison. The prosecutor also stated:

> Lotter can only be described in one word. And that word is evil. Evil to put a bullet in the — someone's head because she had the audacity to tell on him. To talk about — To make a rape complaint. How dare she make a rape complaint. He puts a bullet in her head. And it's evil shot Lisa Lambert and then evil that shot Phillip DeVine as he begged for his life, and then went back in that other bedroom and made sure, under the chin and a second shot through Lisa Lambert's head. That's what we're dealing with here. You bet we're dealing with evil. But the evil's on trial. Nissen's trial is done; Nissen's not on trial here. This is evil and this is guilty of seven charges.

On direct appeal, we held that because trial counsel did not object to the comments and move for a mistrial, any claim of reversible error was waived.

Trial counsel testified in the postconviction proceeding that he thought the comment referring to Lotter as "evil" was a characterization of Lotter's actions and was only marginally objectable, and thus he made no objection. The district court held that the comments about Nissen were proper argument, that the reference to "evil" was "no more than hyperbole resulting in harmless prejudice," and that no substantial miscarriage of justice resulted. We conclude that trial counsel's performance in this regard was neither deficient nor prejudicial.

d. Nissen's Prior Statements

At trial, Investigator Roger Chrans of the Nebraska State Patrol was called as a witness by Lotter. On direct examination, Chrans was asked questions about two statements made by Nissen to investigators within months of the homicides. Chrans testified that in these statements, Nissen did not admit to stabbing anyone. On cross-examination, the State asked Chrans whether Nissen had stated in a magazine article that he had stabbed Brandon and that Lotter had shot the victims. This article was not in evidence. After Chrans responded affirmatively, Lotter's counsel objected but did not move to strike the response. Chrans also testified on cross-examination, without objection,

that Nissen's trial testimony was consistent with prior statements Nissen had made to others. The State asked specific questions relating to Nissen's two earlier statements made to the investigators within months of the homicides, and Lotter's counsel did not object. The questions and answers generally indicated that Nissen's earlier statements were consistent with his trial testimony.

On direct appeal, Lotter assigned as error the introduction of the prior statement of Nissen in the magazine article. Noting that counsel did not move to strike the testimony after objecting, we held that any error was waived. In his motion for postconviction relief, Lotter alleged that his counsel was ineffective for failing to move to strike the testimony concerning the magazine article. At the postconviction hearing, Lotter's trial counsel testified that he did not move to strike this testimony because he thought it was somewhat beneficial in that it demonstrated that Nissen repeatedly changed his story. He further testified that he did not object to testimony about Nissen's prior consistent testimony because it demonstrated a pattern of Nissen's lying. In addition, the record is clear that Lotter's counsel initially adduced testimony relating to Nissen's prior statements. Based on this evidence and the deference we are required to give to counsel's strategic decisions during trial, we conclude that trial counsel did not perform deficiently in this regard. Moreover, Lotter has failed to demonstrate a reasonable probability that the result of his trial would have been different even if such testimony had been stricken.

e. Testimony That Nissen Was Convicted of Same Murders

The State called Chrans as a witness during its case in chief. Chrans was used to establish a chain of custody for evidence. In response to a question in this context, Chrans testified that he relinquished possession of the gun used in the homicides during the "State versus Marvin Nissen trial." During his direct examination, Nissen testified that he was present at the location of the homicides, that Lotter shot all three victims, and that Nissen stabbed Brandon. Nissen then testified that he had an agreement that he would be sentenced to three life terms. During closing, the prosecutor stated that Nissen testified that he was convicted of one first degree murder and two second degree murders. Lotter

argues that we refused to address these improper references as plain error on direct appeal because no objection was made.

Trial counsel testified at the evidentiary hearing that he was aware of trial testimony suggesting that Nissen had been convicted of the same murders and that at least one Nebraska case had been reversed based upon evidence of a codefendant's conviction. He stated that he did not object to this evidence because he used Nissen's actions in not testifying at his own trial during his cross-examination of Nissen. In this regard, trial counsel stated: "Our decision was that you could not effectively cross-examine . . . Nissen and not address the fact that he had been convicted of one count of first-degree murder and two counts of second-degree murder."

The trial references cited by Lotter do not explicitly state that Nissen was convicted of the same murders. Moreover, trial counsel explained that he decided not to object to testimony on this subject based upon trial strategy. His performance was not deficient and affords no basis for a claim of ineffective assistance.

f. Cross-Examination of Larry Schott on Prior Convictions

Larry Schott testified on behalf of Lotter. During his direct examination, he testified that he had previously been incarcerated on misdemeanor convictions. On cross-examination, the State elicited details of each prior conviction for dishonesty. On recross-examination, the State elicited testimony from Schott that certain of his prior convictions were for forgery and false use of a financial instrument. Lotter attempted to raise the inadmissibility of this evidence on direct appeal, but we refused to address it because counsel did not object to the questions.

At the postconviction evidentiary hearing, Lotter's counsel acknowledged his awareness that the State's questioning of Schott was improper, but stated that he did not object to the questions because he was attempting to contrast Schott's prior criminal history with that of Nissen. Based on this testimony, trial counsel made a reasonable strategic decision not to object and his performance was not deficient. Moreover, Lotter has shown no prejudice, and thus he has failed to establish ineffective assistance of counsel on this ground.

g. Testimony of Dr. Reena Roy

Dr. Reena Roy, a forensic serologist, testified on behalf of the State at Lotter's trial. Roy performed a presumptive test on the gloves found with the murder weapons and confirmed that there was some blood present. She testified that she did not conduct further tests to determine if the blood was human because she had received a letter from "the defense attorney" requesting that she save the sample for independent analysis. Lotter sought to raise this issue as plain error on direct appeal, but we declined to address it.

At the postconviction evidentiary hearing, Lotter's trial counsel testified that he did not object to Roy's testimony despite his awareness of case law on the issue of its admissibility. He stated that he did not object because he elected to establish on cross-examination that it was Nissen's counsel who sent the letter to Roy, noting, "That [letter] then fed into my theory that it was . . . Nissen who was trying to keep the evidence from the jury and from law enforcement by stopping Dr. Roy from examining the samples." Based on this evidence, we conclude trial counsel made a reasonable strategic decision, and in any event, Lotter has failed to demonstrate any prejudice. Lotter is not entitled to postconviction relief with respect to this or any of his ineffective assistance of counsel claims.

(e) Cruel and Unusual Punishment

Lotter alleged in the fifth ground of his operative postconviction motion that death by electrocution will subject him "to needless agony, physical suffering, and degradation in violation of the Eighth and Fourteenth Amendments to the United States Constitution." Citing two 1999 cases from other jurisdictions, Lotter also alleges that death by electrocution as authorized and practiced in Nebraska and other states "has resulted in documented and repeated malfunctioning resulting in ghastly spectacles of violent disfigurement so as to constitute wanton physical, psychological, and moral cruelty in violation of the Eighth and Fourteenth Amendments to the United States Constitution." The district court denied this postconviction claim without an evidentiary hearing.

(i) Assignment of Error I: Constitutionality of Death By Electrocution

Lotter assigns, restated, that the district court erred when it failed to grant an evidentiary hearing and vacate the death sentence because execution by judicial electrocution is in violation of the cruel and unusual punishment protections provided by the 8th and 14th Amendments to the U.S. Constitution.

[25] A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *Hall v. State*, 264 Neb. 151, 646 N.W.2d 572 (2002); *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002). We rejected an Eighth Amendment claim in Lotter's direct appeal, based upon our prior holdings that "Nebraska's death penalty statutes do not constitute cruel and unusual punishment" under the federal or state Constitution. *State v. Lotter*, 255 Neb. 456, 511, 586 N.W.2d 591, 629 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999).

[26,27] 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. Harrison*, 264 Neb. 727, 651 N.W.2d 571 (2002); *State v. Gamez-Lira*, 264 Neb. 96, 645 N.W.2d 562 (2002). 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. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002); *State v. Dean, supra*. Lotter's motion for postconviction relief includes no specific factual allegations which would warrant reconsideration of our prior decisions holding that death by electrocution as administered in this state is not cruel and unusual punishment. See *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). Accordingly, the district court did not err in denying this claim for postconviction relief without an evidentiary hearing.

III. CONCLUSION

In summary, we conclude that because Lotter's convictions and sentences had become final prior to the decision in *Ring v.*

Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), they are not affected by the new procedural rule of law established by *Ring*. We therefore deny Lotter's motions filed in this court requesting that the causes be remanded for resentencing. Based upon our review of the record, we conclude that the district court did not err in denying Lotter's various claims for postconviction relief, as well as his motions for writ of error coram nobis and for new trial. The judgments entered by the district court in each of the cases included in this consolidated appeal are hereby affirmed.

AFFIRMED.

BARBARA MORRIS, APPELLEE, V. NEBRASKA HEALTH SYSTEM, APPELLANT, AND SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., AND UNIVERSITY OF NEBRASKA MEDICAL CENTER, APPELLEES.

664 N.W.2d 436

Filed July 11, 2003. No. S-01-1194.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.
3. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation: Time.** The date of injury for an occupational disease is that date upon which the accumulated effects of the disease manifest themselves to the point the injured worker is no longer able to render further service. It is on that date that the occupational disease is said to manifest itself to the level of disability permitting recovery for an occupational disease under the Nebraska Workers' Compensation Act.
6. **Workers' Compensation: Appeal and Error.** The discontinuation of employment standard as is employed by appellate courts in repetitive trauma cases is inapplicable to cases involving an occupational disease.

7. **Workers' Compensation: Liability.** In an occupational disease case, liability is most frequently assigned to the carrier who was covering the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease. The employer or insurer at the time of the most recent exposure which bears a causal relation to the disability is generally liable for the entire compensation.
8. **Workers' Compensation: Liability: Words and Phrases.** The last injurious exposure, to be injurious, must bear a causal relationship to the disease. However, this means simply that the exposure must be of the type which could cause the disease, given prolonged exposure. An exposure which will support imposition of liability under this rule need not be proved to have been a "material contributing cause" of the disease.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and HANNON and MOORE, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed.

Robert D. Mullin, Jr., and William J. Birkel, of McGrath, North, Mullin & Kratz, for appellant.

James E. Harris and Britany S. Shotkoski, of Harris, Feldman Law Offices, for appellee Barbara Morris.

Don Stenberg, Attorney General, and Hobert B. Rupe for appellee University of Nebraska Medical Center.

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

HENDRY, C.J.

INTRODUCTION

Nebraska Health System (NHS) seeks further review of the decision of the Nebraska Court of Appeals in *Morris v. Nebraska Health System*, No. A-01-1194, 2002 WL 31360609 (Neb. App. Oct. 22, 2002) (not designated for permanent publication). NHS contends the Court of Appeals erred in affirming the trial judge's finding that Barbara Morris' date of injury was the day she ceased employment with NHS due to her latex allergy. NHS also contends the Court of Appeals erred in affirming the trial judge's finding that Morris' last injurious exposure to latex occurred while employed by NHS.

FACTUAL BACKGROUND

Morris was initially employed by the University of Nebraska Medical Center (UNMC) from 1983 through 1991. She did not

work full time in 1992 and 1993 due to reasons unrelated to the issues in this case. In 1993, Morris returned to work at UNMC in the radiation oncology department. In June 1998, UNMC and Clarkson Hospital merged to form NHS. Although Morris continued working in the same position after the merger, her employer was now NHS.

In 1994, Morris reduced her work schedule to 32 hours per week, as she was experiencing fatigue and shortness of breath. In the spring of 1998, prior to commencing employment with NHS, Morris further limited her work schedule to 24 hours per week due to continuing symptoms later associated with a latex allergy. On October 9, 1998, while performing employment-related functions, Morris suffered a reaction to latex that required her to go to the emergency room to receive medical treatment. Morris ceased employment with NHS after this incident.

Morris subsequently filed a petition seeking benefits with the compensation court. A hearing was held on November 27, 2000. Morris testified and submitted, inter alia, medical records of several doctors who treated her, as well as a vocational rehabilitation counselor's evaluation and earnings capacity assessment. At this hearing, the parties stipulated that Morris suffered from a "Type I" work-related latex allergy.

Morris testified that while working at UNMC in the 1980's, her hands would break out in a rash after being exposed to the powder in latex gloves. As early as 1994, Morris began experiencing fatigue and shortness of breath. Morris testified that by 1996, existing gastrointestinal problems began to worsen. Prior to 1998, Morris also began experiencing hoarseness in her voice. Morris' latex allergy was first diagnosed on March 22, 1997, while she was employed by UNMC. However, the record indicates that the connection between Morris' latex allergy and her decline in health was not established until after Morris ceased employment in October 1998.

Dr. Ronald C. McGarry worked with Morris in the radiation oncology department and was also one of Morris' treating physicians. Dr. McGarry stated in a letter dated October 28, 1998, that Morris' latex allergy would have a "negative impact on her ability . . . to earn a good livelihood." Dr. McGarry also stated that "other employment will be difficult to obtain without exposure to

the wide variety of latex-like compounds in the environment." In a second letter, dated April 8, 2000, Dr. McGarry indicated that he worked closely with Morris until she withdrew from the radiation oncology department due to her health and that he had "directly observed her problems and [knew of] her high titre of reactivity to latex." Dr. McGarry also reiterated his concern that Morris would find it difficult to "obtain employment in a safe environment." In a third letter, dated October 16, 2000, Dr. McGarry again indicated he had the opportunity to directly observe Morris' "decline in health," and opined that Morris' latex allergy "makes it all but impossible for her to perform her nursing career."

Finally, in a report dated October 16, 2000, the vocational rehabilitation counselor opined that Morris was an "odd lot worker, since suitable work would not be regularly and continuously available to her."

On February 21, 2001, the trial judge of the Workers' Compensation Court entered an award finding that Morris' disability began on October 9, 1998, while she was employed by NHS. Although finding that Morris was first diagnosed with a latex allergy while employed by UNMC, the judge determined that Morris "sustained an accident and injury on October 9, 1998, at the time she was employed by [NHS]" and that as a result, Morris was permanently and totally disabled.

On October 3, 2001, a review panel of the compensation court affirmed the trial judge's decision. NHS timely appealed, and the Court of Appeals affirmed in an unpublished opinion. *Morris v. Nebraska Health System*, No. A-01-1194, 2002 WL 31360609 (Neb. App. Oct. 22, 2002) (not designated for permanent publication). In that opinion, the Court of Appeals determined that the date of injury in an occupational disease case is the date on which the employee's diagnosed condition progresses to the point where his or her employment, or type of employment, ceases. Therefore, the Court of Appeals concluded that the trial judge was not clearly wrong in finding that Morris' date of injury was October 9, 1998. The Court of Appeals further determined that Morris' last injurious exposure to latex occurred on that same date, which was during her employment with NHS. NHS petitioned for further review, which this court granted.

ASSIGNMENTS OF ERROR

NHS contends, rephrased, that the Court of Appeals erred in affirming the trial judge's findings that (1) Morris' injury date was October 9, 1998, and (2) Morris' October 9, 1998, exposure to latex was injurious under the "last injurious exposure" rule. NHS argues that such findings are inconsistent with our holdings in *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999), and *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001). NHS does not assign as error the trial judge's finding that Morris is permanently and totally disabled.

STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award. *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003); *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002).

[2,3] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002); *Vonderschmidt, supra*. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Frauendorfer, supra*.

[4] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002); *Vega, supra*.

ANALYSIS

DATE OF INJURY

In its first assignment of error, NHS argues the Court of Appeals erred in affirming the trial judge's finding that the date of

Morris' injury was October 9, 1998. NHS contends that in so determining, the Court of Appeals erroneously established a new standard for the determination of the date of injury in an occupational disease case.

We first addressed the date of injury in an occupational disease case in *Hauff v. Kimball*, 163 Neb. 55, 77 N.W.2d 683 (1956). We stated that

> "[w]here an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be 'injured' only when the accumulated effects of the substance manifest themselves, which is when the employee becomes disabled and entitled to compensation; and the 'date of injury', within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred, and the six months' period of limitations runs from that date and not from the time the employee has knowledge of the disease."

163 Neb. at 61, 77 N.W.2d at 687. We concluded that under the facts presented, Hauff's injury, thus his disability, manifested itself in July 1954, when Hauff was prohibited from continuing his employment due to employment-related pneumoconiosis silicosis.

Similarly, in *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981), we concluded that Osteen's disability manifested itself on the day he entered the hospital, February 1, 1977. That date was Osteen's last day at work, as he was subsequently unable to continue in his employment due to an abdominal disorder, later determined to be employment-related peritoneal mesothelioma.

We were again faced with determining when an employee's occupational disease manifested itself in disability in *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995). We concluded that "the date that determines liability is the date that the employee becomes disabled from rendering further service." *Id.* at 719, 529 N.W.2d at 789 (citing *Lowery v. McCormick Asbestos Co.*, 300 Md. 28, 475 A.2d 1168 (1984)). We then determined that Hull's disability manifested itself in March 1989, despite the fact

that Hull continued to work limited hours in his practice of dentistry until January 1991. Our determination was based on the fact that it was in March 1989 that both Hull's dermatologist and pulmonary specialist advised him that he should cease working due to his contact dermatitis and pulmonary problems. See, also, *Ross v. Baldwin Filters*, 5 Neb. App. 194, 557 N.W.2d 368 (1996).

[5] When considered collectively, *Hauff*, *Osteen*, and *Hull* set forth the rule that in an occupational disease context, the "date of injury" is that date upon which the accumulated effects of the disease manifest themselves to the point the injured worker is no longer able to render further service. It is on that date that the occupational disease is said to manifest itself to the level of disability permitting recovery for an occupational disease pursuant to the Nebraska Workers' Compensation Act. Given the records before this court in *Hauff* and *Osteen*, the "date of injury" happened to coincide with the actual date the respective workers ceased employment, as there was no medical evidence to suggest that either worker was advised to cease employment prior to such date. In *Hull*, the date of injury was determined to be March 13, 1989, the date Hull's dermatologist recommended that Hull cease practicing dentistry, even though Hull continued his practice on a reduced basis until 1991. See, also, *Watson v. Omaha Pub. Power Dist.*, 9 Neb. App. 909, 622 N.W.2d 163 (2001) (date of disability was date on which worker's employment with prior employer ceased due to testimony indicating that worker was unable to again obtain work in that field due to medical restrictions); *Ross, supra* (date of disability was determined to be date on which it was recommended that worker cease employment due to occupational disease).

The record in this case reveals that while Morris modified her working conditions due to her latex allergy, she was able to continue working until October 9, 1998, when, during the performance of her duties with NHS, she suffered a reaction to latex which required her to go to the emergency room for treatment. It was only after this exposure that the causal connection between Morris' latex allergy and her symptoms was finally made by her physicians and that she ceased employment with NHS. The record also contains competent evidence to support the trial judge's determination that Morris' date of injury was

October 9, the date Morris ceased employment with NHS. As the Court of Appeals noted:

> In this case, the trial judge determined that Morris' date of injury was October 9, 1998, because "[i]t was at that time that [Morris'] claimed condition progressed to the point where she could no longer continue her employment, even at reduced hours." Morris could no longer work as a nurse as of October 9. The medical evidence establishes that it would be "all but impossible for [Morris] to perform her nursing career." Additionally, the evidence shows it would be difficult for Morris to find *any* job because of the wide variety of latex compounds in the environment.

Morris v. Nebraska Health System, No. A-01-1194, 2002 WL 31360609 at *4 (Neb. App. Oct. 22, 2002) (not designated for permanent publication).

NHS contends, however, that this court's decisions in *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999), and *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001), enunciate a new legal standard in occupational disease cases. We disagree. In *Vonderschmidt*, we stated that

> cessation of employment is a requirement regardless of whether the injury arises from an accident or an occupational disease. In either event, the injury must be such that the employee discontinues employment and seeks medical treatment. . . .
>
> . . . .
>
> Both accidental injuries and occupational diseases have specific requirements which must be met in order for compensation to be received. [Citation omitted.] One requirement is common to both. The injury must result in a disability, and the disability must be such that the employee can no longer perform the work required.

262 Neb. at 558, 635 N.W.2d at 410 (citing *Jordan, supra*). Specifically, we found in *Vonderschmidt* that a brief interruption in employment was sufficient to constitute a cessation of employment for purposes of entitlement to workers' compensation benefits in a repetitive trauma injury case. NHS argues that under the *Vonderschmidt* standard, Morris' date of injury was in 1996 or 1997, when she "stop[ped] work and [sought] medical treatment."

262 Neb. at 558, 653 N.W.2d at 410. At that time, NHS emphasizes, Morris was still employed by UNMC.

[6] *Jordan* and *Vonderschmidt* are inapplicable, as they are both repetitive trauma cases. This court has consistently analyzed repetitive trauma injuries as accidents within the meaning of Neb. Rev. Stat. § 48-151(2) (Reissue 1998), rather than occupational diseases. See *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991), *disapproved on other grounds, Jordan, supra* (analyzing repetitive trauma injuries as accident rather than occupational disease). Accordingly, our discussion in *Vonderschmidt* of the "discontinuation of employment" standard was framed in the context of establishing an identifiable point in time when an accident occurs "suddenly and violently" within the meaning of § 48-151(2). However, such an inquiry is unnecessary in an occupational disease case and, as such, has no application to the issues presented by this case. Any suggestion in either *Jordan* or *Vonderschmidt* that the "discontinuation of employment" standard is the same for both repetitive trauma and occupational disease cases is dicta and contrary to this state's line of occupational disease case law.

We determine that the Court of Appeals did not err in concluding that the trial judge of the Workers' Compensation Court was not clearly wrong in finding Morris' date of injury to be October 9, 1998. NHS' first assignment of error is without merit.

LAST INJURIOUS EXPOSURE RULE

In its second assignment of error, NHS argues the Court of Appeals erred in affirming the trial judge's conclusion that Morris' last injurious exposure to latex occurred while she was employed by NHS.

[7,8] This court most recently discussed the last injurious exposure rule in *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 720, 529 N.W.2d 783, 789 (1995):

> In the case of occupational disease, liability is most frequently assigned to the carrier who was covering the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease. The employer or insurer at the time of the most

> recent exposure which bears a causal relation to the disability is generally liable for the entire compensation.

This court addressed the issue of the necessary causal relation in greater detail in *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 290-91, 307 N.W.2d 514, 520 (1981):

> The last injurious exposure, to be "injurious," must indeed bear a causal relationship to the disease. However, according to the authorities, this means simply that the exposure must be *of the type which could* cause the disease, given prolonged exposure. As described in *Mathis v. State Accident Insurance Fund*, 10 Or. App. 139, 499 P.2d 1331 (1972), an exposure which will support imposition of liability under this rule need not be proved to have been a "material contributing cause" of the disease. Indeed, to so require would bring the employee back to Square One by requiring "proof of the unprovable and litigation of the unlitigable." *Holden v. Willamette Industries, Inc.*, [28 Or. App. 613, 560 P.2d 298 (1977)].

Thus, to determine Morris' last injurious exposure, we must first determine the date of disability, then search backward to find the last causal relationship between the exposure and the disability. *Hull, supra.* See 9 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 153.02[1] (2003).

Having concluded that the trial judge did not err in finding Morris' date of injury, and thus the date of disability, to be October 9, 1998, we must now decide whether Morris' exposure to latex on October 9 was "of the type which could cause the disease, given prolonged exposure." See *Osteen*, 209 Neb. at 290, 307 N.W.2d at 520.

NHS contends the medical evidence with respect to Morris' latex exposure while employed by NHS was insufficient to impose liability upon NHS. In particular, NHS directs us to letters written by Dr. McGarry with respect to Morris' condition. NHS acknowledges that Dr. McGarry noted a " 'progressive worsening of [Morris'] health difficulties in the work environment.' " Brief for appellant in support of petition for further review at 6. However, NHS argues that in a letter dated April 8, 2000, Dr. McGarry stated he stopped working with Morris in mid-1998, which would have been "before the alleged latex

exposure at NHS and presumably at or before the time that Morris's employment with NHS started." *Id.* Thus, NHS argues that "[h]is letter . . . offers no support for the claim that [Morris'] October 9, 1998 latex exposure while working for NHS resulted in a permanent worsening of her condition." *Id.*

Our review of the April 8, 2000, letter, however, suggests an equally plausible meaning. In particular, that same letter goes on to state that Dr. McGarry was familiar with Morris' condition and that he "worked closely with her until her health forced her to withdraw from the department." The record is undisputed that Morris did not "withdraw" from the department until after her latex exposure on October 9, 1998. Our review of all letters authored by Dr. McGarry supports a finding that Dr. McGarry both observed and treated Morris throughout her employment with NHS and that Morris' latex allergy worsened during that period of time.

In sum, the record indicates that Morris' employment as a nurse exposed her to various latex products. Morris' undisputed testimony was that such exposure continued while in the employ of NHS. Moreover, the parties to this action stipulated that Morris' latex allergy was work related. Finally, the letters from Dr. McGarry stated, inter alia, that "by virtue of [his] extensive background in Immunology and general medical practise [sic] along with the fact that [he had] had the opportunity to directly observe . . . Morris' decline in health on multiple occasions over a period of time prior to her retirement from nursing," Dr. McGarry opined that Morris' latex allergy was "an occupationally induced problem that will prevent [Morris] from returning to her chosen profession indefinitely."

In also rejecting NHS' argument that the record did not support the trial judge's conclusion that Morris' last injurious exposure to latex occurred while employed at NHS, the Court of Appeals observed:

> NHS makes two arguments regarding why it should *not* be held liable for Morris' disability. First, NHS contends that there is no causation between the October 9, 1998, incident and Morris' disability. Second, NHS argues that Morris' allergic reaction on October 9 is only a temporary condition and not an "injurious exposure." Therefore, NHS

> argues that it should not be held liable for paying Morris' benefits. NHS bases its arguments on the opinion of Dr. Mary Wampler. In a letter dated June 29, 2000, Dr. Wampler opined that Morris' exposure to latex on October 9 "resulted in a temporary aggravation of a pre-existing latex allergy." Dr. Wampler also stated that Morris' allergic reaction ceased the following day and would not recur if she did not return to work.
>
> The trial judge recognized that Morris "exhibited most, if not all, symptoms associated with latex allergy . . . prior to June, 1998," during her employment with UNMC. But, the trial judge also found that Morris was able to continue her employment up until the incident on October 9, when Morris' condition "progressed to the point where she could no longer continue her employment.["]
>
> The trial judge's findings are supported by Dr. McGarry's letters indicating that Morris' latex allergy over a period of time contributed to her "decline in health." The trial judge's findings are also supported by evidence that shows Morris' latex allergy worsened from her exposure to latex in the early 1980's until October 9, 1998.

Morris v. Nebraska Health System, No. A-01-1194, 2002 WL 31360609 at *5 (Neb. App. Oct. 22, 2002) (not designated for permanent publication).

Our review of the record leads us to the same conclusion. The record supports the trial judge's finding that Morris' October 9, 1998, exposure bore the requisite causal relationship to Morris' disability. As such, the trial judge's finding that NHS was responsible for Morris' benefits was not clearly wrong and NHS' second assignment of error is without merit.

We recognize that this conclusion may seem harsh, as Morris was employed by NHS for only approximately 5 months. However, as we have stated, "[t]he law of averages . . . will spread the costs proportionately among insurers over time." *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 721, 529 N.W.2d 783, 789 (1995).

CONCLUSION

The trial judge did not err in finding that Morris' date of injury, and thus the date of disability, was October 9, 1998. Since Morris'

employment with NHS on that date exposed her to latex, under the last injurious exposure rule, NHS was properly held liable for Morris' compensation benefits.

AFFIRMED.

STEPHAN, J., not participating.

CITY OF YORK, APPELLANT, V. YORK COUNTY BOARD OF EQUALIZATION, APPELLEE.

664 N.W.2d 445

Filed July 11, 2003. No. S-02-498.

1. **Taxation: Judgments: Appeal and Error.** Decisions rendered by the Tax Equalization and Review Commission shall be reviewed by the court for errors appearing on the record of the commission.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Constitutional Law: Legislature.** Nebraska's Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature is free to act on any subject not inhibited by the constitution.
5. **Taxation: Property.** The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation.
6. **Taxation: Property: Words and Phrases.** Incidental use is defined as a use other than the primary use and is so minor or secondary in nature as not to distract from the primary use.

Appeal from the Nebraska Tax Equalization and Review Commission. Reversed and remanded with directions.

Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

Randy R. Stoll, York County Attorney, for appellee.

William G. Blake and Shanna L. Cole, of Pierson, Fitchett, Hunzeker, Blake & Katt, for amicus curiae League of Nebraska Municipalities.

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

WRIGHT, J.

NATURE OF CASE

The City of York (City) owns certain land adjacent to the York Municipal Airport, which land was leased to a private party for agricultural use. The York County Board of Equalization (Board) ruled that the leased property was not exempt from taxation. The Tax Equalization and Review Commission (TERC) affirmed the decision of the Board, and the City appealed.

SCOPE OF REVIEW

[1] Decisions rendered by TERC shall be reviewed by the court for errors appearing on the record of the commission. Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2000); *Marshall v. Dawes Cty. Bd. of Equal.*, 265 Neb. 33, 654 N.W.2d 184 (2002).

[2] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *City of Alliance v. Box Butte Cty. Bd. of Equal.*, 265 Neb. 262, 656 N.W.2d 439 (2003).

FACTS

The City is the owner of property located in York County, Nebraska, that is adjacent to the York Municipal Airport. The property consists of four tracts which are described as (1) the northeast quarter of Section 26, Township 11, Range 3; (2) the northwest quarter of Section 26, Township 11, Range 3; (3) the southeast quarter of Section 26, Township 11, Range 3; and (4) part of the southeast quarter of Section 23, Township 11, Range 3. The tracts comprise approximately 423.2 acres.

Approval for the airport was obtained from the Federal Aviation Administration (FAA) and the Nebraska Department of Aeronautics. According to the City's director of public works, 90 percent of the cost to acquire the airport property was funded by a federal grant. The City issued bonds to pay for its portion of the cost. At the time of the hearing before TERC, the bonded indebtedness had been satisfied and no bonds were outstanding. Under the federal grant-in-aid program, the City is required to

comply with provisions of federal law and advisory circulars of the U.S. Department of Transportation and the FAA.

The airport property is improved with a paved runway, as well as a number of hangars and other buildings, taxiways, and roads. These improvements are surrounded by the unimproved tracts at issue in this case. Pursuant to FAA regulations regarding erosion control, the City has two options concerning these unimproved tracts: It can seed and otherwise maintain the unimproved land at its own expense, or it can lease the property for restricted agricultural use. The City has elected to lease approximately 245 acres to a private party for agricultural use. Only these 245 acres were determined to be taxable by the Board, and only that property is at issue in this appeal.

Pursuant to Neb. Rev. Stat. § 77-202.12(1) (Cum. Supp. 2002), the York County assessor notified the City of her determination that the leased property was not being used or developed for a public purpose. The county assessor testified that she reviewed the lease and then sent a notice to the City stating that the property was income producing and therefore taxable because it was not being used for a public purpose. However, she testified that she was not aware of the FAA restrictions on buffer zones at the time she made her decision. After the county assessor made her determination, she received a directive from the state Property Tax Administrator indicating that the areas within the buffer zone would not be subject to taxation.

After the county assessor notified the City that the land at issue was taxable, the City filed a protest to the Board. The Board denied the protest, and the City appealed the denial to TERC.

The City argued before TERC that the primary purpose of the lease of the land surrounding the airport was to control erosion and wildlife, as recommended by the FAA. The City asserted that the agricultural use was incidental.

The City's public works director testified that it was required to maintain a buffer zone or hazard transition zone to clear the approach and takeoff of aircraft. FAA assurances that were part of the grant used to purchase the land required protecting the airport from hazards, and development was restricted within the area that was being farmed. FAA assurances also required that all revenues generated from the land be used for aviation purposes,

and all revenues generated from the lease of the land were placed in the airport budget.

The public works director stated that the lease of the property was awarded after the City completed a formal bidding process. The terms of the lease placed restrictions on the crops in accordance with the airport plan and prohibited livestock on the premises. The lease was subject to approval by the FAA and to the terms of the FAA-approved layout plan. The terms of the lease were from March 1, 2000, to February 2003, and the rent was $111.84 per acre, for a total of $27,400 per year. The public works director testified that the lease represented the fair market value for the land because it was based on a sealed bid process. He stated that if the land were not leased, the City would be required to use its own labor to maintain the land and control the weeds.

TERC found that the land at issue was leased to a private party for agricultural use and was in direct competition with all other land available for lease for agricultural use. TERC stated that the City had failed to demonstrate that the agricultural use of the property by a private party was a qualifying "public purpose" under Neb. Rev. Stat. § 77-202(1)(a) (Cum. Supp. 2000). TERC therefore affirmed the decision of the Board denying the City's protest.

ASSIGNMENTS OF ERROR

The City of York assigns as error: (1) TERC erred in finding that the use of the property did not qualify as a public purpose under § 77-202(1)(a); (2) TERC erred in finding that the primary use of the property was agricultural; (3) TERC erred in finding that the lease of the land to a private party for agricultural use is in direct competition with all other land available for lease for agricultural use; (4) TERC's findings and orders are contrary to Neb. Rev. Stat. §§ 3-206, 3-209, and 3-215 (Reissue 1997); (5) TERC's findings and orders conflict with the grant agreement, the FAA-approved airport layout plan, assurances from the FAA, and applicable federal statutes and regulations; and (6) TERC's findings and orders violate article VIII, § 1, of the Nebraska Constitution, which requires that real estate be taxed uniformly and proportionately.

ANALYSIS

Decisions rendered by TERC shall be reviewed by the court for errors appearing on the record of the commission. § 77-5019(5); *Marshall v. Dawes Cty. Bd. of Equal.*, 265 Neb. 33, 654 N.W.2d 184 (2002). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *City of Alliance v. Box Butte Cty. Bd. of Equal.*, 265 Neb. 262, 656 N.W.2d 439 (2003).

The statutes governing TERC create a presumption that the Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 603 N.W.2d 447 (1999) (construing Neb. Rev. Stat. § 77-1511 (Reissue 1996), currently at Neb. Rev. Stat. § 77-5016(7) (Cum. Supp. 2002)). This presumption remains until there is competent evidence to the contrary presented. See, *Firethorn Invest. v. Lancaster Cty. Bd. of Equal.*, 261 Neb. 231, 622 N.W.2d 605 (2001); *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999). Once the presumption has been rebutted, the burden shifts to the party requesting the exemption to prove its entitlement thereto. See *Pittman v. Sarpy Cty. Bd. of Equal., supra.* In this case, the City had the burden to prove that the predominant use of the property was for a public purpose.

TERC found that the assessor was unfamiliar with the rules and regulations of the U.S. Department of Transportation and the FAA, which restrict land use on and adjacent to airports. It also found that the assessor was unfamiliar with the restrictions imposed on the City as a recipient of federal grants. Based upon these findings, TERC concluded that the City had rebutted the presumption in favor of the Board. However, TERC concluded that the City failed to establish that the property qualified for an exemption under § 77-202(1)(a).

We are presented with the legal question of whether the above-described lease serves a public purpose. Questions of law arising during appellate review of TERC decisions are reviewed

de novo on the record. *City of Alliance v. Box Butte Cty. Bd. of Equal., supra.*

In 1998, Neb. Const. art. VIII, § 2, was amended to provide in part:

> (1) The property of the state and its governmental subdivisions shall constitute a separate class of property and shall be exempt from taxation to the extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental subdivision by this Constitution or the Legislature. To the extent such property is not used for the authorized public purposes, the Legislature may classify such property, exempt such classes, and impose or authorize some or all of such property to be subject to property taxes or payments in lieu of property taxes except as provided by law . . . .

This constitutional amendment was codified in § 77-202(1)(a), which provides:

> (1) The following property shall be exempt from property taxes:
>
> (a) Property of the state and its governmental subdivisions to the extent used or being developed for use by the state or governmental subdivision for a public purpose. For purposes of this subdivision, public purpose means use of the property (i) to provide public services with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and welfare . . . . Public purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose.

[4] Nebraska's Constitution "is not a grant, but, rather, is a restriction on legislative power, and the Legislature is free to act on any subject not inhibited by the constitution." *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 999, 644 N.W.2d 563, 570 (2002). This court has previously held:

> "It is the fundamental law of this state that the Legislature is vested with the taxing power without limit, subject only to restrictions contained in the Constitution. It is axiomatic therefore that the provisions of the Constitution in relation

> to taxation are not grants of power but are limitations on the taxing power of the state lodged in the Legislature. . . ."

Sandberg v. State, 188 Neb. 335, 340, 196 N.W.2d 501, 505 (1972), quoting *State ex rel. School Dist. of Scottsbluff v. Ellis*, 168 Neb. 166, 95 N.W.2d 538 (1959).

Prior to the 1998 amendment to the Nebraska Constitution, which removed some of the restrictions on taxing government property, the Legislature could not impose taxes on any government property. Pursuant to the amendment, to the extent the property is not used for a public purpose, the Legislature may classify it, exempt certain classes from taxation, and authorize some or all of the property to be subject to property taxes. The term "public purpose" means "use of the property (i) to provide public services . . . including . . . transportation." § 77-202(1)(a).

In 1945, the Legislature specifically declared that acquisition of land for the establishment and maintenance of municipal airports was a public function "exercised for a public purpose" and a matter of "public necessity." See § 3-206. Thus, the land acquired for the municipal airport has previously been declared to be exempt from taxation "to the same extent as other property used for public purposes." See § 3-209. All income received for operation of a municipal airport is also exempt. See *id.*

Section 3-206 provided:

> (1) The acquisition of any lands for the purpose of establishing airports or other air navigation facilities . . . (3) the . . . maintenance . . . and operation of airports and other air navigation facilities and (4) the exercise of any other powers herein granted to municipalities are hereby declared to be public, governmental and municipal functions, exercised for a public purpose, and matters of public necessity. Such lands and other property . . . used by such municipalities in the manner and for the purposes enumerated in sections 3-201 to 3-238 . . . are hereby declared to be acquired and used for public, governmental and municipal purposes and as a matter of public necessity.

The statutes governing airports were not expressly or impliedly repealed by the passage of the 1998 constitutional amendment or § 77-202(1)(a). It is therefore clear that airports owned and operated by municipalities are exempt from taxation.

[5,6] As noted above, the question is whether the lease of the land surrounding the airport served a public purpose. The leasing of property by a municipality to a private party is not exempt unless the lease is at fair market value for a public purpose. See § 77-202(1)(a). "The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation." *Doane College v. County of Saline*, 173 Neb. 8, 11, 112 N.W.2d 248, 250 (1961). Incidental use is defined as a use other than the primary use and is so minor or secondary in nature as not to distract from the primary use. See 350 Neb. Admin. Code, ch. 15, § 002.21 (2001).

It was not disputed before TERC that the lease was for fair market value. The property is leased for the purpose of maintaining the area surrounding the runways as a buffer zone as required by the FAA assurances, federal legislation, and state law. The lease ensures that the grounds will be properly maintained and that weeds will be controlled without the use of city labor or at the City's expense. The revenue generated from the rent is used to support the airport's operating expenses as required by the FAA and as provided by federal legislation. We conclude that the primary use of the land is as an airport buffer zone and that the agricultural use is incidental.

A similar situation was considered in *City of Winfield v. Board of County Commissioners*, 205 Kan. 333, 469 P.2d 424 (1970). In that case, the cities of Arkansas City and Winfield, Kansas, brought an action for recovery of taxes paid under protest on a part of the municipal airport consisting of irregular tracts planted to wheat under an oral lease. In 1967, the assessor placed the portion of the airport which the cities had orally leased on the tax rolls, contending that farming operations removed the land from the exemption provisions of Kansas law. The portion of the airport placed upon the tax rolls consisted of approximately 634 acres.

The board denied the cities' appeal, finding that the property was not being used exclusively for municipal purposes so as to bring it within the exemption provisions of the Kansas Constitution and Kansas law. The trial court reversed, concluding that the partial use made of the municipal airport premises for wheat farming was only incidental to its exclusive use as the public municipal airport.

The Kansas Supreme Court agreed. It concluded that since the ground was being operated as an airport facility pursuant to federal regulations, the cities' decision to permit the growing of wheat in the areas in question was not only a sound practice but was economically wise. The court concluded that it was merely incidental to the exclusive operation of the airport facility as a municipal airport and did not alter the primary use.

In this case, the land is being leased for agricultural use, which is incidental to its purpose as a buffer zone for the airport. We conclude as a matter of law that the leased property is being used for a public purpose and is exempt from taxation.

In addition to the exemption issue, the City argues that TERC's findings and orders violate article VIII, § 1, of the Nebraska Constitution, which requires that real estate be taxed uniformly and proportionately. Because of our decision that the land is exempt from taxation, it is not necessary for us to reach that issue, and we decline to do so.

CONCLUSION

An appellate court's review of a decision by TERC is for errors appearing on the record. § 77-5019(5); *Marshall v. Dawes Cty. Bd. of Equal.*, 265 Neb. 33, 654 N.W.2d 184 (2002). We conclude that TERC's decision does not conform to the law, and therefore, we reverse the decision and remand the cause with directions that TERC reverse the decision of the Board finding the property to be taxable.

REVERSED AND REMANDED WITH DIRECTIONS.

CITY OF YORK, APPELLANT, V. YORK COUNTY BOARD OF EQUALIZATION, APPELLEE.

664 N.W.2d 452

Filed July 11, 2003. No. S-02-499.

1. **Taxation: Judgments: Appeal and Error.** Decisions rendered by the Tax Equalization and Review Commission shall be reviewed by the court for errors appearing on the record of the commission.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Taxation: Property.** The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation.

Appeal from the Nebraska Tax Equalization and Review Commission. Reversed and remanded with directions.

Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

Randy R. Stoll, York County Attorney, for appellee.

William G. Blake and Shanna L. Cole, of Pierson, Fitchett, Hunzeker, Blake & Katt, for amicus curiae League of Nebraska Municipalities.

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

WRIGHT, J.

NATURE OF CASE

The City of York (City) owns certain land adjacent to the York Municipal Airport. A portion of this land has been developed into an industrial park, and the City has leased the remainder of the land to a private party for agricultural use. The York County Board of Equalization (Board) ruled that the leased property was not exempt from taxation. The Tax Equalization and Review Commission (TERC) affirmed the decision of the Board, and the City appealed.

SCOPE OF REVIEW

[1] Decisions rendered by TERC shall be reviewed by the court for errors appearing on the record of the commission. Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2000); *Marshall v. Dawes Cty. Bd. of Equal.*, 265 Neb. 33, 654 N.W.2d 184 (2002).

[2] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *City of Alliance v.*

Box Butte Cty. Bd. of Equal., 265 Neb. 262, 656 N.W.2d 439 (2003).

FACTS

The property at issue is legally described as Lots 1, 3, and 8 through 12 in Block 1; Lots 1, 2, 3, 8, and 9 in Block 2; and Lots 1 through 4 in Block 3, in the York Industrial Park, as well as Lots 2 and 3 in Block 2, in the York Industrial Park "2nd Platting," York County, Nebraska. The property, which we will refer to as "the industrial park," includes approximately 85.04 acres, of which 83.5 acres has been leased to a private party for agricultural use. The 83.5 acres which have been leased were determined to be taxable and are the subject of this appeal.

The industrial park has been developed by the City as part of its economic development plan. The primary purpose of creating the industrial park was to allow the City to offer improved industrial land for sale, which would attract industry to the community. The City has installed a street system and water and sewer mains. The City holds the lots in the industrial park for sale to private individuals and entities. The lots have been advertised for sale for $18,500 per acre, which includes $5,000 per acre for deposit into an airport fund. The remaining amount is used by the City for improvements. The former airport runway has been modified to serve as a street for the industrial park.

The property at issue is leased for $100 per acre, which the city administrator stated represented the fair market value. The lease is subject to the sale of the property for industrial use.

The York County assessor reviewed the lease and determined that because the property was income producing and not used for a public purpose, it was not exempt from taxation. She notified the City, which filed a protest with the Board. The Board denied the exemption, and the City appealed to TERC.

The City argued before TERC that the agricultural use of the industrial park land was an incidental use and that the primary use was for community development. TERC found that the primary or predominant use of the industrial park land was for agricultural purposes and that the property was not being used or developed for use as a development project. It concluded that the City had failed to establish that leasing of the industrial park

land was a qualifying use under the community development definition found in state regulations. TERC also found that the City had failed to establish the imminent sale of any of the lots or to demonstrate that the use of the leased land qualified as a public purpose. For these reasons, TERC affirmed the decision of the Board denying the exemption.

ASSIGNMENTS OF ERROR

The City of York assigns as error: (1) TERC erred in finding that the use of the property did not qualify as a public purpose under Neb. Rev. Stat. § 77-202(1)(a) (Cum. Supp. 2000); (2) TERC erred in finding that the primary use of the property was agricultural; (3) TERC erred in finding that the lease of the land to a private party for agricultural use is in direct competition with all other land available for lease for agricultural use; (4) TERC erred in finding no evidence to establish that sale of the lots is imminent; (5) TERC erred in failing to determine that the property is exempt under Neb. Rev. Stat. § 18-2137 (Reissue 1997); and (6) TERC's findings and orders violate article VIII, § 1, of the Nebraska Constitution, which requires that real estate be taxed uniformly and proportionately.

ANALYSIS

The question presented is whether the 83.5 acres of leased property in the City's industrial park is being used for a public purpose. Decisions rendered by TERC shall be reviewed by the court for errors appearing on the record of the commission. § 77-5019(5); *Marshall v. Dawes Cty. Bd. of Equal.*, 265 Neb. 33, 654 N.W.2d 184 (2002). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *City of Alliance v. Box Butte Cty. Bd. of Equal.*, 265 Neb. 262, 656 N.W.2d 439 (2003).

Pursuant to Neb. Const. art. VIII, § 2, the property of the State and its governmental subdivisions is exempt from taxation to the extent the property is used for public purposes. The amendment to article VIII, § 2, has been codified in § 77-202(1)(a).

A public purpose is defined as

> use of the property (i) to provide public services with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and welfare, developments by a public housing authority, parks, culture, recreation, community development, and cemetery purposes, or (ii) to carry out the duties and responsibilities conferred by law with or without consideration.

§ 77-202(1)(a). The statute provides that the definition of a public purpose does not include "leasing of property to a private party unless the lease of the property is at fair market value for a public purpose." *Id.*

State regulations further provide that the phrase "[b]eing developed for use for a public purpose" means that the governmental subdivision has publicly stated the intended use of the property in the future, and the intended use must clearly qualify as a public purpose. See 350 Neb. Admin. Code, ch. 15, §§ 002.20 and 002.20A (2001). In addition, the property must be actively prepared for the specified use, and reasonable progress must be made toward completion of the project. §§ 002.20B and 002.20C.

The City asserts that TERC erred in finding that the use of the property did not qualify as a public purpose under § 77-202(1)(a). We agree. One of the uses which qualifies as a public purpose under § 77-202(1)(a) is "community development." The term is defined in state regulations as "public property for use in a development project." See 350 Neb. Admin. Code, ch. 15, § 002.13 (2001).

The land at issue was authorized for development as an industrial park when the city council adopted a comprehensive plan in 1996. Six lots were sold between 1994 and 2001. Prior to the hearing before TERC, the City had transferred ownership of an additional four lots. The zoning of some of the lots had been changed to commercial. Contrary to the findings of TERC, a number of the lots in the industrial park have been sold.

The industrial park was created by the city council acting as a community redevelopment authority for the purpose of community development. The industrial park land includes streets, water and sewer lines, and street lights. The property has been

subdivided and is zoned for industrial or commercial use. The City has spent approximately $13,500 per acre to develop the area. The York County Development Corporation erected a building on speculation to facilitate development. The property was offered for sale at $18,500 per acre, with $13,500 to be placed in an unspecified fund and $5,000 to be placed in an airport fund.

[4] "The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation." *Doane College v. County of Saline*, 173 Neb. 8, 11, 112 N.W.2d 248, 250 (1961). We conclude that the primary use the industrial park land serves is for a public purpose and that the agricultural use is incidental. The leased property is exempt as a community development project under § 77-202(1)(a). The unsold lots have been leased for a 3-year term for agricultural use. This use of the property is incidental to the primary purpose of being an industrial park for community development. The primary use of the property is for a public purpose. Renting the property for $100 per acre cannot be considered anything but an incidental use when one compares the rental income to the $13,500 per acre spent by the City to develop the area.

The City also argues that TERC's findings and orders violate article VIII, § 1, of the Nebraska Constitution, which requires that real estate be taxed uniformly and proportionately. Because of our decision that the land is tax exempt, it is not necessary for us to reach that issue, and we decline to do so.

CONCLUSION

This court's review of a decision by TERC is conducted for errors appearing on the record of the commission. § 77-5019(5); *Marshall v. Dawes Cty. Bd. of Equal.*, 265 Neb. 33, 654 N.W.2d 184 (2002). We find that TERC's decision does not conform to the law. Thus, the decision is reversed, and the cause is remanded with directions that TERC reverse the decision of the Board finding the property to be taxable.

REVERSED AND REMANDED WITH DIRECTIONS.

CITY OF YORK, APPELLANT, V. YORK COUNTY BOARD OF EQUALIZATION, APPELLEE.

664 N.W.2d 456

Filed July 11, 2003. No. S-02-500.

1. **Taxation: Judgments: Appeal and Error.** Decisions rendered by the Tax Equalization and Review Commission shall be reviewed by the court for errors appearing on the record of the commission.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Taxation: Property.** The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation.

Appeal from the Nebraska Tax Equalization and Review Commission. Reversed and remanded with directions.

Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

Randy R. Stoll, York County Attorney, for appellee.

William G. Blake and Shanna L. Cole, of Pierson, Fitchett, Hunzeker, Blake & Katt, for amicus curiae League of Nebraska Municipalities.

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

WRIGHT, J.

NATURE OF CASE

The City of York (City) owns land which is adjacent to the York Municipal Airport and is used as a solid waste landfill. The York County Board of Equalization (Board) upheld the county assessor's determination that a 44-acre parcel of the land was not being used for a public purpose and was taxable because the parcel was leased to a private party for agricultural use. The Tax Equalization and Review Commission (TERC) affirmed the Board's decision, and the City appeals.

SCOPE OF REVIEW

[1] Decisions rendered by TERC shall be reviewed by the court for errors appearing on the record of the commission. Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2002); *Marshall v. Dawes Cty. Bd. of Equal.*, 265 Neb. 33, 654 N.W.2d 184 (2002).

[2] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *City of Alliance v. Box Butte Cty. Bd. of Equal.*, 265 Neb. 262, 656 N.W.2d 439 (2003).

FACTS

The solid waste landfill is made up of two tracts of land in York County, Nebraska. One tract is described as the north half, southeast quarter, excluding railway and highway, Section 24, Township 11, Range 3, consisting of approximately 75.99 acres. The second tract, which is leased, is described as the south half, southeast quarter, excluding highway and excluding Section 24, Township 4, Range 3, and excluding Section 24, Township 4, Range 4, consisting of approximately 44 acres.

The landfill is owned and operated by the York Area Solid Waste Agency (Agency), an organization created by the City and York County through an interlocal agreement. The Agency is operated by the City. The landfill receives solid waste, disposes of it in accordance with state and federal regulations, conducts recycling activities, and does ground water monitoring. The landfill is licensed by Nebraska's Department of Environmental Quality (DEQ).

The parcel at issue was acquired via eminent domain after it was discovered that the landfill's monitoring wells needed to be extended. During the eminent domain proceedings, the Agency was required to establish that the land was being taken for a public purpose.

At the time of the hearing before TERC, the leased property was being maintained for future expansion of the recycling facility and for use as cover for solid waste cells. Three of the

landfill's monitoring wells were located on this property. The wells, which are required by DEQ, are approximately 6 feet by 6 feet each. Each of these wells is located along the property line and minimally disturb use of the leased property. The remainder of the property was used for agricultural production and other investigative activities, such as geoprobing and soil borings for ground water monitoring.

The parcel of land held to be taxable is leased to a private party, and it includes 44 acres of tillable irrigated cropland. The land rents for $135 per acre, for a total annual rent of $5,940. The rental income is placed in the landfill fund and used to fund capital and operating expenses.

After the York County assessor reviewed the lease, she determined that the 44-acre parcel was income producing and was therefore not used for a public purpose. She notified the City that the property was taxable. The City filed a protest with the Board, which also found the property to be taxable. The City appealed to TERC, alleging that the primary use of the land was for ground water monitoring required by DEQ and that the agricultural use was an incidental use.

TERC found that the City acquired title to the 44-acre parcel in 1995 through eminent domain. Evidence was received that the leased property was not currently being used or developed for the acceptance of solid waste, but it is expected to be further developed for the receipt of solid waste in approximately 30 years.

TERC concluded that the statutory presumption in favor of the Board had been extinguished but that the burden remained on the City to establish that the subject property qualifies for exemption under Neb. Rev. Stat. § 77-202(1)(a) (Cum. Supp. 2000). TERC noted that the solid waste site was irrigated with equipment owned by the airport and leased to the tenant and that the agricultural use of the property was limited only by future landfill expansion and monitoring well installation and service.

TERC concluded that the landfill expansion was not scheduled to begin for approximately 30 years and that the well monitoring process created minimal disturbance to the agricultural use. It found that the City adduced no evidence to establish that the monitoring wells, which are located at the edge of the leased land, must be expanded now or in the future and that the City

failed to demonstrate that the lease is for a public purpose. TERC concluded that the City had failed to establish that the use of the leased land qualifies as a public purpose, and it affirmed the decision of the Board denying the protest.

ASSIGNMENTS OF ERROR

The City of York assigns as error: (1) TERC erred in finding that the use of the property did not qualify as a public purpose under § 77-202(1)(a); (2) TERC erred in finding that the primary use of the property was agricultural; (3) TERC erred in finding that the lease of the land to a private party for agricultural use is in direct competition with all other land available for lease for agricultural purposes; and (4) TERC's findings and orders violate article VIII, § 1, of the Nebraska Constitution, which requires that real estate be taxed uniformly and proportionately.

ANALYSIS

Decisions rendered by TERC shall be reviewed by the court for errors appearing on the record of the commission. § 77-5019(5); *Marshall v. Dawes Cty. Bd. of Equal.*, 265 Neb. 33, 654 N.W.2d 184 (2002). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

The City asserts that TERC erred in finding that the use of the leased property did not qualify as a public purpose under § 77-202(1)(a). Related to this argument is the City's contention that TERC erred in finding that the primary use of the property was agricultural. Property of a governmental subdivision that is leased to a private party must be leased at fair market value for a public purpose in order to be exempt from property taxes. See § 77-202(1)(a).

Section 77-202(1)(a) defines a public purpose as use of the property "to provide public services with or without cost to the recipient, including the general operation of government[,] public works[, and] public health and welfare." The City argues that the landfill is an "operation of government" that serves a statutorily defined purpose.

The Integrated Solid Waste Management Act (Act), Neb. Rev. Stat. §§ 13-2001 to 13-2043 (Reissue 1997 & Cum. Supp. 2000),

provides that local governments, including counties and municipalities, are "best positioned to develop efficient solid waste management programs." See § 13-2002(5). Each county and municipality is required to provide for disposal of solid waste generated within its jurisdiction. See § 13-2020(1). The governing body of a county or municipality "may make all necessary rules and regulations governing the use, operation, and control of a facility or system." § 13-2020(4). Section 13-2023 states in 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."

The Agency, which operates the landfill, was created in 1993 by the City and York County. In March 2000, the City leased 44 acres of the landfill to a private party for agricultural use at $135 per acre. The parties agree the lease represents the fair market value of the property. The question is whether this parcel is used for a public purpose.

This 44-acre parcel was acquired after ground water contamination was discovered on the property. DEQ required the Agency to extend the ground water monitoring of the landfill to this tract. In December 1995, the Agency commenced eminent domain proceedings in the York County Court. The condemnees subsequently appealed the decision to the York County District Court. One of the issues on appeal from the condemnation was whether the taking was for a public purpose and necessary for public use.

The district court ultimately concluded that the Agency had authority pursuant to the Act to acquire the land by eminent domain for the purpose of conducting the investigation of ground water contamination. Therefore, it is clear that the property at issue was acquired for a public purpose. However, we must also determine whether the subsequent leasing of the property for agricultural purposes subjects the property to taxation.

[4] "The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation." *Doane College v. County of Saline*, 173 Neb. 8, 11, 112 N.W.2d 248, 250 (1961). If the lease of the property for

agricultural use is incidental to the primary or dominant use, then the property is not subject to taxation.

The Act authorizes a county, municipality, or agency to purchase, develop, maintain, and improve solid waste facilities. See § 13-2021. Landfills operated by local government entities must have long-range plans to ensure sufficient capacity to meet future waste disposal requirements because state law requires landfills to have adequate capacity for solid waste disposal until 2014. See § 13-2032(1)(a). Therefore, long-range planning is necessary to ensure adequate capacity.

The leased property at issue is directly adjacent to the existing landfill. Part of the property is used to monitor ground water contamination from the existing landfill. Areas of the property will be used to supply cover dirt for existing cells as they become filled with solid waste. When necessary, the property will become a cell for solid waste.

The landfill began receiving waste disposal in 1996. When an active waste disposal cell is filled, an additional area in the landfill is opened for receipt of waste. At some time in the future, dirt will be removed from the leased property to cover a waste disposal cell. It was estimated that cells directly north of the leased property would require cover dirt from the leased property in 25 to 30 years.

Obviously, a site used for waste disposal must be large enough to provide for expansion. The land surrounding the landfill must provide dirt to cover the waste deposited there. The acquisition of land adjacent to an existing landfill for future waste disposal is a measure of good planning in order to meet the future needs of the landfill. Unless landfills are properly managed, the waste creates hazards to the environment and the public health.

Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *City of Alliance v. Box Butte Cty. Bd. of Equal.*, 265 Neb. 262, 656 N.W.2d 439 (2003). We conclude that renting the property for $135 per acre for agricultural purposes is incidental to the land's primary purpose as a landfill, the purpose for which the land was condemned. The 44 acres of land at issue was acquired for use as a landfill at a total cost of $216,191. The fact that the Agency derives income from the leased property does not change its primary purpose.

Thus, TERC erred in finding that the leased property is not being used for a public purpose and in determining that it is taxable.

The City's final argument is that TERC's findings and orders violate article VIII, § 1, of the Nebraska Constitution, which requires that real estate be taxed uniformly and proportionately. Because of our decision that the land is exempt from taxation, it is not necessary for us to reach that issue, and we decline to do so.

CONCLUSION

This court's review of a decision by TERC is conducted for errors appearing on the record of the commission. See, § 77-5019(5); *Marshall v. Dawes Cty. Bd. of Equal.*, 265 Neb. 33, 654 N.W.2d 184 (2002). We find that TERC's decision does not conform to the law. The primary purpose of the property at issue is for use as a solid waste landfill, and the lease for agricultural use is incidental to this purpose. Thus, TERC's decision is reversed, and the cause is remanded with directions that TERC reverse the decision of the Board finding the property to be taxable.

REVERSED AND REMANDED WITH DIRECTIONS.

THE ESTATE OF LEE ANNA McELWEE, DECEASED, BY AND THROUGH HER COPERSONAL REPRESENTATIVES, JACQUELYNE McELWEE-BROWN ET AL., APPELLEE, V. OMAHA TRANSIT AUTHORITY, ALSO KNOWN AS THE TRANSIT AUTHORITY OF OMAHA, DOING BUSINESS AS METRO AREA TRANSIT, A POLITICAL SUBDIVISION, AND KATHRYN WALTRIP, APPELLANTS.

664 N.W.2d 461

Filed July 11, 2003. No. S-02-692.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997), the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.
2. ____: ____. Where the relevant facts are undisputed, whether the notice requirements of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997), have been satisfied is a question of law, on which an appellate court reaches a conclusion independent of the lower court's ruling.

3. **Estoppel: Equity: Appeal and Error.** A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the trial court.
4. **Political Subdivisions Tort Claims Act: Jurisdiction.** While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997).
5. **Political Subdivisions Tort Claims Act: Pleadings: Notice: Proof.** If a political subdivision, by an appropriately specific allegation in a demurrer or answer, raises the issue of the plaintiff's noncompliance with the notice requirement of Neb. Rev. Stat. § 13-905 (Reissue 1997), the plaintiff has the burden to show compliance with the notice requirement.
6. **Political Subdivisions Tort Claims Act: Notice.** For substantial compliance with the written notice requirements of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997), within 1 year from the act or omission on which the claim is based, the written notice of claim must be filed with an individual or office designated in the act as the authorized recipient for notice of claim against a political subdivision. A notice of claim filed only with one unauthorized to receive a claim pursuant to § 13-905 does not substantially comply with the notice requirements of the act.
7. **Statutes.** In the absence of ambiguity, courts must give effect to statutes as they are written.
8. **Estoppel: Equity.** The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice.
9. ____: ____. Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.
10. ____: ____. 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.
11. **Limitations of Actions: Political Subdivisions.** There is no legal duty on the part of a political subdivision, or any other party, to inform an adversary of the existence of a statute of limitations or other nuance of the law.
12. **Parties: Estoppel: Negligence.** An estoppel cannot arise where the party claiming estoppel is equally negligent or at fault.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded with directions.

Jeffrey J. Blumel and Tyler P. McLeod, of Abrahams, Kaslow & Cassman, L.L.P., for appellants.

John E. Corrigan, of Law Office of John P. Fahey, P.C., for appellee.

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

PER CURIAM.

NATURE OF CASE

The Omaha Transit Authority, doing business as Metro Area Transit, and Kathryn Waltrip (collectively MAT) appeal from a judgment entered against them pursuant to the Political Subdivisions Tort Claims Act (the Act), Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997). The dispositive issue presented in this appeal is whether the plaintiff, the estate of Lee Anna McElwee, presented its claim to MAT in compliance with the notice provisions of the Act.

BACKGROUND

On November 13, 1998, McElwee was struck by a MAT bus operated by Waltrip in the parking lot of the Crossroads Mall in Omaha, Nebraska. McElwee, who was 70 years old at the time of the accident, is since deceased from unrelated causes. McElwee was struck as she crossed the street from a MAT bus station, constructed in the parking lot, to the east end of the mall. The bus station was next to a T-shaped intersection formed by two mall access roads and the mall itself. The witnesses disputed whether McElwee was in the crosswalk between the bus station and the mall at the time of the collision.

McElwee was taken to the hospital, where surgery was performed for a ruptured spleen and a bleeding pancreas. McElwee was hospitalized for 6 days. After trial, the district court awarded the plaintiff damages in the sum of $140,000, which included $26,217.51 in special damages.

MAT alleged in its answer, and argued throughout the proceedings, that the plaintiff had failed to comply with the notice provisions of the Act. Section 13-905 requires that

> [a]ll tort claims under the Political Subdivisions Tort Claims Act . . . shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision, or the governing body of a political subdivision may provide that such claims may be filed with the duly constituted law department of such subdivision.

In this case, notice of the plaintiff's claim against MAT was directly addressed to Pat Arps, the MAT director of administration and human resources. The evidence establishes that Arps is responsible for overseeing claims for personal injury and property damage made against MAT and for any resulting litigation, including the investigation of such claims. However, the evidence does not contain any policy or job description specifically conferring upon Arps any of the duties set forth in § 13-905.

Arps was notified of the accident on the day it occurred and opened an investigation. Soon after, Arps received a letter from the plaintiff's attorney notifying Arps of the plaintiff's representation and requesting claim forms "[i]f you have any official claim forms to be filled out." Arps did not provide any such forms, as MAT does not have preprinted claim forms, and did not acknowledge receipt of the letter. The plaintiff's attorney sent another letter enclosing a notice of claim for the incident. Arps did not respond, although the letter requested acknowledgment. Subsequently, the plaintiff's attorney withdrew the claim. Arps placed both the purported claim and withdrawal of claim in her files, and discussed them with no one.

Arps testified that the MAT employee authorized to receive claims under the Act is the executive director of the board of directors, as the "official whose duty it is to maintain the official records." See § 13-905. The plaintiff presented evidence that Arps has, on some past instances, acknowledged claims pursuant to the Act. In those cases, MAT did not raise a defense of insufficient notice.

The district court stated that Arps "has not been designated to perform the duties described in Section 13-905." Nonetheless,

the district court concluded that "Plaintiff has met its' [sic] burden of proof in establishing by a preponderance of the evidence that Plaintiff has complied with the filing and notice provisions incumbent upon claimants under the Political Subdivisions Tort Claims Act."

ASSIGNMENTS OF ERROR

MAT assigns, consolidated and restated, that the district court erred in (1) finding the plaintiff complied with the notice provisions of the Act, (2) considering the plaintiff's evidence of MAT's acceptance and acknowledgment of claims filed in other cases, (3) finding that the proximate cause of the collision was Waltrip's failure to yield to McElwee in the crosswalk, (4) not ascribing contributory negligence to McElwee, (5) finding that McElwee was in the crosswalk when the collision occurred, (6) failing to find that McElwee assumed the risk of the accident, (7) finding that Waltrip's view to the area east of the intersection was partially obscured by another bus, and (8) awarding excessive damages.

STANDARD OF REVIEW

[1,2] In actions brought pursuant to the Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001). Where the relevant facts are undisputed, however, whether the notice requirements of the Act have been satisfied is a question of law, on which an appellate court reaches a conclusion independent of the lower court's ruling. See, *Wilder v. Grant Cty. Sch. Dist. No. 0001*, 265 Neb. 742, 658 N.W.2d 923 (2003) (requirements of statute are question of law); *Springer v. Bohling*, 259 Neb. 71, 607 N.W.2d 836 (2000) (question of law determined independent of lower court's ruling); *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999) (where facts are undisputed, whether liability precluded by sovereign immunity is question of law).

[3] A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the trial court. *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003).

ANALYSIS

[4,5] We first address whether the plaintiff complied with the notice requirements of the Act. As previously noted, claims made under the Act are to be filed with "the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision," or, if designated, the law department of the political subdivision. § 13-905. While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Act. *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). If a political subdivision, by an appropriately specific allegation in a demurrer or answer, raises the issue of the plaintiff's noncompliance with the notice requirement of § 13-905 of the Act, the plaintiff has the burden to show compliance with the notice requirement. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). In order to meet that burden in the instant case, the plaintiff must show that Arps, the person to whom the plaintiff's sole notice of claim was directly addressed, was, in fact, a person designated by § 13-905 for the filing of a claim made under the Act.

[6] The district court, in concluding that the plaintiff had met its burden of proof with respect to the notice requirement, cited *Franklin v. City of Omaha*, 230 Neb. 598, 432 N.W.2d 808 (1988), for the proposition that substantial compliance with the statutory provisions pertaining to the content of a claim supplies requisite and sufficient notice to a political subdivision. However, in *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989), we explained that the substantial compliance doctrine was inapplicable to situations in which the political subdivision contends the claim was not filed with a recipient designated by § 13-905. We stated that

> [o]ur previous decisions regarding substantial compliance with the notice provisions of the . . . Act concern cases in which a political subdivision contended that the *content* of a filed claim was deficient as notice to the governmental subdivision. "[S]ubstantial compliance with the statutory provisions *pertaining to a claim's content* supplies the requisite and sufficient notice to a political subdivision in accordance

> with [§ 13-905] . . . ." [Here], the city does not contend that the content of [the] letter is inadequate notice. . . . Rather, the city contends . . . that the deficiency regarding [the] claim is found in the fact that a "claim" was not filed with a recipient designated by § 13-905 pertaining to the filing of a claim against a political subdivision.
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> . . . .
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> . . . [W]e hold that for substantial compliance with the written notice requirements of the . . . Act, within 1 year from the act or omission on which the claim is based, the written notice of claim must be filed with an individual or office designated in the act as the authorized recipient for notice of claim against a political subdivision. A notice of claim filed only with one unauthorized to receive a claim pursuant to § 13-905 does not substantially comply with the notice requirements of the . . . Act.

(Emphasis supplied.) (Citations omitted.) *Willis*, 232 Neb. at 538-39, 441 N.W.2d at 849-50. Based on that holding, we concluded that the plaintiff's notice of claim, which had been provided to the city's insurance representative, was deficient.

Since *Willis*, courts applying Nebraska law have consistently rejected arguments that the notice requirement of the Act can be satisfied by claims presented to persons other than those specifically designated by § 13-905. See, *Centric Jones Co. v. City of Kearney, Neb.*, 324 F.3d 646 (8th Cir. 2003) (utilities director); *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999) (risk management office); *Schoemaker v. Metropolitan Utilities Dist.*, 245 Neb. 967, 515 N.W.2d 675 (1994) (claims adjuster); *Keene v. Teten*, 8 Neb. App. 819, 602 N.W.2d 29 (1999) (insurance representative). See, also, *Shrum v. Kluck*, 85 F. Supp. 2d 950 (D. Neb. 2000) (rejecting substantial compliance argument), *affirmed* 249 F.3d 773 (8th Cir. 2001).

The plaintiff does not dispute, on appeal, that the substantial compliance doctrine is inapplicable. Rather, the plaintiff argues that Arps was, in fact, a person designated by § 13-905 to file claims made under the Act. However, the record simply does not establish that Arps was a clerk, secretary, or official responsible for maintaining the official records of the political subdivision. Instead, the evidence establishes that the executive director of

the MAT board of directors was responsible for keeping the official records.

The plaintiff bases its argument on evidence presented of what Arps and MAT did regarding other claims. The plaintiff contends that Arps is responsible for overseeing all claims; that in other cases, Arps has acknowledged claims; and that in at least one of those cases, MAT settled the claim instead of raising lack of notice as an affirmative defense. However, the plaintiff cites no authority for the proposition that failure to raise a defense in one case precludes raising that defense in another, unrelated action. The fact that Arps may have accepted claims in the past does not meet the plaintiff's burden of showing that Arps had the authority to accept the claim in this case. See *Munroe v. Booth*, 305 N.Y. 426, 113 N.E.2d 546 (1953).

Nor has the plaintiff presented any evidence that Arps was a de facto clerk, secretary, or official recordkeeper for MAT. There is no evidence that Arps was appointed to an office named in § 13-905, or was acting in such a capacity in a way calculated to induce people, without inquiry, to suppose her to be the occupant of one of those offices. See *Prucka v. Eastern Sarpy Drainage Dist.*, 157 Neb. 284, 59 N.W.2d 761 (1953) (explaining de facto officer doctrine). As will be discussed more fully below, the plaintiff can point to no misleading representation by Arps or MAT indicating that Arps had any of the duties set forth in § 13-905. In short, the record contains no evidence contrary to the conclusion that Arps has not been designated to perform the duties described in § 13-905.

The plaintiff also relies on the language of *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989), in which we discussed the purpose of the notice requirement. We stated that

> [a] notice which has been filed with a person or recipient designated by the [A]ct and which contains appropriate information to satisfy the notice requirement of the [A]ct provides a political subdivision with an opportunity to investigate, and possibly settle, a tort claim. . . . However, a notice of claim given to one who is not designated to receive notice under the . . . Act may prevent a political subdivision's opportunity to investigate and settle claims inasmuch as an unauthorized recipient of notice very likely

> lacks power to initiate an investigation into the claim with a view toward settlement or formulation of a defense in litigation over an unsettled claim.

(Citation omitted.) *Willis*, 232 Neb. at 539, 441 N.W.2d at 850. The plaintiff argues that a notice provided to Arps satisfies this purpose because she is authorized to investigate claims.

However, this argument is contrary to *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999); *Schoemaker v. Metropolitan Utilities Dist.*, 245 Neb. 967, 515 N.W.2d 675 (1994); and *Keene v. Teten*, 8 Neb. App. 819, 602 N.W.2d 29 (1999), in which the persons notified of the claims were authorized to investigate, but were nonetheless not designated to perform the duties set forth in § 13-905. While § 13-905 does facilitate the timely investigation of claims, as stated in *Willis, supra*, it is also obviously intended to ensure that notice of pending claims is provided to those who have a legal duty to file those claims in the official records of the political subdivision, and to notify the governing body of the subdivision.

[7] While a subordinate employee may ultimately be directed to oversee the administration of the claim, it is still necessary that the claim be filed in the official records and made known to the governing body, and § 13-905 facilitates this purpose by requiring that claims be presented to the officer of the political subdivision with the legal responsibility for filing such records. "It would defeat the purpose of § 13-905 if mere knowledge of an act or omission, by a nondesignated party, was sufficient to satisfy the requirements of that section." *Schoemaker*, 245 Neb. at 973, 515 N.W.2d at 679. In any event, we are not at liberty to ignore the plain language of the statute. In the absence of ambiguity, courts must give effect to statutes as they are written. *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002). Arps did not have any of the duties set forth by the unambiguous language of § 13-905, so the notice of claim directed to Arps was not effective notice under the Act. The plaintiff's purported claim did not meet the plainly stated requirements of § 13-905.

Finally, the plaintiff complains that Arps took no action to inform counsel that the executive director was authorized to receive the claim, even after she was asked to acknowledge

receipt of the claim. We view this as an argument that MAT is equitably estopped from asserting lack of notice as a defense.

[8,9] The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice. *Simons v. Simons*, 261 Neb. 570, 624 N.W.2d 36 (2001). Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy. *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994).

[10] 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. *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002).

[11,12] The record in this case fails to establish the elements for estoppel. There is no evidence to suggest that Arps or MAT misrepresented that Arps was designated by § 13-905 to file claims made under the Act or that the plaintiff relied on any such representation. Arps did not reply to or acknowledge the plaintiff's "claim" or otherwise lull the plaintiff into a false sense of security regarding the purported filing. There is no legal duty on

the part of a political subdivision, or any other party, to inform an adversary of the existence of a statute of limitations or other nuance of the law. See *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999). This is particularly so where the plaintiff did not inquire of the political subdivision to whom the claim should have been addressed. An estoppel cannot arise where the party claiming estoppel is equally negligent or at fault. *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993).

The Act contains a clear procedure for filing a tort claim against a political subdivision, which information was ostensibly possessed by the plaintiff's counsel, and no one informed the plaintiff or plaintiff's counsel that the filing of a claim with another person was unnecessary. See, *Schoemaker v. Metropolitan Utilities Dist.*, 245 Neb. 967, 515 N.W.2d 675 (1994); *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989). See, also, *Keene v. Teten*, 8 Neb. App. 819, 602 N.W.2d 29 (1999). We conclude that MAT was not estopped from raising the defense of noncompliance with the notice requirement.

The district court erred in concluding that the plaintiff satisfied the notice requirement of the Act. Because the plaintiff did not comply with a condition precedent to commencement of a suit under the Act, see *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001), the plaintiff's petition should have been dismissed. Having so determined, we need not consider MAT's remaining assignments of error.

CONCLUSION

The district court erred in determining that the plaintiff met the notice requirements of the Act. The judgment of the district court is reversed, and the cause is remanded with directions to dismiss the plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

GERRARD, J., concurring.

It is not possible to condone the behavior of Arps and MAT in this case. One would think that a political subdivision's responsibility to its constituents, and in this case, MAT's relationship with its customers, would be well served by at least taking some steps to ensure that potential claimants understand the requirements of MAT's claims process. The absence of a legal obligation does not

preclude a political subdivision from acting fairly toward a potential claimant in an accident case. Nonetheless, the plaintiff in this case failed to satisfy the notice requirements of the Political Subdivisions Tort Claims Act (the Act), Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997), and MAT was under no *legal* duty to inform the plaintiff of the mistake prior to alleging a meritorious defense. Consequently, I join in the opinion of the court.

Pursuant to the requirements of the Act, as well established in this court's jurisprudence, it is the plaintiff who must ensure that notice of a claim has been filed with the appropriate agent of a political subdivision. If the identity of the appropriate party is unknown, mirroring the statutory language and addressing a claim to the "clerk, secretary, or other official whose duty it is to maintain the official records" of a political subdivision would, in my opinion, suffice to meet the statutory requirement. See § 13-905. See, e.g., *McLendon v. City of Houston*, 153 Tex. 318, 267 S.W.2d 805 (1954). Guesswork is not required. A claimant is entitled to rely on the representations and procedures of a political subdivision to identify the party to whom a claim should be addressed for filing—provided that the plaintiff is diligent in inquiring.

Because the plaintiff did not inquire in this case, however, there were no representations made by MAT on which the plaintiff could demonstrate reliance, and there is no basis to conclude that the notice provided to MAT met the requirements of the Act. Therefore, I join the opinion of the court.

McCormack and Miller-Lerman, JJ., join in this concurrence.

State of Nebraska ex rel. Special Counsel for Discipline of the Nebraska Supreme Court, relator, v. Glenn A. Shapiro, respondent.

665 N.W.2d 615

Filed July 18, 2003. No. S-01-409.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where

the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.

2. **Attorney Fees.** An attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility and inconsistent with the character of the profession.
3. **Attorney and Client: Conflict of Interest: Attorney Fees.** An attorney who performs work despite a conflict of interest is generally prohibited from recovering any fees for the work.
4. ____: ____: ____. An attorney who has a conflict of interest of which he or she knew, or should plainly have known, may not receive attorney fees for legal services rendered to a client after acquiring such knowledge.
5. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
6. **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.
7. **Disciplinary Proceedings: Attorney Fees.** A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.
8. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
9. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
10. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
11. ____. The Nebraska Supreme Court imposes disciplinary sanctions to deter others from misconduct in order to protect the public and to maintain the reputation of the bar as a whole.

Original action. Judgment of suspension.

Jarrod S. Boitnott, Special Counsel for Discipline, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for relator.

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

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

PER CURIAM.

NATURE OF CASE

On April 9, 2001, amended formal charges were filed against Glenn A. Shapiro by a Special Counsel for Discipline of the Nebraska Supreme Court (relator). The referee recommended dismissal of the amended formal charges. The relator filed exceptions to the referee's report and recommendations.

FACTS

In March 1999, Manuel Mendoza was arrested in Omaha, Nebraska, on a federal drug conspiracy charge. While incarcerated in the Douglas County jail, he contacted Bobbi Scott and asked her to retain an attorney on his behalf. On March 18, a federal public defender entered an appearance on behalf of Mendoza and represented him at his arraignment. That same day, an attorney in Shapiro's firm appeared at the arraignment of a codefendant of Mendoza's.

On March 19, 1999, Scott called Shapiro at his law office. During that conversation, Shapiro entered into an oral agreement to provide legal representation for Mendoza. Shapiro gave Scott directions to his house, where Scott was to deliver $15,000 in cash the next day. When Scott delivered the cash to Shapiro, she asked for a receipt. Shapiro gave her a handwritten receipt acknowledging that he had received $15,000.

Between March 20 and 22, 1999, Shapiro gathered information concerning Mendoza's case from the U.S. Attorney's office and met with Mendoza at the Douglas County jail. On March 23, Shapiro discovered that he had a conflict of interest because a senior partner in his firm was representing a party who was a codefendant of Mendoza's and a potential witness for the federal government against Mendoza.

Shapiro then contacted Michael Bianchi and referred the case to him. Shapiro asked Bianchi about his fee for representing an individual charged in federal court with taking part in a drug conspiracy. Bianchi responded that his fee was $10,000.

Shapiro and Bianchi subsequently met with Mendoza at the Douglas County jail, where Shapiro told Mendoza that he had a conflict of interest and could not directly represent Mendoza. However, Shapiro told Mendoza he could advise Bianchi as to

the general strategies in a federal drug conspiracy case. Mendoza agreed to be represented by Bianchi.

According to Mendoza, he was not informed as to Bianchi's fee. Shapiro paid Bianchi $10,000 in cash and retained the additional $5,000 paid to him to represent Mendoza. Shapiro believed Mendoza understood that he was keeping the $5,000 for the time he had spent on the case.

Mendoza testified that he learned that Shapiro had retained $5,000 of the initial $15,000 during a conversation with Bianchi in the summer of 1999, which was after Mendoza had been sentenced to federal prison. Mendoza wrote to Shapiro two or three times requesting return of the $5,000. In a letter dated November 3, 1999, Shapiro stated that he felt the $5,000 was earned for the time he had invested and "for the ability for you and/or your lady friend to contact me about the case." Shapiro also questioned why Mendoza had not objected earlier, and he asked Mendoza to write back to "see if we can agree to some compromise that is fair." Shapiro did not return any of the money at that time.

On February 2, 2000, Mendoza again wrote to Shapiro, demanding return of the money. Mendoza also wrote a letter of complaint to the Counsel for Discipline on February 23. A Special Counsel for Discipline was appointed, and Shapiro responded to the complaint on July 24. Shapiro ultimately returned the $5,000 to Mendoza on August 17, 2001.

FORMAL CHARGES

Formal charges were filed alleging that Shapiro had violated Canon 1, DR 1-102(A)(1) and (4), and Canon 2, DR 2-106(A), DR 2-107(A)(1) and (2), and DR 2-110(A)(3), of the Code of Professional Responsibility.

DR 1-102(A) states in pertinent part that "[a] lawyer shall not: (1) Violate a Disciplinary Rule . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The relator asserted that Shapiro violated this rule by referring Mendoza to Bianchi under the guise that Shapiro could continue to advise Bianchi as to general strategies despite an acknowledged conflict of interest, by informing Mendoza that Bianchi would be paid the original $15,000 fee without disclosing that Bianchi was charging only $10,000, and by retaining $5,000 of the original fee

without telling Mendoza and without performing services warranting payment of a $5,000 fee.

DR 2-106(A) states that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." The relator asserted that Shapiro violated this rule by retaining $5,000 of the original fee, which is in excess of the fee reasonably and customarily charged in the locality for similar legal services, based on the time, labor, and skill required and the length of the professional relationship with Mendoza.

DR 2-107(A) states in pertinent part:

> A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his or her law firm or law office, unless:
>
> (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
>
> (2) The division is made in proportion to the services performed and responsibility assumed by each.

The relator asserted that Shapiro violated this rule by dividing a fee for legal services with Bianchi, who is not a partner or associate of Shapiro's, and that Shapiro did not make full disclosure to or receive consent from Mendoza. In addition, Shapiro's portion of the fee division was not proportionate to the services he performed and the responsibility he assumed.

DR 2-110(A)(3) states that "[a] lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned." The relator alleged that Shapiro violated this rule when he did not promptly or otherwise refund the part of the fee paid to him in advance that he did not earn when he withdrew as counsel for Mendoza.

REFEREE'S RECOMMENDATION

In a report filed on September 9, 2002, the referee recommended dismissal of the charges. With respect to the first charge, the referee concluded that "some wrongful purpose or intent to deceive is necessary to make out a violation of DR 1-102(A)(4)" and that Shapiro demonstrated no such intent. The referee found that Mendoza was aware that Shapiro was serving as an advisor on technical matters and that Mendoza wanted Shapiro to remain on the case in some capacity. The referee also found that both

Shapiro and Bianchi believed the arrangement between them could be accomplished without creating any conflict of interest. The referee noted that the charges against Shapiro did not assert that he should be disciplined for acting in an advisory capacity.

The referee found that the evidence was in conflict "as to what Mendoza knew, and when he knew it" in relation to the fee agreement with Bianchi. Shapiro claimed that Bianchi told Mendoza he was receiving $10,000 to take over the case and that, therefore, it could be inferred that Mendoza was aware of Shapiro's retention of $5,000.

The referee noted that although Mendoza denied that he was told about the $10,000 agreement with Bianchi, and Bianchi had no recollection of advising Mendoza of his fee, the referee credited the testimony of Shapiro and found that, at the very least, "Mendoza knew of the actual fee arrangement with Bianchi, and therefore, by clear inference, knew that Shapiro had retained $5,000 of the original $15,000 payment."

The referee noted that Bianchi testified that Shapiro told Mendoza he could not take any direct action in the case, such as filing pleadings, talking to Mendoza, or going to court for Mendoza, but he could discuss the case with Bianchi. The referee found that Mendoza was satisfied with that arrangement.

The referee concluded that the evidence failed to prove by clear and convincing evidence that Shapiro engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation intending to deceive Mendoza or that Mendoza was deceived by any conduct, misrepresentation, or omission by Shapiro in violation of DR 1-102(A)(4). The referee recommended dismissal of the first charge.

Regarding the second charge, the referee concluded that the evidence did not establish that a $5,000 fee for consultation on a multidefendant federal drug conspiracy in which the penalties are 10 years to life in prison was excessive or unreasonable. The fee agreement provided that Shapiro would be available for consultation. The referee called this a retainer fee, "which is generally considered earned when paid." Although Shapiro should have considered a refund based on the fact that no services were ultimately provided, the referee noted that Shapiro eventually refunded the entire fee when he was under no legal obligation to

do so. The referee concluded that the relator did not prove by clear and convincing evidence that Shapiro charged an excessive fee in violation of DR 2-106(A), and the referee recommended dismissal of the second charge.

The third charge asserted that the fee agreement between Shapiro and Bianchi was an improper division of fees among lawyers. The referee stated that he did not need to resolve the issue of whether there was full disclosure and a reasonable division because he found that there was no division of fees within the meaning of DR 2-107.

The referee opined that DR 2-107 prohibits a lawyer who refers a legal matter to another lawyer from receiving a portion of the fee paid to the referred lawyer. An exception allows such a division of fees with the client's consent, as long as the division of fees is based on a division of the services provided. The referee noted that in this case, Bianchi testified that he was not part of any referral arrangement with Shapiro and that he did not pay a referral fee to Shapiro or divide his fees with Shapiro. Shapiro did not share his fee with Bianchi, but, rather, he paid Bianchi the agreed-upon fee to take over the case when Shapiro withdrew.

The referee found that the evidence established there were three fee agreements: (1) between Mendoza and Shapiro in which a third party paid Shapiro $15,000 to represent Mendoza, (2) between Mendoza and Bianchi when Bianchi replaced Shapiro as Mendoza's attorney and Mendoza agreed to pay Bianchi $10,000, and (3) between Shapiro and Mendoza for Shapiro to remain on the case to consult on nonsubstantive matters for the $5,000 which Shapiro had already received as part of the initial payment.

The referee determined that Shapiro and Bianchi did not share a fee within the meaning of DR 2-107 and that it was difficult to conclude that either should have construed their conduct to implicate DR 2-107. The referee found there was a failure to prove by clear and convincing evidence that the lawyers divided fees in violation of the rule. The referee recommended dismissal of the third charge.

The fourth charge alleged that Shapiro failed to promptly refund the fee in violation of DR 2-110(A)(3) when he failed to refund the unearned portion of the fee after he withdrew from

employment. The referee stated that he had already concluded that the $5,000 fee retained by Shapiro related to a new fee agreement between Mendoza and Shapiro after he withdrew from representing Mendoza on the drug conspiracy charge. The referee found there was no evidence that the fee was excessive or that Shapiro withdrew from consulting on the case after Bianchi took over the defense. The referee found that DR 2-110(A)(3) was not implicated by the facts of the case, and he recommended dismissal of the charge.

The referee concluded that the evidence was insufficient to establish each of the material elements of the formal charges by clear and convincing evidence, and he recommended dismissal of all charges.

The relator generally took exception to each of the legal conclusions and findings of fact contained in the referee's report and recommendation.

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. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

ANALYSIS

In accordance with our standard of review, we will analyze each of the charges de novo on the record and reach our conclusion independent of the findings of the referee. All conclusions of law will be decided independently of the determination made by the referee.

DR 1-102(A)(4)

DR 1-102(A) states that "[a] lawyer shall not: . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." In summary, the relator alleges that Shapiro misrepresented his ability to serve as Mendoza's attorney in order to keep $5,000 of the $15,000 fee he had been paid by Scott.

The referee concluded that Nebraska law requires evidence of a lawyer's intent to commit acts of dishonesty, fraud, deceit, or misrepresentation to prove a violation of DR 1-102(A)(4). The referee found that Shapiro's actions in offering to consult on the case were not dishonest, fraudulent, deceitful, or an intentional misrepresentation of fact intended to deceive Mendoza. As to whether Mendoza knew about the fee agreement between Shapiro and Bianchi, the referee found that the evidence was in conflict. Shapiro stated that he believed Mendoza understood he would retain $5,000. Mendoza claimed that he was not told the specific amount each attorney would receive.

The relator argues that the plain language of DR 1-102(A)(4) does not require intent as an element to prove a violation, whereas other disciplinary rules specifically include intent, i.e., Canon 7, DR 7-101(A), of the Code of Professional Responsibility, which states that a lawyer shall not intentionally take certain actions.

This court has not previously held that intent is an element of a violation of DR 1-102(A)(4); however, other states have considered the question. The Oregon Supreme Court has stated: " 'Misrepresentation' may include an affirmative misstatement, an intentional failure to disclose material facts that may or may not have been intended to deceive, or a combination of both." *In re Conduct of Huffman*, 331 Or. 209, 215, 13 P.3d 994, 998 (2000). The Oregon court has also noted that its version of DR 1-102(A)(4) "focuses on the effect of the lawyer's conduct, not on the lawyer's intent." *In re Stauffer*, 327 Or. 44, 59, 956 P.2d 967, 976 (1998). In Illinois, the Supreme Court has held that intent to defraud or to deceive is not an element of a violation of Illinois' version of DR 1-102(A)(4). See *In re Gerard*, 132 Ill. 2d 507, 548 N.E.2d 1051, 139 Ill. Dec. 495 (1989).

The Iowa Supreme Court has held: "[A] lawyer should conduct himself in his professional capacity with honesty and truthfulness, and should avoid statements or actions that are *calculated to deceive or mislead*." (Emphasis supplied.) *Committee on Professional Ethics v. Hurd*, 325 N.W.2d 386, 390 (Iowa 1982).

We conclude that proof of actual intent to deceive or defraud is not required to demonstrate a violation of DR 1-102(A)(4). The focus of the inquiry is on the effect of the lawyer's conduct, not on the lawyer's intent. Although we find that evidence of intent is

not required, our inquiry does not end there. We must review the evidence to determine whether Shapiro violated DR 1-102(A)(4).

Shapiro's conduct demonstrated misrepresentation. When Shapiro learned of the conflict of interest, he should have immediately withdrawn from such representation and refunded the fee. Instead, Shapiro told Mendoza that Bianchi would be paid from the original $15,000 fee but did not disclose that Bianchi was charging only $10,000. Shapiro retained $5,000 of the original fee without telling Mendoza that he was doing so.

Bianchi testified that he was asked by Shapiro to represent Mendoza in a federal drug conspiracy case. Bianchi said he was told by Shapiro that his fee for such cases was $15,000. Bianchi testified he told Shapiro he would take the case for his usual fee of $10,000. When Bianchi and Shapiro met with Mendoza at the Douglas County jail, Shapiro explained to Mendoza that he could no longer represent Mendoza and that he was referring the case to Bianchi if Mendoza agreed.

Bianchi said Mendoza expressed concern that Shapiro was no longer going to represent him. Bianchi testified that Mendoza asked if Shapiro could "at least keep tabs on the case, maybe provide general strategy or advice." Bianchi said Shapiro explained to Mendoza that he could not file any pleadings for him, could not talk to him, and could not go to court for him but that Shapiro could talk to Bianchi about the case if Mendoza agreed. This conversation occurred at a time when Shapiro knew that a senior partner in his firm was representing a codefendant who might possibly be a witness against Mendoza in the federal drug conspiracy case.

The evidence does not establish that either Bianchi or Shapiro told Mendoza the amount of Bianchi's fee. Bianchi testified that Shapiro told Mendoza, "I'll take care of Mike with the money that you have paid me." Bianchi testified that Shapiro gave him $10,000 in cash on March 23 or 24, 1999, at Shapiro's home. Bianchi testified that Shapiro said he was going to keep the remaining $5,000 and that he asked Bianchi if he had a problem with Shapiro's keeping the money. Bianchi said the matter was between Shapiro and Mendoza. Bianchi said he may have kept Shapiro informed about the case, but Shapiro did not have any input as to the strategies utilized in the case.

Bianchi testified that it was not until after Mendoza had entered his guilty plea, but prior to sentencing, that he and Mendoza discussed the fee arrangement. Bianchi said that Mendoza asked him how much money Shapiro had given him, and he answered $10,000. Mendoza asked about the other $5,000, and Bianchi said Shapiro had kept it. When Mendoza expressed dissatisfaction, Bianchi told him to contact Shapiro to straighten it out.

Bianchi testified that following this conversation, he told Shapiro that Mendoza was upset about the $5,000 and might contact him. Bianchi testified that Shapiro responded that Mendoza was "just a disgruntled client who was not happy with the fact that he was going to be doing an extensive amount of time in a federal prison." Bianchi testified that Shapiro said he did not intend to refund the money. At some later time, Shapiro told Bianchi he was considering giving half of the money back to Mendoza.

Shapiro testified that he was first contacted by Scott on March 18, 1999, and that he told her he required a $15,000 retainer. He said that Scott came to his office on March 18 or 19 and gave him $15,000 in cash and that they reached an oral agreement for Shapiro to represent Mendoza through trial and sentencing. In contrast to Scott's testimony about a receipt, Shapiro stated that he was not sure whether he provided Scott with a receipt because it was his practice to prepare one only if requested by the client.

Shapiro said he met with Mendoza on March 19, 1999, at the Douglas County jail, where he told Mendoza he had received $15,000 from Scott. Shapiro testified that at a later meeting, Mendoza gave him permission to discuss his case with Scott. Shapiro said he and Mendoza met four times. During the third meeting, on March 23, Shapiro informed Mendoza of the conflict of interest and that he would need to withdraw. Shapiro said Mendoza asked if he could stay on the case if Mendoza paid additional money. Shapiro explained that rules prevented him from representing Mendoza. Shapiro told Mendoza he would see if he could arrange to continue with the case in federal court if Mendoza waived any claim concerning a conflict of interest.

Shapiro said his final meeting with Mendoza was on March 24, 1999, when they met with Bianchi. Shapiro said he told Mendoza that he could provide general answers on his case. Shapiro said that during this meeting, Mendoza asked Bianchi

about his fee. Shapiro said Mendoza knew that Shapiro had $5,000 left over from the money paid by Scott. Based on his conversation with Mendoza, Shapiro said he believed Mendoza was going to allow him to keep the $5,000 for the time he had invested and so that he would be available for Scott if she needed legal assistance in the future. Thus, it is Shapiro's position that part of the $5,000 was earned and part was retained for future services for Mendoza or Scott for matters unrelated to the federal indictment. Shapiro testified that Scott was his client under the retainer agreement with Mendoza.

In a deposition, Mendoza stated that he was sentenced to a term of 14 years in prison for conspiracy to possess and distribute methamphetamine. He stated that he asked his friend, Scott, to find a lawyer and that she retained Shapiro. Mendoza stated that Shapiro told him at their first meeting that the fee was $15,000. Mendoza said he assumed the $15,000 covered all expenses and fees because he had no specific discussion about it with Shapiro. They had no written agreement, and Mendoza stated that he had no agreement with Shapiro to do additional work for Scott. Mendoza said he met Bianchi at his second meeting with Shapiro, where Shapiro told Mendoza about the conflict with his firm's representing a codefendant.

Mendoza testified that Shapiro told him he was free to pick another lawyer, but that if he retained Bianchi, Shapiro would "watch over" the case and provide help. Shapiro then left so Mendoza and Bianchi could talk. Mendoza said he never talked to Shapiro about Bianchi's fee or how he was going to be paid. Mendoza said he "figured" that Shapiro would get some of Bianchi's fee because Shapiro had referred Bianchi. When Bianchi met with Mendoza at the federal prison in Leavenworth, Kansas, Mendoza asked Bianchi about his fee because Mendoza was considering firing Bianchi. Mendoza said that that was the first time he learned that Bianchi's fee was $10,000 and that Shapiro had retained $5,000. Mendoza said that at one point, he told Bianchi to tell Shapiro he could keep $1,000 and should send $4,000 to Mendoza's family. Mendoza said he was willing to give Shapiro $1,000 because he did not want any more problems, and he "figured a thousand was more than enough for the two times that he went to visit me that took up his time."

We find that the evidence demonstrates clearly and convincingly that Shapiro misrepresented his financial agreement with Mendoza. When Shapiro learned that he had a conflict of interest in representing Mendoza, he could not charge Mendoza for work performed after he knew or should have known of the conflict of interest. Shapiro could not represent to Mendoza that he could continue to serve as an advisor on technical matters when Shapiro's partner was representing a codefendant who could testify against Mendoza.

Numerous ethical conflicts would be presented in this situation. Shapiro's disqualification existed before he agreed to represent Mendoza. His partner was representing a codefendant who might possibly testify against Mendoza. Therefore, Shapiro could not continue to represent Mendoza. Such representation would clearly be adverse to Mendoza, and such representation would potentially be adverse to the codefendant who was being represented by Shapiro's partner.

Shapiro's right to any fee terminated no later than March 23, 1999, when he knew of the conflict of interest. The record clearly and convincingly demonstrates that Shapiro knowingly agreed to continue in some type of representative capacity in order to keep the entire $5,000. The record does not establish that Mendoza knew that Shapiro was going to keep $5,000 of the fee or that he consented to such an arrangement. We do not accept Shapiro's claim that part of the fee was for work done for Mendoza and part of the fee was for Shapiro to serve as an advisor on technical matters or to advise Scott in the future.

[2] We have previously held:

> We do not accept the contention that an attorney can receive fees for representation which from the outset gives the appearance of impropriety and is violative of established rules of professional conduct. An attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility and inconsistent with the character of the profession.

State ex rel. FirsTier Bank v. Mullen, 248 Neb. 384, 390, 534 N.W.2d 575, 580 (1995), citing *Eriks v. Denver*, 118 Wash. 2d 451, 824 P.2d 1207 (1992); *In re Estate of McCool*, 131 N.H. 340,

553 A.2d 761 (1988); and *Moses v. McGarvey*, 614 P.2d 1363 (Alaska 1980).

[3,4] In *In re Estate of Watson*, 5 Neb. App. 184, 189, 557 N.W.2d 38, 41 (1996), the Court of Appeals noted: "Many courts have held that once a conflict of interest or other ethical violation has been established, the attorney is prohibited from collecting fees for his or her services." The Court of Appeals stated: "[A]n attorney who performs work, despite a conflict of interest, is generally prohibited from recovering any fees for the work." *Id.* at 190, 557 N.W.2d at 42. The general principle holds that "once a conflict of interest has been established, an attorney is prohibited from recovering fees for his services, regardless of any benefit to the client." *Id.* at 191, 557 N.W.2d at 42. The Court of Appeals concluded: "[A]n attorney who has a conflict of interest of which he or she knew, or should plainly have known, may not receive attorney fees for legal services rendered to a client after acquiring such knowledge." *Id.* at 193, 557 N.W.2d at 43. Shapiro's conflict of interest existed before he agreed to represent Mendoza, and he discovered the conflict 3 days after he began the representation.

Other courts have addressed the issue of whether an attorney may charge a fee when a conflict of interest exists. In *Pessoni v. Rabkin*, 220 A.D.2d 732, 633 N.Y.S.2d 338 (1995), the court held that an attorney whose representation of multiple parties created a conflict of interest was not entitled to legal fees for services rendered. In *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982), the court held that the law firm forfeited its attorney fees for failing to disclose to the client-plaintiff its ongoing relationship with the defendant's claims adjuster who was negotiating with the plaintiff. In *White v. Roundtree Transport, Inc.*, 386 So. 2d 1287 (Fla. App. 1980), the attorney's right to a fee terminated when the attorney realized or should have realized that he could not ethically represent the client's interests.

[5,6] Disciplinary charges against an attorney must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Petersen*, 264 Neb. 790, 652 N.W.2d 91 (2002). 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. *Id.* From our de novo review of

the record, we conclude that the evidence shows clearly and convincingly that Shapiro violated DR 1-102(A)(1) and (4).

DR 2-106(A)

The second charge against Shapiro alleged that he violated DR 2-106(A), which states that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." The relator asserted that Shapiro violated this rule by retaining $5,000 of the original fee, which is in excess of the fee reasonably and customarily charged in the locality for similar legal services, based on the time, labor, and skill required and the length of the professional relationship with Mendoza.

In recommending dismissal of this charge, the referee stated that there was no evidence to establish that a $5,000 fee for consultation on a multidefendant federal drug conspiracy in which the penalties are 10 years to life in prison is excessive or unreasonable. According to the referee, the fee agreement contemplated that Shapiro would be available for consultation. The referee concluded that the relator did not prove by clear and convincing evidence that Shapiro charged an excessive fee in violation of DR 2-106(A). We disagree.

[7] This court has held that a fee is clearly excessive "when, 'after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.'" *State ex rel. NSBA v. Miller*, 258 Neb. 181, 192, 602 N.W.2d 486, 496 (1999).

Shapiro kept $5,000 of the $15,000 fee paid to him by Scott. The only testimony concerning the appropriateness of that fee was offered by Sean Brennan, a criminal defense attorney with nearly 20 years of experience in the field. Brennan stated that in his opinion, if an attorney receives a $15,000 fee up front from a client in a federal drug conspiracy case, the fee is earned as services are provided unless the client is told that it is a flat fee retainer and that it is not refundable. According to Brennan, the lawyer should place the retainer in a trust account and bill against the retainer on an hourly basis. If the client is clearly told that the money is a nonrefundable retainer, the attorney may place the funds in a business account. However, Brennan said the situation must be made clear to the client.

The record shows that between the time Shapiro was hired and the time he learned of the conflict, he worked approximately 10 hours on behalf of Mendoza. After the discovery of the conflict, Shapiro had no right to represent or charge Mendoza for work done after that time. The $5,000 fee for the work performed prior to knowledge of the conflict is excessive and a violation of DR 2-106(A).

DR 2-107(A)

The third charge alleged that Shapiro violated DR 2-107(A)(1) and (2), which prohibits division of fees. The relator asserted that Shapiro violated this rule by dividing a fee with Bianchi without making full disclosure to or receiving consent from Mendoza. The relator also alleged that Shapiro's portion of the fee was not proportionate to the services he performed and the responsibility he assumed.

The referee recommended dismissal of this charge, finding no division of fees within the meaning of DR 2-107(A)(1). The referee noted that an exception is allowed when the client consents and if the division of fees is based on a division of the services provided. The referee noted that Bianchi testified that he was not part of any referral arrangement with Shapiro and that he did not pay a referral fee to Shapiro or divide his fees with Shapiro. The referee stated that Shapiro did not share his fee with Bianchi, but, rather, Shapiro paid Bianchi the agreed-upon fee to take over the case when Shapiro withdrew. The referee found that the lawyers did not share a fee within the meaning of DR 2-107(A)(1) and that the relator failed to prove by clear and convincing evidence that the lawyers divided fees in violation of the rule.

We conclude that the referee was incorrect in finding no violation of DR 2-107(A)(1). Bianchi testified that Shapiro told him the fee for such a case was $15,000. Bianchi told Shapiro he would take the case for his usual fee of $10,000. Bianchi testified that Shapiro gave him $10,000 in cash, said he was going to keep the remaining $5,000, and asked Bianchi if he had a problem with that. Bianchi responded that the matter was between Shapiro and Mendoza. Bianchi said he may have kept Shapiro informed about the case, but Shapiro did not have input as to the strategies utilized in the case. From our de novo review of the

record, we find that it was Shapiro who divided the fee. He kept $5,000 and gave Bianchi $10,000 without making a full disclosure of the arrangement or obtaining Mendoza's consent to do so. This arrangement was a violation of DR 2-107(A)(1) and (2).

DR 2-110(A)(3)

The fourth charge alleged that Shapiro violated DR 2-110(A)(3) by failing to promptly refund the $5,000 when he withdrew as counsel for Mendoza. Because the referee concluded that the $5,000 fee retained by Shapiro related to a new fee agreement between Mendoza and Shapiro after he withdrew from representing Mendoza on the drug conspiracy charge, the referee found that there was no evidence that the fee was excessive and that Shapiro never withdrew from consulting on the drug conspiracy case after Bianchi took over Mendoza's defense. The referee found that DR 2-110(A)(3) was not implicated by the facts of this case.

We disagree. Shapiro, upon learning of his conflict of interest, failed to promptly refund the unearned portion of the fee. In fact, Shapiro did not refund the fee until August 17, 2001, which was more than 2 years after Mendoza asked for the refund. DR 2-110(A)(3) states that "[a] lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned." Shapiro violated DR 2-110(A)(3) when he failed to promptly refund the unearned portion of the fee.

DISCIPLINARY SANCTION

[8-10] We have determined that Shapiro violated DR 1-102(A)(1) and (4), DR 2-106(A), DR 2-107(A)(1) and (2), and DR 2-110(A)(3). 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 [of the] reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.

State ex rel. Counsel for Dis. v. Thompson, 264 Neb. 831, 842, 652 N.W.2d 593, 601 (2002). Each case must be evaluated individually in light of its particular facts and circumstances. *Id.* 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. *Id.*

Shapiro agreed to represent Mendoza and accepted $15,000 to do so. Upon learning of a conflict of interest, Shapiro represented to Mendoza that he could continue in an advisory capacity when he should have promptly withdrawn. Shapiro instead contacted another attorney, who agreed to represent Mendoza for $10,000. Without advising Mendoza of the fee arrangement, Shapiro kept $5,000 of the $15,000 fee. The retention of the $5,000 was an excessive fee. He had not earned the $5,000 because he learned of the conflict of interest 3 days after he was initially paid the $15,000 fee. The unearned portion should have been promptly returned when Shapiro learned that his partner was representing a codefendant who might testify against Mendoza. He did not refund the $5,000 until after formal charges had been filed against him, which was more than 2 years after he had withdrawn as Mendoza's attorney.

[11] This court must impose a disciplinary sanction to deter others from misconduct in order to protect the public and to maintain the reputation of the bar as a whole. *State ex rel. Counsel for Dis. v. Huston*, 262 Neb. 481, 631 N.W.2d 913 (2001). We conclude that Shapiro should be suspended from the practice of law in the State of Nebraska for a period of 60 days, effective immediately.

CONCLUSION

It is the judgment of this court that Shapiro should be suspended for a period of 60 days, effective immediately. He is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2000), and upon failure to do so, he shall be subject to punishment for contempt of this court. In addition, Shapiro 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.

JAMES A. STEJSKAL, APPELLEE, V. DEPARTMENT OF ADMINISTRATIVE SERVICES, STATE OF NEBRASKA, APPELLANT.

665 N.W.2d 576

Filed July 18, 2003. No. S-01-797.

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 not arbitrary, capricious, or unreasonable.
3. **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.
4. ____: ____. 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.
5. **Administrative Law: Courts: Evidence: Appeal and Error.** Although a district court in its de novo review of agency determinations is not required to give deference to the findings of fact by the agency hearing officer, it may consider the fact that the hearing officer, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and may give weight to the hearing officer's judgment as to credibility.
6. **Employer and Employee: Words and Phrases.** "Just cause" for employee discipline is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for formally disciplining an employee, as distinguished from an arbitrary whim or caprice.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Don Stenberg, Attorney General, Kyle C. Dahl, and Vicki L. Boone-Lawson for appellant.

Anthony C. Coe, of Polsky, Cope, Shiffermiller, Coe & Monzon, for appellee.

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

GERRARD, J.

NATURE OF CASE

James A. Stejskal was an employee of the Department of Administrative Services (DAS) from 1987 until his employment was terminated in January 1999. Stejskal followed the employee grievance procedure of the State of Nebraska Classified System Personnel Rules & Regulations, appealing first to the agency head, who denied his grievance. Stejskal then appealed to the Nebraska State Personnel Board (the Board). The Board appointed a hearing officer who conducted a hearing and then recommended overturning the agency head's decision to deny Stejskal's grievance. Nevertheless, the Board voted, and the denial of the grievance was affirmed. Stejskal then appealed to the district court, which reversed the Board's decision, based both on insufficient evidence and on the unfairness of the proceedings. DAS now appeals the decision of the district court.

FACTUAL BACKGROUND

Stejskal was employed as an accountant by DAS from August 1987 until his termination of employment on January 21, 1999. LaVerne Halstrom was his immediate supervisor. The hearing officer and district court found that the work atmosphere in Stejskal's department at DAS was fast-paced and stressful and that raised voices were not uncommon.

The record shows that Stejskal was first warned of unprofessional conduct in a November 1994 memorandum from Halstrom. Stejskal and Halstrom were discussing problems they both were having with a supplier. According to Halstrom, Stejskal took an "unprofessional and negative position" and "demonstrated an emotionally negative reaction" to the extra work caused by the supplier's shortcomings. Halstrom acknowledged that Stejskal completed the required tasks as requested.

The next incident occurred in October 1996. Stejskal was placed on 6 months' probation for three separate instances. First, he told a coworker in an inappropriate tone of voice to " '[g]o back to your desk and quit your bitching to me.' " Second, he reacted defensively and in an inappropriate tone to Halstrom's question regarding the adequacy of Stejskal's performance on a particular task. Third, when questioned by Halstrom why Stejskal

placed a stack of papers on the wrong desk after a coworker indicated the correct desk, Stejskal stated his reasons in "a negative way." Stejskal successfully completed the 6 months' probation, apparently without incident.

Stejskal was again placed on 6 months' probation in 1997 for another incident between Halstrom and him. On September 8, Halstrom entered Stejskal's work area to give him some instructions. Stejskal testified that he felt very ill that day, later asked to go home sick, and visited a medical clinic in Lincoln for some relief. When Halstrom appeared, Stejskal kept his back to Halstrom, took issue with something Halstrom said, stood up, ignored Halstrom's question, and walked to the men's bathroom while Halstrom asked Stejskal three times to come to his office. When Stejskal returned from the bathroom, he complied with Halstrom's request and they had a 20-minute meeting in his office. In a subsequent meeting called to discuss Halstrom's allegations of Stejskal's conduct, Stejskal presented evidence that he had been ill and had been prescribed some medication. Halstrom dismissed this as unrelated to the offense. Stejskal successfully completed this 6 months' probation without incident.

The final set of events resulting in disciplinary action—this time termination—occurred on January 4, 1999. Stejskal had just returned from vacation to find a stack of invoices on his desk. Stejskal testified that these invoices were not to be left idle on a desk, that they were "priority," and that they should have been processed in his absence. Stejskal feared he was being set up for termination. Halstrom approached Stejskal at 8 a.m. on his first day back with Stejskal's pay stub to speak with him about work issues. Stejskal did not initially communicate with Halstrom. Stejskal then asked repeatedly if he was being fired and appeared to Halstrom to be upset. At a meeting discussing this incident attended by another administrator, Halstrom gave Stejskal instructions to communicate directly with him and to do so in a professional manner. After the other administrator left the meeting, Halstrom told Stejskal to give him hourly updates on the progress with his current task. Stejskal failed to update Halstrom for several hours following this directive, but it is not disputed that Stejskal performed his job functions adequately.

After a meeting informing Stejskal of his alleged violations, Halstrom terminated Stejskal's employment.

PROCEDURAL BACKGROUND

After his dismissal, Stejskal filed a grievance with the agency head, William Wood, who then denied the grievance. Stejskal appealed to the Board. The Board designated a hearing officer to conduct the hearing and recommend a decision to the Board. The hearing officer held a hearing, made findings, and recommended that the agency head's denial of Stejskal's grievance be overturned. The Board reviewed the evidence, including testimony from Wood as a witness against Stejskal. Upon voting, the Board came to a 2-to-2 impasse. The administrative procedures dictate that in the event of a tie, the decision of the agency head prevails. See 273 Neb. Admin. Code, ch. 14, § 009.03C (1998). Wood's denial of Stejskal's grievance therefore prevailed.

Stejskal appealed to the district court. After adopting the hearing officer's findings of fact, the court found insufficient evidence to establish just cause to discipline Stejskal. The court also found that the type of discipline—dismissal—was not justified by the evidence of Stejskal's actions. This finding came despite the court's conclusion that consideration of previous, time-barred offenses was proper for the limited role of determining the severity of discipline to impose. The court also found that it was "unfair" to Stejskal for Wood's decision to be the tie-breaker on the Board when Wood himself testified against Stejskal before the Board. Upon these findings, the court directed the Board to adopt the hearing officer's recommendations. DAS appeals the district court's judgment.

ASSIGNMENTS OF ERROR

DAS assigns, restated, that the district court erred by (1) finding insufficient evidence to establish just cause to terminate Stejskal's employment and (2) determining that Wood's dual role as witness and tie-breaker was unfair.

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. *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. 605, 650 N.W.2d 760 (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 not arbitrary, capricious, or unreasonable. *Id.*

[3] 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. *Kubicek v. City of Lincoln*, 265 Neb. 521, 658 N.W.2d 291 (2003).

[4] 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. *American Bus. Info. v. Egr*, 264 Neb. 574, 650 N.W.2d 251 (2002).

ANALYSIS

The Administrative Procedure Act entitles any person aggrieved by an agency's final decision to a judicial review of that decision. The district court reviews the agency's decision de novo on the record of the agency, Neb. Rev. Stat. § 84-917 (5)(a) (Reissue 1999), and if appealed, the court's decision is reviewed by the appellate court for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Reissue 1999). We therefore review the district court's decision for errors appearing on the record, while cognizant that the court's review of the agency's decision was de novo.

DAS first alleges that the district court erred by finding insufficient evidence to establish just cause to terminate Stejskal's employment. It specifically argued that the court applied the incorrect standard for a finding of just cause. We must decide whether the court's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.

[5] After its de novo review of the record, the court adopted the hearing officer's findings. The district court in its de novo review of agency determinations is not required to give deference to the findings of fact by the agency hearing officer. *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d

285 (1995). However, it may consider the fact that the hearing officer, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and may give weight to the hearing officer's judgment as to credibility. See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002). Upon review of the record, we determine that the hearing officer's findings, adopted by the court, are supported by competent evidence and conform to the law.

Upon these findings, the district court concluded that the evidence was insufficient to establish the "just cause" which DAS must have prior to disciplining an employee. The court also determined that Stejskal's conduct on the record did not justify the particular measure of termination of employment.

[6] While we have not defined "just cause" in this context, we have said that "good cause" for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice. *Koster v. P & P Enters.*, 248 Neb. 759, 539 N.W.2d 274 (1995); *Brockley v. Lozier Corp.*, 241 Neb. 449, 488 N.W.2d 556 (1992); *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 438 N.W.2d 494 (1989). The two concepts in this context are interchangeable. Therefore, we apply the above standard to the findings regarding just cause in the instant case.

Before considering whether just cause existed, the district court considered which acts could form the basis of that just cause. The court found that the State's labor contract does not permit acts occurring over 1 year earlier to form the basis for initiating discipline. This finding is not erroneous. Therefore, Stejskal's behavior on January 4, 1999, formed the only basis for initiating disciplinary action, since all other incidents took place over 1 year before that action was initiated. The court then concluded that the competent evidence presented of Stejskal's behavior that day was insufficient to show just cause for formal discipline.

According to Halstrom's January 1999 memorandum to Stejskal, he states that Stejskal's acts allegedly violated the following sections of the DAS handbook:

> (10) Failure to maintain a satisfactory working relationship with the public or other employees;

(14) Insubordinate acts or language which seriously hamper the agency's ability to control, manage or function; and

(15) Acts or conduct on the job which adversely affects the employee's performance and/or the employing agency's performance or function.

The evidence of Stejskal's wrongful acts of January 4, 1999, consisted of the testimony of Stejskal's supervisor, Halstrom, with whom Stejskal had a personality conflict. That evidence reveals that Stejskal momentarily refused to communicate with Halstrom, appeared upset, asked if he were being fired, and failed to follow Halstrom's subsequent directive to update him each hour. The directive appeared to the hearing officer to be unreasonable in context of the rush to process invoices already backlogged. The only working relationship shown by the evidence to have been affected was that between Stejskal and Halstrom. The evidence, however, does not lead to a conclusion (1) that any insubordination allegedly directed at Halstrom on January 4 "seriously hampered" DAS control or (2) that Stejskal's or DAS' performance was hindered by Stejskal's acts that day.

Upon this evidence, the court determined that no just cause was established by DAS. The conclusion that a reasonable employer, acting in good faith, would not regard Stejskal's January 4, 1999, behavior as good and sufficient reason for formal discipline is a conclusion that conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. DAS' first assignment of error is without merit.

Having determined the dispositive issue, we need not consider DAS' second assignment of error.

CONCLUSION

The district court's judgment that the evidence was insufficient to show just cause to discipline Stejskal conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. Accordingly, we affirm.

AFFIRMED.

IN RE TRUST CREATED BY H. WAYNE MARTIN, DECEASED. U.S. BANK, N.A., APPELLEE AND CROSS-APPELLANT, V. ANITA MARTIN-WALKER AND CLARK G. NICHOLS, AS NEXT FRIEND FOR MEGAN WALKER ET AL., MINOR CHILDREN, OBJECTORS-APPELLANTS AND CROSS-APPELLEES.

664 N.W.2d 923

Filed July 18, 2003. No. S-01-1232.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
3. **Decedents' Estates: Appeal and Error.** In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
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. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
6. **Attorney Fees.** Attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
7. **Trusts: Attorney Fees: Costs.** Generally, if a fiduciary's defense of his acts is substantially successful, he is ordinarily entitled to recover the reasonable costs necessarily incurred in preparing his final account and in successfully defending it against objections.
8. **Decedents' Estates: Attorney Fees.** In general, if a fiduciary is found guilty of a breach of duty or the court orders the fiduciary to account to the estate, the estate is not liable for the fiduciary's attorney fees.

Appeal from the County Court for Scotts Bluff County: G. GLENN CAMERER, Judge. Affirmed.

Clark G. Nichols, of Nichols Law Office, for appellants Megan Walker et al.

Rhonda R. Flower, of Flower Law Office, for appellant Anita Martin-Walker.

John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellee.

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

McCORMACK, J.

NATURE OF CASE

This case requires us to judge the investment decisions of a trustee against the standards established by Neb. Rev. Stat. §§ 30-2813 and 30-3201 (Reissue 1995). Anita Martin-Walker and her three minor children, Megan Walker, Kristin Walker, and Logan Walker (collectively the objectors), objected to the management of the assets of the H. Wayne Martin Trust by U.S. Bank, N.A. The objectors argued in the county court, as they do here, that they were damaged by the bank's selection of fixed income investments over equity investments. The county court rejected the objectors' claims, and we affirm.

BACKGROUND

On April 19, 1989, Martin established the trust at issue in this case. Upon Martin's death, certain property was to be held by his successor trustees "as a separate trust and in further trust hereunder for the use and benefit of my daughter, ANITA J. MARTIN-WALKER." The trust further directed:

> The income from the trust established for my daughter ANITA shall be paid in convenient installments, at least quarterly, to her for the remainder of her lifetime.
>
> . . . .
>
> . . . My successor trustees may also pay to or for the benefit of my daughter ANITA such sums from principal as my successor trustees deem necessary or advisable from time to time for her health, maintenance in reasonable comfort and best interests, considering her other income and means of support from all sources known to my successor trustees.
>
> . . . .
>
> . . . Upon the death of my said daughter ANITA J. MARTIN-WALKER . . . my successor trustees shall

> distribute the remaining trust estate as then constituted to her then living descendants . . . .

Martin died on August 25, 1989. Pursuant to the trust, Martin-Walker and the bank became cotrustees of the trust and assumed control of the trust assets. One of the assets originally included in the trust was a farm, while the remaining assets were invested in fixed income investments. The decision to invest in fixed income investments was consistent with the bank's determination that the objective of the trust was to provide maximum income to Martin-Walker. The farm was sold in 1993, at which point 100 percent of the trust assets were invested in fixed income investments. Also in 1993, the bank sold a number of assets described as private placements or limited partnerships. The value of these assets had been substantially diminished by a change in the Internal Revenue Code, and the bank decided to sell them in part because they were no longer deemed to be trust-quality assets. These assets, however, were sold for amounts in some cases of less than the annual income they produced.

After the sale of the farm, the trust continued to be invested entirely in fixed income investments until August 1994, when the bank began investing in equities. As of August 1996, approximately 14 percent of the trust assets were invested in equities, with the remainder still invested in fixed income investments.

The trust provided Martin-Walker with the power to remove the bank as cotrustee, a power she exercised on November 8, 1996. Earlier that year, Martin-Walker had expressed her dissatisfaction with the performance of the trust, particularly with the lack of growth of the trust principal. Having been removed as a cotrustee, the bank transferred the assets to Martin-Walker's newly designated cotrustee. The bank filed its petition for final accounting in the county court on December 4, 1997. Martin-Walker filed an amended objection to the bank's petition. She alleged that the bank failed to invest the trust assets as a prudent person would by failing to invest in a manner which would have produced growth of the trust principal. As a result, Martin-Walker alleged that the beneficiaries of the trust suffered damages. Martin-Walker's three minor children objected on identical grounds. In its response, the bank alleged, among other things,

that the objections were barred by Neb. Rev. Stat. § 30-2818 (Reissue 1995).

The county court undertook the issues raised in two stages. On April 14, 1999, the court concluded that § 30-2818 did not bar the objections. The court found, in part, that the beneficiaries of the trust did not receive a final account or other statement fully disclosing the matter in question 6 months or more before the beneficiaries asserted their claim. On July 24, 2001, the county court rejected the objectors' claims and approved the bank's final accounting, concluding that the bank did not abuse its discretion in selecting fixed income investments over equity investments. However, the court did not approve of the bank's liquidation of the private placements and limited partnership assets. The court found that the bank unilaterally decided to liquidate these assets without regard to their historical and potential income production. The court found that this action was an abuse of discretion and that the bank took this action for its own convenience. The court declined to award damages on this issue, however, because no evidence of damages was presented and any award would be speculative.

Subsequently, the court overruled the objectors' motion for new trial. The court also overruled the bank's motion for attorney fees, concluding that because the bank breached its duty with regard to the private placements and limited partnerships, the bank was not fully successful in defending its actions. The objectors filed this appeal, and the bank cross-appeals.

ASSIGNMENTS OF ERROR

The objectors assign that the county court erred in (1) finding that the bank had discretion as to whether or not to invest the assets of the trust in accordance with §§ 30-2813 and 30-3201, (2) failing to find that the beneficiaries of the trust were damaged by the breach of fiduciary duty on the part of the bank in failing to invest and manage the assets of the trust in accordance with §§ 30-2813 and 30-3201, and (3) overruling the objectors' motion for new trial.

On cross-appeal, the bank assigns that the county court erred in (1) failing to hold that the objectors' claims were barred by the statute of limitations and (2) failing to award attorney fees and expenses.

STANDARD OF REVIEW

[1-3] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002). In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *Id.* In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

[4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Fox v. Nick*, 265 Neb. 986, 660 N.W.2d 881 (2003).

[5] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997).

ANALYSIS

The objectors argue that the bank failed to invest and manage the assets of the trust in accordance with §§ 30-2813 and 30-3201. Specifically, the objectors contend that the bank had a duty to invest the trust assets in a manner which would balance the interests of the income beneficiary and the remainder beneficiaries. They argue that the bank violated that duty by investing the trust assets in predominately fixed income investments. The objectors claim that the bank should have invested the trust assets in investments that would grow the trust corpus for the benefit of the remainder beneficiaries, or at least protect the real value of the corpus.

Section 30-2813 provided in relevant part:

> Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills, or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

A prudent person, for purposes of § 30-2813, is defined as "a trustee whose exercise of trust powers is reasonable and equitable in view of the interests of income or principal beneficiaries, or both, and in accordance with the standards of care provided for trustees in section 30-2813." Neb. Rev. Stat. § 30-2819(2) (Reissue 1995).

Section 30-3201 similarly provided in relevant part:

> Except as may be otherwise provided . . . by law or by the instrument creating the fiduciary relationship involved, each and every trustee . . . having funds for investment shall invest the same in investments of the nature which men of prudence, discretion, and intelligence acquire or retain in dealing with the property of another, and if the trustee . . . has special skills or is named as fiduciary on the basis of representations of special skills or expertise, he is under a duty to use those skills.

These rules are applicable in this case because all of the bank's decisions and actions concerning the trust occurred prior to September 13, 1997. We note that trustee actions and decisions occurring after that date are governed by the "prudent investor rule" as codified by the Nebraska Uniform Prudent Investor Act, Neb. Rev. Stat. § 8-2201 et seq. (Reissue 1997).

The Restatement (Second) of Trusts § 232, comment *b.* at 555-56 (1959), has commented on the somewhat antagonistic interests of income and remainder beneficiaries:

> *Duty to each of successive beneficiaries.* If by the terms of a trust the trustee is directed to pay the income to a beneficiary during a designated period and on the expiration of the period to pay the principal to another beneficiary, the trustee is under a duty to the former beneficiary to take care not merely to preserve the trust property but to make it productive so that a reasonable income will be available for him, and he is under a duty to the latter beneficiary to take care to *preserve* the trust property for him.
>
> Although the trustee is not under a duty to the beneficiary entitled to the income to endanger the safety of the principal in order to produce a large income, he is under a duty to him *not to sacrifice income for the purpose of increasing the value of the principal.* Thus, the trustee is

> under a duty to a life beneficiary not to purchase or retain unproductive property or property which yields an income substantially lower than that which is normally earned by trust investments, although it is probable that the property will appreciate in value. . . .
>
> On the other hand, the trustee is under a duty to the beneficiary who is ultimately entitled to the principal not to purchase or retain property which is certain or likely to depreciate in value, although the property yields a large income, unless he makes adequate provision for amortizing the depreciation.

(Emphasis supplied.)

These principles were applied in *Tovrea v. Nolan*, 178 Ariz. 485, 875 P.2d 144 (Ariz. App. 1993), a case which is identical to the present case in all relevant respects. In *Tovrea*, a husband's will created a trust and named his wife as the life beneficiary of the trust income and his children as the remainder beneficiaries. The children brought suit against the trustees, arguing, among other things, that the trustees failed to invest the trust assets prudently. The Arizona Court of Appeals rejected the children's arguments:

> [The children's] claim that [the trustees] had a duty to make growth investments to protect the principal against inflation, based on the trustees' duty to treat the income and remainder beneficiaries impartially, contravenes both the terms of Tovrea's will and the law. Tovrea's will provided that the net income of the trust was to be paid to, or for the benefit of, [his wife], and also authorized the trustees to invade and apply the principal for [his wife's] benefit "at such times and in such amounts as they shall determine, in their sole and absolute discretion, that she may benefit from additional funds to maintain her health, education and general welfare." Clearly, Tovrea intended that the trust provide for [his wife], even at the expense of principal. Furthermore, because this trust was to provide her a lifetime income, the *trustees could not sacrifice income in order to increase the value of the principal. In re Frances M. Johnson Trust*, 211 Neb. 750, 320 N.W.2d 466 (1982); Restatement (Second) of Trusts, § 232, comment b (1956). *The trustees' duty was to*

> *invest in such a manner as to produce an income for [his wife] and, secondarily, preserve the principal. See id.*; [IIIA Austin Wakeman Scott & William Franklin Fratcher,] Scott on Trusts § 232 (4th ed. 1988).

(Emphasis supplied.) *Tovrea v. Nolan*, 178 Ariz. at 490, 875 P.2d at 149.

The trust established by Martin provided for the payment of trust income to Martin-Walker for her lifetime. It further authorized the trustees to invade the principal for her "health, maintenance in reasonable comfort and best interests." We cannot say that the bank violated the standards codified in §§ 30-2813 and 30-3201 by investing the large majority of trust assets in fixed income investments rather than investing the trust assets in equity investments which, without the benefit of hindsight, may have endangered the integrity of the trust principal. We conclude that the bank's actions in investing the preponderance of the trust assets in fixed income investments rather than equity investments conformed to the applicable standards of §§ 30-2813 and 30-3201.

[6] Having rejected the objectors' arguments on appeal, it is unnecessary to address the bank's first assignment of error on cross-appeal. However, the bank also assigns that the county court erred in failing to award attorney fees. As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002). Prior to our decision in *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997), the law in Nebraska provided:

> In general, if the final order in the litigation involved finds the fiduciary guilty of a breach of duty or orders him to account to the estate, the estate is not liable for his attorney fees. If the fiduciary's defense of his acts is *fully successful*, he is ordinarily entitled to recover the reasonable costs necessarily incurred.

(Emphasis supplied.) *In re Guardianship of Bremer*, 209 Neb. 267, 274, 307 N.W.2d 504, 509 (1981).

[7,8] In *Rapp*, we modified that standard in part. We held that a fiduciary's defense need not be 100 percent successful in order

for the fiduciary to be entitled to recover costs, including attorney fees. Instead, a fiduciary is entitled to recover reasonable costs necessarily incurred in preparing his or her final account and defending it against objections if the fiduciary's defense is *substantially successful. Rapp v. Rapp, supra.* However, our decision in *Rapp* left undisturbed the principle that if a fiduciary is found guilty of a breach of duty or the court orders the fiduciary to account to the estate, the estate is not liable for the fiduciary's attorney fees. See *In re Guardianship of Bremer, supra.*

In this case, the county court denied the bank attorney fees based on its findings that the bank breached its duty in the disposition of the private placements and limited partnerships. The bank has not taken exception with these findings on cross-appeal. Under *In re Guardianship of Bremer, supra,* the bank's breach of duty with regard to the private placements and limited partnerships precludes an award of attorney fees. We conclude that the county court's decision denying the bank attorney fees was not an abuse of discretion.

CONCLUSION

Under Nebraska law, the bank's decisions and actions regarding the investment of the trust assets complied with the applicable standards of §§ 30-2813 and 30-3201. We therefore affirm the order of the county court approving the bank's final accounting. We also affirm the county court's order denying the bank attorney fees.

AFFIRMED.

DLH, INC., DOING BUSINESS AS COACHES SPORTS BAR & GRILL, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., APPELLEES.

665 N.W.2d 629

Filed July 18, 2003. No. S-02-033.

1. **Administrative Law: Liquor Licenses: Appeal and Error.** Appeals from orders or decisions of the Nebraska Liquor Control Commission are taken in accordance with the Administrative Procedure Act.

2. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
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.
4. **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.
5. **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.
6. **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.
7. ____: ____. An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which it is to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute.
8. **Administrative Law: Liquor Licenses: Statutes: Intent.** The Nebraska Liquor Control Commission is empowered to adopt and promulgate rules and regulations to carry out the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 1998 & Cum. Supp. 2002), including provisions covering any and all details which are necessary or convenient to the enforcement of the intent, purpose, and requirements of the act.
9. **Administrative Law: Alcoholic Liquors.** In order for a regulation to be "necessary or convenient" to the enforcement of the Nebraska Liquor Control Act, the Nebraska Liquor Control Commission must show some nexus between the regulation and alcoholic liquors.
10. **Administrative Law: Liquor Licenses: Statutes: Intent.** The Nebraska Liquor Control Commission may not adopt rules and regulations that are in conflict with the Nebraska Liquor Control Act. The power to regulate must be exercised in conformity with all the provisions of the act and in harmony with its spirit and expressed legislative intent.
11. **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.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

K.C. Engdahl, of Raynor, Rensch & Pfeiffer, for appellant.

Don Stenberg, Attorney General, and Hobert B. Rupe for appellees.

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

MCCORMACK, J.

NATURE OF CASE

The Nebraska Liquor Control Commission (Commission) suspended the liquor license of DLH, Inc., after an administrative hearing. The Commission found that DLH allowed a "disturbance" in or about the licensed premises in violation of 237 Neb. Admin. Code, ch. 6, § 019.01F1 (1994). The district court affirmed the Commission's order, and DLH appealed. 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).

BACKGROUND

DLH is a Nebraska corporation doing business as Coaches Sports Bar & Grill. In June 2000, DLH; Duane Hartman Investments, Inc.; and DTR, Inc., doing business as Cheetah's, (Cheetah's) entered into a contract whereby Cheetah's would provide "adult entertainment performers" to its portion of the premises. Cheetah's is a leased property separate but adjacent to Coaches Sports Bar & Grill and is within the licensed premises to be covered by DLH's liquor license.

On three separate occasions, August 10, 16, and 19, 2000, an undercover Lancaster County sheriff's deputy visited Cheetah's. Thereafter, according to DLH, the Commission sent three notices to DLH, one for each occasion, alleging that DLH did allow or permit a "disturbance" in or about the licensed premises in violation of a Commission regulation, § 019.01F1. An administrative hearing was scheduled for October 19, 2000.

At the hearing, the State offered the testimonies and investigation reports of the three undercover officers who had visited Cheetah's. The testimonies were consistent. Each officer testified that he observed female dancers dressed in bikini tops and bottoms, which generally covered their genital areas, buttocks, and breasts, engaging in physical contact with patrons. Contact involved the dancers' touching the patrons, among whom were

the officers, with their hands and breasts, including rubbing their breasts on patrons' faces. No attempts by employees or owners to stop or prevent the contact were witnessed by the officers. The officers also testified that the patrons often tipped the dancers with dollar bills after such contact. At no time did the officers observe topless dancing or physical contact initiated by the patrons toward the dancers. Nor did the officers observe activity which they believed to endanger the patrons, but if they had, they testified that they would have acted. The officers also testified that they did not inform the owners or management of their surveillance, nor did they inquire whether the dancers were agents or employees of DLH. After the officers testified, the State rested.

Hartman was the only witness called to testify on DLH's behalf. Hartman confirmed that Cheetah's is within the licensed premises of DLH and that a contract existed between DLH and Cheetah's whereby Cheetah's would provide adult entertainment to its portion of the premises. Hartman also testified that after receiving notice of the Commission's allegations in the mail, he notified his attorney to make demand on Cheetah's to comply with Nebraska law. To the best of Hartman's knowledge, Cheetah's complied with the terms made in the demand. In support of Hartman's testimony, DLH offered exhibit 9, an acknowledgment signed by the owner of Cheetah's, agreeing to abide by the laws of Nebraska. Hartman further testified that in July 2000, he applied to the Commission to delicense the space occupied by Cheetah's. Hartman wanted to avoid any question concerning the compliance or noncompliance with liquor laws on Cheetah's portion of the premises. The application was unanimously denied by the Commission. At the conclusion of the hearing, the Commission found DLH to be in violation of its regulation, § 019.01F1. The Commission suspended DLH's liquor license for 30 days, 10 days for each offense.

Pursuant to Neb. Rev. Stat. §§ 84-917 to 84-919 (Reissue 1999) of the Administrative Procedure Act (APA), DLH appealed the Commission's decision to the district court. The district court, in affirming the Commission's order, found that (1) the type of business that occurs in Cheetah's does fall under the Commission's authority to regulate dancing where alcohol is

sold; (2) DLH did allow a disturbance in violation of the regulation on three separate occasions; and (3) it was DLH's responsibility, as a liquor license holder, to ensure that the dancers were not violating any of the Commission's regulations.

ASSIGNMENTS OF ERROR

DLH assigns, rephrased, that the district court erred in (1) finding that the Commission did not exceed its statutory authority in promulgating rules and regulations §§ 019.01F and 019.01F1; (2) affirming suspension of DLH's liquor license for violation of a regulation which is not prohibitory but merely definitional; (3) affirming suspension of DLH's liquor license for violation of a regulation, § 019.01F, which was never alleged to be violated in the Commission's complaint or order; (4) relying upon *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483 (1972), in affirming the order of the Commission; (5) concluding that the Commission has authority to regulate "dancing" where alcohol is sold; and (6) determining that DLH is responsible for "dancers" at the licensed premises notwithstanding the absence of evidence adduced at the time of trial by the Commission to establish either employment or agency of the individuals by DLH.

STANDARD OF REVIEW

[1-4] Appeals from orders or decisions of the Commission are taken in accordance with the APA. Neb. Rev. Stat. § 53-1,116 (Cum. Supp. 2002); *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002). Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *City of Omaha v. Kum & Go, supra*. A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Id.* 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.*

[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.*

ANALYSIS

The Commission's "disturbance" regulation at issue in this case provides:

> 019.01F Disturbance: No licensee or partner, principal, agent or employee of any licensee shall allow any unreasonable disturbance, as such term is defined hereunder, to continue without taking the steps, as set forth hereunder, within a licensed premise or in adjacent related outdoor areas.
>
> 019.01F1 A "disturbance" as used in this section shall mean any brawl, fight, or other activity which may endanger the patrons, employees, law enforcement officers, or members of the general public within licensed premises or adjacent related outdoor area. Such term shall include incidents involving, but not necessarily limited to: drug dealing; intoxicated individuals; soliciting of prostitution; or *any physical contact between the licensee's agents or employees and its customers, involving any kissing, or any touching of the breast, buttock, or genital areas.*
>
> . . . .
>
> 019.01F4 A licensee who has conformed with the procedure as set forth in this section shall be deemed to have not permitted a disturbance to occur and continue.

(Emphasis supplied.) The unreasonable disturbance specifically complained of in this case, which we limit our analysis to, is *any physical contact between the licensee's agents or employees and its customers, involving any kissing, or any touching of the breast, buttock, or genital areas.* See § 019.01F1.

[6,7] In this appeal, DLH argues that the Commission, an administrative agency, exceeded its statutory authority in promulgating its disturbance regulation. Our review is guided by the following principles of law: The Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute. *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002). However, an administrative agency is limited in its rulemaking

authority to powers granted to the agency by the statutes which it is to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute. *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996).

In determining whether the Commission exceeded its statutory authority, we must interpret its enabling legislation. 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. *American Legion v. Nebraska Liquor Control Comm.*, 265 Neb. 112, 655 N.W.2d 38 (2003); *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002); *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002).

[8-10] The Commission is empowered to adopt and promulgate rules and regulations to carry out the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 1998 & Cum. Supp. 2002), including provisions covering any and all details which are necessary or convenient to the enforcement of the intent, purpose, and requirements of the act. *City of Omaha v. Kum & Go, supra.* In order for a regulation to be "necessary or convenient" to the enforcement of the Nebraska Liquor Control Act, the Commission must show some nexus between the regulation and alcoholic liquors. *County Cork v. Nebraska Liquor Control Comm., supra.* The Commission may not, however, adopt rules and regulations that are in conflict with the act. The power to regulate must be exercised in conformity with all the provisions of the act and in harmony with its spirit and expressed legislative intent. *City of Omaha v. Kum & Go, supra.* According to § 53-101.05:

> The Nebraska Liquor Control Act shall be liberally construed to the end that the health, safety, and welfare of the people of the State of Nebraska are protected and temperance in the consumption of alcoholic liquor is fostered and promoted by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquor.

In the case presently before us, we must decide whether a nexus exists between the regulation and alcoholic liquor. The

regulation prohibits any physical contact between the licensee's agents or employees and its customers, involving any kissing, or any touching of the breast, buttock, or genital areas. We conclude such nexus exists.

In *County Cork v. Nebraska Liquor Control Comm., supra*, we said that for a regulation to be "necessary or convenient" to the enforcement of the Nebraska Liquor Control Act, the Commission must show some nexus between the activity and alcoholic liquor. In *County Cork*, the activity was the sale of tobacco to a minor, which was alleged to be "other illegal activity" under the act. We held that there was no nexus, and the Commission exceeded its statutory authority in promulgating the "other illegal activities" regulation under which County Cork's license was suspended. In *County Cork*, we relied upon *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483 (1972), wherein this court recognized a nexus between the sale of alcohol and topless dancing. In DLH's case, the activity prohibited by the regulation was the touching of the breast which occurred in this case. The regulations at issue in this case are for the protection of those persons enumerated: patrons, employees, law enforcement officers, or members of the general public within the licensed premises or adjacent outdoor area. The nexus between the activity and alcoholic liquor is apparent in the regulation. The regulations, by their terms, prohibit sexual contact occurring on the licensed premises or in adjacent related outdoor areas as a logical means of protecting patrons, employees, and others on the premises or in adjacent related outdoor areas from activity which could lead to contact endangering those persons within the licensed premises or in adjacent related outdoor areas.

[11] Having concluded that the Commission's regulation is valid, we address DLH's remaining assignments of error. Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *American Legion v. Nebraska Liquor Control Comm.*, 265 Neb. 112, 655 N.W.2d 38 (2003). A judgment or final order entered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors

appearing on the record. *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002); *Davis v. Wimes*, 263 Neb. 504, 641 N.W.2d 37 (2002). 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. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *American Legion v. Nebraska Liquor Control Comm., supra.* An appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings. *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002); *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002).

The record in this case supports the district court's findings that DLH failed to prevent or stop an unreasonable disturbance in violation of § 019.01F. It is undisputed that the physical contact complained of occurred within the licensed premises covered by DLH's liquor license. Furthermore, each officer testified that no attempt was made by DLH or anyone else to stop the physical contact on the three occasions. As the liquor licensee, it is DLH's responsibility to ensure that Cheetah's is in complete compliance with the Commission's rules and regulations.

The record also contains the contract between DLH and Cheetah's, which includes a provision that adult entertainment was to be provided. In addition, the officers testified that the dancers on the licensed premises were receiving tips from patrons. From this evidence, one could reasonably infer that the dancers were agents or employees of DLH.

Finally, the record contains, as DLH asserts, that the Commission found DLH to be in violation of § 019.01F1 and that the district court found DLH to be in violation of § 019.01F. Nonetheless, the district court's finding, on its de novo review, is not arbitrary and capricious, and thus we do not consider this finding to be reversible error.

We note that we have considered all other assignments of error not specifically addressed in this opinion and find them to be without merit. See, *Kubicek v. City of Lincoln*, 265 Neb. 521, 658 N.W.2d 291 (2003); *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001).

CONCLUSION

The Commission did not exceed its statutory authority in promulgating its "disturbance" regulation prohibiting any physical contact between the licensee's agents or employees and its customers, involving any kissing, or any touching of the breast, buttock, or genital areas. We also conclude that the district court's findings are supported by competent evidence. Therefore, we affirm the district court's affirmance of the Commissions' order suspending DLH's liquor license.

AFFIRMED.

GERRARD, J., concurring.

The primary issue presented in this appeal is whether the regulation defining a "disturbance" exceeds the authority granted to the Nebraska Liquor Control Commission (Commission) by the Legislature in the Nebraska Liquor Control Act, Neb. Rev. Stat. § 53-101 et seq. (Reissue 1998 & Cum. Supp. 2002). Stated more specifically, the issue is whether there is a nexus between the regulation and the sale or use of alcoholic liquors. See *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996). The parties to this case have not presented us with a record on which we can base such a determination. Because administrative regulations are presumed to be valid, see *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002), and there is no evidence in this record to rebut that presumption, I conclude that DLH has failed to demonstrate that the Commission's regulation is ultra vires. On that basis, I concur in the result reached by the majority.

As noted by the majority, 237 Neb. Admin. Code, ch. 6, § 019.01F (1994) prohibits a licensee from allowing an unreasonable disturbance on the licensed premises, and § 019.01F1 defines a disturbance, in relevant part, as "any physical contact between the licensee's agents or employees and its customers, involving any kissing, or any touching of the breast, buttock, or genital areas." The parties appear to agree that § 019.01F1 has not been enacted pursuant to any statute that specifically authorizes the Commission to regulate such conduct. DLH contends that § 019.01F1 exceeds the Commission's authority to promulgate regulations "necessary or convenient to the enforcement of the intent, purpose, and requirements" of the Nebraska Liquor

Control Act. See § 53-118(4). The initial question is which party bears the burden of showing that a regulation is, or is not, within the authority delegated to an administrative agency.

The answer to that question is provided by the Administrative Procedure Act (APA), Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999). Section 84-906(1) specifically provides that "[t]he filing of any rule or regulation shall give rise to a rebuttable presumption that it was duly and legally adopted." This statutory presumption is consistent with the principle that 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. *Jacobson, supra*; *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 623 N.W.2d 672 (2001). See, also, *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995); *Dolan v. Svitak*, 247 Neb. 410, 527 N.W.2d 621 (1995); *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995) (rebuttable presumption of validity attaches to actions of administrative agencies and burden of proof rests with party challenging agency's actions).

Furthermore, this rule is consistent with the substantial weight of authority from courts in other jurisdictions, which have applied similar principles in the context of determining whether a rule or regulation is within the scope of authority statutorily delegated to an administrative agency. See, e.g., *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S. Ct. 1652, 36 L. Ed. 2d 318 (1973); *WPPA v. State, Dept. of Revenue*, 148 Wash. 2d 637, 62 P.3d 462 (2003) (en banc); *Mass. Fed. of Teachers v. Bd. of Educ.*, 436 Mass. 763, 767 N.E.2d 549 (2002); *Kuppersmith v. Dowling*, 93 N.Y.2d 90, 710 N.E.2d 660, 688 N.Y.S.2d 96 (1999); *Fogle v. H & G Restaurant*, 337 Md. 441, 654 A.2d 449 (1995); *In re Township of Warren*, 132 N.J. 1, 622 A.2d 1257 (1993); *Ford Dealers v. Department of Motor Vehicles*, 32 Cal. 3d 347, 650 P.2d 328, 185 Cal. Rptr. 453 (1982); *Hiserote Homes, Inc. v. Riedemann*, 277 N.W.2d 911 (Iowa 1979); *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193 (Mo. 1972) (en banc); *Norwood v. Paranteau*, 75 S.D. 303, 63 N.W.2d 807 (1954); *Toole v. State Bd. of Dentistry*, 306 Mich. 527, 11 N.W.2d 229 (1943); *Public*

Counsel v. Public Utility Com'n, 104 S.W.3d 225 (Tex. App. 2003); *N.M. Mining Ass'n v. N.M. Mining Com'n*, 122 N.M. 332, 924 P.2d 741 (N.M. App. 1996); *A-Plus v. Com'r of Jobs and Training*, 494 N.W.2d 522 (Minn. App. 1993). Cf. *O'Callaghan v. Rue*, 996 P.2d 88 (Alaska 2000) (court exercises independent judgment, but defers to areas of agency expertise and policy determinations). But see *Ore. Newspaper Pub. v. Peterson*, 244 Or. 116, 415 P.2d 21 (1966) (en banc) (burden on administrative agency). Cf. *In re Club 107*, 152 Vt. 320, 566 A.2d 966 (1989) (deference not warranted where Liquor Control Board regulated outside area of expertise).

As one leading commentator has explained:

> Placing the burden on agencies generally to demonstrate the lawfulness of their rules when they are challenged in court would be inconsistent with the well-established general presumption of agency regularity. Placing that burden on agencies is also not rational because, under normal circumstances, one would expect persons occupying public positions of trust to honor their oath of office and to act lawfully. Shifting this burden to agencies generally would also place an unnecessarily heavy burden on them, requiring agencies to incur significant costs in fully defending a rule every time an unsupported allegation of invalidity was made in a lawsuit. In addition, generally requiring agencies to demonstrate initially and finally the validity of their rules when they are challenged in court would needlessly increase the uncertainty with respect to the validity of many agency rules, would encourage litigation, and would automatically denigrate the competence and good faith of our government administrators. . . . Consequently . . . agency rules should be presumed valid, and the burden should be imposed on those who challenge them to initially and finally demonstrate their illegality, except in those unusual situations where countervailing considerations of public policy dictate a contrary result.

Arthur Earl Bonfield, State Administrative Rule Making § 9.2.9 at 569-70 (1986 & Supp. 1993).

I recognize that in *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 465, 550 N.W.2d 913, 919 (1996), we said

that "in order for a regulation to be 'necessary or convenient' to the enforcement of the [Nebraska Liquor Control] Act, *the Commission must show* some nexus between [the challenged regulation] and alcoholic liquors." (Emphasis supplied.) We did not otherwise discuss the burden of showing such a nexus. To the extent *County Cork* implies that the burden of proving a nexus is on the Commission, it is contrary to § 84-906(1). More significantly, however, placing the burden of proving a nexus was not before us in that case. In *County Cork*, the Commission did not attempt to show that there was a nexus between the regulation at issue in that case and alcoholic liquor. See brief for appellee at 8 to 11, case No. S-95-1395. Since neither party in *County Cork* contended there was a nexus between the regulation and the sale or use of alcoholic liquor, we were not required to place the burden of proof in order to conclude there was no nexus present in that case.

Based on the foregoing analysis, I would hold that where a party asserts that an administrative rule or regulation is ultra vires, the rule or regulation is presumptively valid, and the burden is on the party who challenges its validity. See *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002). More specifically, a party asserting that a Commission regulation is not "necessary or convenient" to the enforcement of the Nebraska Liquor Control Act has the burden to show that there is no nexus between the challenged regulation and the sale or use of alcoholic liquors. See, *County Cork, supra*; § 53-118(4). " 'That burden cannot be carried "by arguing that the record does not affirmatively show facts which support the regulation." ' " *Mass. Fed. of Teachers v. Bd. of Educ.*, 436 Mass. 763, 771, 767 N.E.2d 549, 558 (2002).

The difficulty in this case is that the record is devoid of any basis upon which this issue can properly be decided. Meaningful review of a regulation is very difficult without some substantiated explanation of the basis for the regulation. Courts are not intended to be experts in the area of alcohol regulation, nor are courts intended to be experts in other state-regulated areas. It is not the function of a court either to "provide a nexus" or to "show the lack of a nexus" between a challenged regulation and the regulated activity in the absence of evidence tending to

prove or disprove the existence of such a relationship. A developed record is a prerequisite to meaningful judicial review.

For instance, in *Anderson, Leech & Morse v. Liquor Bd.*, 89 Wash. 2d 688, 690, 575 P.2d 221, 223 (1978) (en banc), the appellant tavern owners challenged a regulation prohibiting "topless table dancing" on licensed premises. The record included evidence noting the "great increase in arrests for disorderly conduct on licensed premises, and the frequency with which these incidents occurred where topless table dancing was permitted." *Id.* at 695, 575 P.2d at 226. Based on that evidence, the court concluded that there was "a nexus between the conduct prohibited and the sale of liquor." *Id.*

This court has engaged in similar analyses when presented with records that substantiate the arguments made by the parties. For example, in *County of Dodge v. Department of Health*, 218 Neb. 346, 355 N.W.2d 775 (1984), the Department of Health had concluded that a hospital could purchase, but not lease, new nuclear medicine equipment. The record contained testimony from a hospital administrator regarding the need for the equipment and the choice to lease rather than purchase the equipment, as well as testimony from a certified public accountant and a financial feasibility analyst regarding the financial costs and benefits of either purchasing or leasing the equipment. Based on that evidence, we concluded that the Department of Health's rules and regulations contravened the statute that the agency was obliged to administer. *Id.* Compare *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987) (upholding regulation prohibiting childcare agencies from using corporal punishment).

The record in the instant case contains no comparable evidence regarding the issue presented. In the absence of such evidence, I conclude that DLH has not met its burden of rebutting the presumption that § 019.01F1 was lawfully adopted.

Nonetheless, the majority concludes, in relevant part, that the Commission's regulations,

> by their terms, prohibit sexual contact occurring on the licensed premises or in adjacent related outdoor areas as a logical means of protecting patrons, employees, and others on the premises or in adjacent related outdoor areas from

> activity which could lead to conduct endangering those persons within the licensed premises or in adjacent related outdoor areas.

I would not go that far. First, the majority's reasoning is circular. The majority appears to conclude that the Commission's regulations are valid solely because the regulations are a logical means of protecting people from the conduct that the regulations prohibit. But more significantly, the record before us does not provide us with a basis for the majority's conclusion—we should be in the business of "judging" whether a nexus exists based on the evidence presented, not providing such a nexus in the absence of such evidence. Thus, we should simply conclude that DLH has failed to meet its burden of showing the absence of a nexus between the regulation and the sale or use of alcoholic liquor, and reserve judgment on whether such a nexus exists until a record is presented that allows for a meaningful review of the matter.

I note that the Legislature's 1994 adoption of significant sections of the 1981 revision of the Model State Administrative Procedure Act, although it did not take effect until after the regulations at issue in this case were promulgated, promises to greatly facilitate the judicial review of agency rules and regulations. Compare Unif. Law Comm. Model State Admin. Procedure Act (1981), 15 U.L.A. 7 (2000 & Supp. 2003), with 1994 Neb. Laws, L.B. 446. For rules or regulations adopted after August 1, 1994, § 84-906.01 requires an administrative agency to maintain an official rulemaking or regulation-making record, containing, inter alia, all of the written materials or petitions prepared for and by the agency in connection with the proposed rule or regulation, any content of oral presentations made in a proceeding about the proposed rule or regulation, and a copy of the "concise explanatory statement" that the agency is required to file with the Secretary of State stating the reasons for adopting the rule or regulation. See § 84-907.04(1). Upon judicial review, this record constitutes the official agency record with respect to the rule or regulation, although it need not constitute the exclusive basis for judicial review of the rule or regulation. § 84-906.01(3). Furthermore, "[o]nly the reasons contained in the concise explanatory statement may be used by an agency as justifications for the adoption

of the rule or regulation in any proceeding in which its validity is at issue." § 84-907.04(2).

These provisions are intended to facilitate a more structured and rational agency and public consideration of proposed rules, and the process of judicial review of the validity of rules. See Unif. Law Comm. Model State Admin. Procedure Act (1981) § 3-112, comment, 15 U.L.A. 51 (2000). "A court reviewing the legality of a rule can do so effectively only if it has access to all the relevant materials that were generated in the agency proceeding upon which that rule was based. Consequently, a rule-making record requirement helps to assure the legality of rules." Arthur Earl Bonfield, State Administrative Rule Making § 6.12.1(a) at 327 (1986 & Supp. 1993).

This requirement does not shift the ultimate burden of persuasion to the agency. See § 84-906(1). See, also, Unif. Law Comm. Model State Admin. Procedure Act (1981), § 5-116(a)(1), 15 U.L.A. 144 (2000). However, it certainly places a burden of production on the agency to provide a reviewing court with the record maintained pursuant to § 84-906.01. This record will provide a basis for judicial review and, in conjunction with § 84-907.04, will provide the party challenging the rule or regulation with a meaningful opportunity to contest the agency's basis for enacting the rule or regulation. Unfortunately, the regulations at issue in this case were filed prior to the August 1, 1994, effective date of the amendments to the APA, and the Legislature specifically provided that the changes made to the APA should not affect the validity of a rule or regulation adopted prior to that date. § 84-906(4).

It is entirely possible, and perhaps even likely, that there is a nexus between § 019.01F1 and the sale or use of alcoholic liquor. Cf. *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996), citing *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483 (1972) (recognizing, in dicta, a nexus between topless dancing and alcohol consumption). However, I am unable to reach that conclusion in this case, because it is unjustified by the record before us. In the absence of evidence proving or disproving a nexus between § 019.01F1 and the sale or use of alcoholic liquor, I conclude that DLH failed to meet its burden to rebut the presumption that

§ 019.01F1 was lawfully enacted. Based on this reasoning, I concur in the result reached by the majority.

HENDRY, C.J., and CONNOLLY, J., join in this concurrence.

SHARON K. OLSON, FORMERLY KNOWN AS SHARON K. PALAGI, APPELLEE, V. RONALD J. PALAGI, APPELLANT.

665 N.W.2d 582

Filed July 18, 2003. No. S-02-273.

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. **Judgments: Costs.** An award of costs in a judgment is considered a part of the judgment.
3. **Judgments: Attorney Fees.** A party seeking statutorily authorized attorney fees, for services rendered in a trial court, must make a request for such fees prior to a judgment in the cause.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Order vacated, and appeal dismissed.

Steven H. Howard, G. Rosanna Moore, and Shayla M. Reed, of Law Offices of Ronald J. Palagi, P.C., for appellant.

Theodore J. Stouffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

GERRARD, J.

NATURE OF CASE

Appellant Ronald J. Palagi (Palagi) was ordered to pay child support as part of his divorce from appellee Sharon K. Olson, formerly known as Sharon K. Palagi (Olson). In 1998, Palagi filed an ultimately unsuccessful application to terminate child support. Olson sought, in the district court, to recover attorney fees and costs accrued in the course of resisting Palagi's application at the trial level. On February 5, 2002, the district court granted

attorney fees and costs to Olson, and Palagi appeals. Because we determine that the district court did not have jurisdiction to enter the February 5 order, we vacate the order and dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

As part of the parties' divorce in 1988, Palagi was ordered to pay child support for their daughter, Eva, born to that marriage in 1980. On July 6, 1998, Palagi filed an application to terminate his $1,000 per month child support obligation as of June 30, 1998, because thereafter Eva was attending college at the University of Kansas in Lawrence; was not residing in Olson's home in Bellevue, Nebraska; and had attained Kansas' age of majority. Olson filed an answer, denying that Eva had left her home in Bellevue and alleging that Eva maintained her legal residence with her and that Eva lived with her when not attending the University of Kansas. As part of her answer, Olson specifically requested that Palagi's application be denied and that she should be awarded attorney fees and costs.

A May 5, 2000, trial was conducted on stipulated facts, none of which concerned the amount or reasonableness of attorney fees. Based on these stipulated facts, the district court entered an order dated May 9, 2000, and file stamped on May 10, denying Palagi's application to terminate child support. The order did not speak to Olson's request for attorney fees and costs. A handwritten docket entry, dated May 9, 2000, noted the entry of the order and further stated, "Nothing under advisement." Olson did not file a motion for new trial with respect to the May 10 order. However, on May 23, Olson filed an application for attorney fees and costs. A separate evidentiary hearing on this issue was scheduled for June 13. On June 8, before that hearing occurred, Palagi filed a notice of appeal from the denial of his application to terminate child support.

The record does not show any activity on the attorney fees issue for the next several months. On January 2, 2001, the court sent out notices of impending dismissal of the attorney fees action for lack of prosecution unless a certificate of readiness was timely filed. The certificate not forthcoming, the court dismissed the action without prejudice for lack of prosecution on February 2. Meanwhile, the appeal of the application to terminate child

support was heard in the Nebraska Court of Appeals. On May 29, 2001, that court affirmed the district court's order denying Palagi's application. *Palagi v. Palagi*, 10 Neb. App. 231, 627 N.W.2d 765 (2001). Thereafter, Olson filed a notice of evidentiary hearing on the now-dismissed attorney fees issue. The district court held a hearing on December 17, apparently without setting aside the dismissal or reinstating the case. Based on evidence presented at that hearing, the district court on February 5, 2002, awarded Olson $6,699 in attorney fees and $127.70 in costs associated with the litigation surrounding Palagi's application to terminate child support. Palagi timely appeals.

ASSIGNMENTS OF ERROR

Palagi assigns, restated, that the district court erred by (1) finding it had jurisdiction over the issue of attorney fees and costs when its May 10, 2000, order did not mention them and the appellate decision did not authorize them, (2) failing to apply res judicata to the issue of attorney fees and costs, (3) exercising jurisdiction over a child support case at a time when no children of the marriage were minors, (4) exercising jurisdiction when the underlying application had been dismissed by an order of dismissal on progression, and (5) abusing its discretion in awarding excessive attorney fees.

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, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002).

ANALYSIS

Palagi's first assignment of error asserts that at the time of its February 5, 2002, order awarding attorney fees and costs to Olson, the district court did not have subject matter jurisdiction over that issue. The law supports his argument.

The original May 10, 2000, order denied Palagi the requested child support termination without articulating a ruling on the attorney fees issue requested by Olson in her answer. The question is whether this silence in the dispositive order constitutes a

denial which should have been timely appealed or cross-appealed in May or June 2000.

Neb. Rev. Stat. § 42-351 (Reissue 1998) is the basis of the court's authority to award attorney fees and costs in this child support modification proceeding. Section 42-351(1) states:

> In proceedings under [Neb. Rev. Stat. §§] 42-347 to 42-381 [(Reissue 1998 & Cum. Supp. 2000)], the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children, the support of either party, the settlement of the property rights of the parties, and the award of costs and attorney's fees.

[2] Our case law generally treats attorney fees, where recoverable, as an element of court costs. See, *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001); *Brodersen v. Traders Ins. Co.*, 246 Neb. 688, 523 N.W.2d 24 (1994). An award of costs in a judgment is considered a part of the judgment. *Salkin, supra*; *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999); *Muff v. Mahloch Farms Co., Inc.*, 186 Neb. 151, 181 N.W.2d 258 (1970).

[3] In *Salkin, supra*, we noted that a party seeking statutorily authorized attorney fees, for services rendered in a trial court, must make a request for such fees prior to a judgment in the cause. This is so because a statutory award of attorney fees, if deemed appropriate, may be made a part of the judgment or final order. See *id.*

In the instant case, Olson properly requested an award of attorney fees and costs in her answer to Palagi's application. The issues were joined when the district court conducted the May 5, 2000, trial on Palagi's application to terminate child support. A district court order, dated May 9, 2000, and file stamped on May 10, denied Palagi's application and granted no other relief as to either party. The silence of the judgment on the issue of attorney fees must be construed as a denial of Olson's request under these circumstances. This is further evidenced by the court's May 9 handwritten docket entry stating, "Nothing under advisement."

Olson did not file a motion for new trial with respect to the May 10, 2000, order (Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), motion to alter or amend the judgment, did not become effective until July 13, 2000); instead, Olson filed a separate application for attorney fees and costs on May 23. As noted earlier in the opinion, Palagi filed a notice of appeal on June 8, prior to the scheduled time for any purported separate hearing on attorney fees or costs.

Olson did not cross-appeal from the May 10, 2000, judgment; thus, the Court of Appeals did not make a determination with respect to the issue of attorney fees at the trial court level. It is apparent, however, that the Court of Appeals construed the district court's silence on the issue of attorney fees as a denial, since the court, and the parties, treated the May 10, 2000, judgment as a final order in *Palagi v. Palagi*, 10 Neb. App. 231, 627 N.W.2d 765 (2001). The Court of Appeals did not dismiss Palagi's appeal, pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2000), for lack of jurisdiction. See *Salkin, supra* (judgment does not become final and appealable until trial court has ruled upon pending statutory request for attorney fees).

Thus, Olson's May 23, 2000, application was insufficient to revive the issue of attorney fees once it had been decided by means of the May 10 final order. Once the May 10 order was appealed to the Court of Appeals and the issue of the statutorily requested attorney fees was not raised in the appellate court, Olson had no recourse to further challenge the original denial of attorney fees at a later time in the district court. For these reasons, we conclude that the district court was without jurisdiction on February 5, 2002, to enter an order awarding attorney fees to Olson; thus, the February 5 order must be vacated.

Because the determination on Palagi's first assignment of error is dispositive, we decline to consider the other assignments of error.

CONCLUSION

For the foregoing reasons, we conclude that the district court did not have jurisdiction to enter the February 5, 2002, order awarding attorney fees to Olson. We, therefore, vacate the February 5, 2002, order and dismiss the appeal.

ORDER VACATED, AND APPEAL DISMISSED.

FARMLAND SERVICE COOPERATIVE, INC., A NEBRASKA COOPERATIVE, APPELLEE, V. SOUTHERN HILLS RANCH, INC., A NEBRASKA CORPORATION, APPELLANT.

665 N.W.2d 641

Filed July 18, 2003. No. S-02-606.

1. **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.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Conversion: Proof: Words and Phrases.** Conversion is any unauthorized or wrongful act of dominion exerted over another's property which deprives the owner of his property permanently or for an indefinite period of time.

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

Ronald H. Stave, of Stave, Dougherty & Stave, for appellant.

Susan C. Williams for appellee.

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

WRIGHT, J.

NATURE OF CASE

Farmland Service Cooperative, Inc. (Farmland), brought this action against Southern Hills Ranch, Inc. (Southern Hills), for conversion of 1,800 bales of alfalfa and prairie hay in which Farmland claimed a perfected security interest. The district court found that there were no issues of material fact as to the conversion claim and that Farmland was entitled to a judgment against Southern Hills as a matter of law. The court found that the hay was no longer a growing crop but was a farm product. The court concluded that the filing requirements for a security interest had been met by the filing of Farmland's security agreement in Lincoln County, Nebraska, the county in which the debtor resided.

SCOPE OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Morello v. Land Reutil. Comm. of Cty. of Douglas*, 265 Neb. 735, 659 N.W.2d 310 (2003).

FACTS

Farmland loaned money to Bryce L. Franzen for his farming operation. As security for the loan, Franzen executed and delivered to Farmland a financing statement and security agreement which was filed August 26, 1996, with the Lincoln County clerk. Franzen was a resident of Lincoln County at that time. The security agreement provided that Farmland was granted a security interest in "[a]ll farm products or inventory, including but not limited to all livestock, crops, grain, hay, seed, feed, fertilizer, supplies, and products of crops and of livestock . . . ."

In April 1997, Franzen began leasing property in Blaine County from Southern Hills. The lease provided that Franzen was to pay Southern Hills cash rent and that Southern Hills was not to receive any share of Franzen's crops. The lease also provided that Southern Hills would have a security interest in all crops grown on the leased property; however, Southern Hills did not perfect its security interest. In 1998, Franzen grew, harvested, and stored approximately 1,800 bales of hay on the leased property in Blaine County.

Franzen failed to make the required payments on his loan to Farmland, and on February 9, 1999, it obtained a judgment of $30,317.35 against Franzen in the Lincoln County District Court. During the summer of 1999, Farmland discovered that the hay grown by Franzen in Blaine County was missing and that Southern Hills had sold it. Farmland made demand upon Southern Hills to provide an accounting, "based upon [Southern Hills'] representations that the hay on the premises had been the landlord's share."

Southern Hills acknowledged that it had taken the hay and sold it between March 2 and April 26, 1999, for a total sum of $31,750.83, for back rent due and owing. Southern Hills refused Farmland's demand for payment from the proceeds of the hay, and Farmland commenced suit against Southern Hills

for conversion of the hay that Farmland claimed was subject to its security agreement.

Each party filed a motion for summary judgment. The district court found that the hay sold by Southern Hills no longer had the status of a growing crop or crop to be grown, which would require that the security agreement include a description of the property on which the crop was grown in order to perfect the security interest. The court concluded that at the time the hay was sold, it was a farm product, and that Farmland had met the filing requirements by filing its security agreement in Lincoln County, the county in which Franzen resided.

The district court specifically found that collection of the money advanced by Farmland, apart from a petroleum lien which is not at issue here, could be enforced through a valid security interest Farmland held on the hay, which was a farm product. It found however that Farmland was entitled to collect only the amount of its original loan. The court sustained Farmland's motion for summary judgment to the extent that it had a claim against Southern Hills for conversion of the hay. The court sustained Southern Hills' motion for summary judgment as to the balance of the funds claimed by Farmland under the petroleum lien. Judgment was entered for Farmland in the amount of $23,962.91 plus interest.

Farmland moved for a new trial on December 7, 2001. Before this motion was ruled upon, Southern Hills filed a notice of appeal on December 14. That appeal was dismissed by the Nebraska Court of Appeals for lack of jurisdiction. See *Farmland Serv. Cooperative v. Southern Hills Ranch*, 11 Neb. App. xxx (No. A-01-1392, Apr. 1, 2002). Subsequently, the district court held a hearing on the motion for new trial and concluded that the only lien available to Farmland was its $20,000 lien, which followed the hay that was converted by Southern Hills. Thus, the court overruled Farmland's motion for new trial as to the amount of its damages. However, the court found that the amount of damages from the conversion was a liquidated amount and was subject to prejudgment interest from the date of conversion, September 11, 1998. To that extent, the court sustained Farmland's motion for new trial. Southern Hills timely filed its notice of appeal from the court's ruling on the motion for new trial.

ASSIGNMENTS OF ERROR

Southern Hills assigns as error that the district court erred in finding (1) that the requirements for Farmland's security interest were met because the security agreement did not describe the county in which the hay was grown and stored; (2) that the hay no longer had the status of a growing crop or crop to be grown, which would require a description of the property on which the crop was grown in order to perfect the security interest; and (3) that the hay was a farm product, but also finding that filing requirements had been met by filing the security agreement in the county where Franzen lived, even though the property on which the hay was grown and stored was not described in the security agreement.

ANALYSIS

[2] Each party filed a motion for summary judgment. Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *K N Energy v. Village of Ansley, ante* p. 164, 663 N.W.2d 119 (2003).

The case before us 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. *Morello v. Land Reutil. Comm. of Cty. of Douglas*, 265 Neb. 735, 659 N.W.2d 310 (2003). The district court determined as a matter of law that the hay sold by Southern Hills no longer had the status of a growing crop or a crop to be grown. The court held that the filing requirements had been met by filing the security agreement in the county where Franzen lived. Therefore, the court concluded as a matter of law that Farmland was entitled to summary judgment. We review that issue independently of the determination made by the lower court.

Southern Hills argues that since the district court concluded that the hay was a farm product and not inventory, Farmland's security agreement had to include a description of Southern Hills' property in Blaine County in order to have been perfected.

Southern Hills points out that the property leased by Franzen from Southern Hills was separate and distinct from the property listed in the security agreement. It asserts that as a result of the failure to describe the real estate upon which the hay was stored, Farmland had no perfected security interest in the hay grown on Southern Hills' property.

At all times relevant to this case, the Nebraska Uniform Commercial Code (U.C.C.) provided:

> (1) The proper place to file in order to perfect a security interest is as follows:
>
> (a) When the collateral is . . . (ii) farm products, including crops growing or to be grown, (iii) farm products which become inventory of a person engaged in farming, (iv) accounts or general intangibles arising from or relating to the sale of farm products by a farmer . . . then in the office of the county clerk in the county of the debtor's residence . . . .

Neb. U.C.C. § 9-401 (Reissue 1992).

The U.C.C. also provided:

> [A] security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:
>
> (a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned.

Neb. U.C.C. § 9-203(1) (Reissue 1992).

Goods were defined as

> "farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory.

Neb. U.C.C. § 9-109(3) (Reissue 1992).

Southern Hills relies upon *Cattle Nat. Bank v. York State Bank*, 229 Neb. 720, 428 N.W.2d 624 (1988), to support its position that Farmland did not have a perfected security interest in the hay in question. For the reasons set forth below, *Cattle Nat. Bank* does not control our decision in this case.

Cattle Nat. Bank involved an action for conversion of proceeds of collateral by Cattle National Bank against York State Bank and Trust Company (York State Bank) and Baack Farms, Inc. In *Cattle Nat. Bank*, Wayne and Leslie Zima executed security agreements and financing statements to Cattle National Bank as security for certain notes totaling $152,000. The agreements gave a security interest in " '[a]ll farm products or inventory, including but not limited to all livestock, crops, grain, hay, seed, feed, fertilizer,' " et cetera. *Id.* at 721, 428 N.W.2d at 626. The security agreements described certain property located in York County and certain property located in Seward County but did not describe the real estate owned by Floyd and Elverna Baack.

On April 12, 1984, Wayne Zima leased different real estate from the Baacks and Baack Farms for farming. Initially, cash rent of $70,000 per year was agreed upon. Although $20,000 was paid, the balance of $50,000 was unpaid because two checks drawn upon Cattle National Bank were dishonored. In lieu of cash rent, a verbal crop-share agreement was reached wherein Wayne Zima would give a sufficient number of bushels of corn from the harvest to the Baacks to make the $50,000 rental payment.

The corn was harvested and taken to an elevator. The elevator then issued a $50,000 draft payable to Mike Baack, Ted Baack, and York State Bank. (Mike and Ted were Floyd Baack's sons, and York State Bank was a secured creditor of the Baacks.) Cattle National Bank brought the action for conversion of the proceeds of the collateral in the amount of $50,000 against the Baacks and York State Bank. The defendants, York State Bank and Baack Farms, claimed that Cattle National Bank did not have a valid perfected security interest in the crops grown on the land leased by the Zimas.

This court concluded that the security agreements and financing statements between the Zimas and Cattle National Bank secured corn growing or to be grown on certain parcels and that the real estate leased by the Zimas from the Baacks involved

separate and distinct parcels from those mentioned in the security agreements and financing statements. It concluded, therefore, that no security interest existed in favor of Cattle National Bank on the corn grown on the Baacks' property.

Cattle National Bank argued that the grain was inventory held by the Zimas that would be encompassed within the security agreement. Although the court in *Cattle Nat. Bank* did not address this issue, the factor that distinguishes that case from the case at bar is that part of the Zimas' lease was converted from cash rent to a crop share. The corn was harvested and hauled to the elevator, which issued a $50,000 draft to Mike Baack, Ted Baack, and York State Bank. At the time the crop was harvested, the Zimas had no interest in that part of the crop to which the security interest of Cattle National Bank attached.

We distinguished a crop share lease from a cash rent lease in *Lone Oak Farm Corp. v. Riverside Fertilizer*, 229 Neb. 548, 428 N.W.2d 175 (1988). There, we held that the landlord's interest in beans from a tract farmed by the tenant was an ownership interest to which the mortgagee's security interest could not attach. We stated that where land is leased and rent is to be paid by a share of the crops to be raised, the landlord and tenant are tenants or owners in common of the growing crops until such time as the crop is harvested and divided. The tenant may mortgage or sell his interest in the crop, but his mortgagee is charged with notice of the landlord's interest. *Id.* The tenant's interest is determined by the terms of the lease, and the mortgagee can take no greater interest in the crop as against the landlord than could be asserted by the tenant himself. *Id.* If, on the other hand, the lease is on a cash rent basis, the cotenancy relationship does not exist, and the landlord's only recourse in the crops would be through an agreement with the tenant to give a security interest in the crops. See *Todsen v. Runge*, 211 Neb. 226, 318 N.W.2d 88 (1982). The crop-share agreement in *Cattle Nat. Bank v. York State Bank*, 229 Neb. 720, 428 N.W.2d 624 (1988), factually distinguishes that case from the case at bar.

A dispute similar to the present case was decided in *Albion Nat. Bank v. Farmers Co-op Assn.*, 228 Neb. 258, 422 N.W.2d 86 (1988). Thomas and Veronica Shotkoski were operators of a multicounty farm operation. Albion National Bank of Albion,

Nebraska, advanced funds to the Shotkoskis for the 1984 crop year, which funds they used to pay expenses for their entire operation, including those associated with land located in Platte and Boone Counties.

The 1984 corn in question was grown in Platte County. After harvest, it was transported and stored in Boone County. The Shotkoskis subsequently delivered the corn to the Farmers Cooperative Association of St. Edward. In exchange, the cooperative credited $10,120 against the Shotkoskis' outstanding debt there.

It was stipulated that at no time did the bank have a perfected security interest in the corn by the filing of documents in Platte County. The bank did have a perfected security interest in the Shotkoskis' farm products in Boone County from August 24, 1981, through the date on which the corn in question was delivered to the cooperative and thereafter.

The cooperative did not allege a competing security interest but argued that the bank had no security interest in the corn and was therefore not entitled to the proceeds realized from the sale to the cooperative. At that time, § 9-401 (Reissue 1980) provided in relevant part:

> "(1) The proper place to file in order to perfect a security interest is as follows:
>
> ". . . .
>
> "(c) When the collateral is any other type of tangible or intangible personal property, the following rules apply: When the debtor is a resident of this state, then in the office of the county clerk in the county of the debtor's residence."

Albion Nat. Bank v. Farmers Co-op Assn., 228 Neb. at 259-60, 422 N.W.2d at 89.

This court noted that farm products were clearly within the meaning of the phrase " 'other . . . tangible or intangible personal property.' " *Id.* at 260, 422 N.W.2d at 89, citing *Genoa Nat. Bank v. Sorensen*, 208 Neb. 423, 304 N.W.2d 659 (1981). Section 9-109 (Reissue 1980) defined "farm products" as " 'crops . . . in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. . . .' " *Albion Nat. Bank v. Farmers Co-op Assn.*, 228 Neb. at 260, 422 N.W.2d at 89. Comment 4 to § 9-109 stated: " 'Products of crops or livestock remain farm

products so long as they are in the possession of a debtor engaged in farming operations and have not been subjected to a manufacturing process. . . .'" *Albion Nat. Bank v. Farmers Co-op Assn.*, 228 Neb. at 260, 422 N.W.2d at 89.

In *Albion Nat. Bank*, we concluded that drying corn, while an act of processing, was not a manufacturing process as that term was understood within the context of article 9 of the U.C.C. and that, therefore, the corn in question remained a farm product while dried and stored on the Shotkoskis' land in Boone County. We noted that the cooperative's difficulty with the result in the court below seemed to be an unwillingness to accept the notion that under article 9 of the U.C.C., goods can change character from one class of collateral to another as circumstances change. As this change in character occurs, goods which have previously fallen outside the scope of a perfected security interest in a certain class of collateral may come within the scope of that security interest, and goods previously within the scope of such a security interest may fall outside of it. Where the filing requirements for perfection of a security interest under the U.C.C. differ depending upon the character of the collateral, and where the filing requirements are not met regarding one character of collateral but are met regarding another character of collateral, a security interest in the collateral is perfected as of the time the collateral changes character from that as to which filing requirements were not met to that as to which filing requirements were met. *Albion Nat. Bank v. Farmers Co-op Assn.*, 228 Neb. 258, 422 N.W.2d 86 (1988).

Once harvested, transported to Boone County, and dried, the corn was no longer a growing crop in Platte County but became a farm product in Boone County, as to which the bank had previously perfected a security interest. *Id.*

> [I]f an otherwise unperfected security interest in collateral of a certain character is not filed at all places required by the Uniform Commercial Code, but is filed at all places required by the code regarding another character of collateral, and the collateral later changes character and becomes that as to which filing meets the requirements of the code, the security interest becomes perfected when the change in character occurs, and the security interest thus

> perfected has rights superior to all other liens not perfected prior to the time the change in character occurred.

Id. at 262-63, 422 N.W.2d at 90.

We noted that although the bank's financing statements did not contain a description of the land in Platte County and therefore the bank's security interest, if any, in growing crops in Platte County was not perfected, this fact was not relevant to our decision. The relevant fact was that the bank had a perfected security interest in farm products in Boone County. The Boone County land was at all relevant times adequately described in the financing statements on file in that county, and by the time the Shotkoskis delivered the corn to the cooperative, that which had once been a crop growing or to be grown in Platte County had become a farm product in Boone County by virtue of having been dried and stored there. Under § 9-401(1)(a) (Reissue 1980), the bank had a perfected security interest in the Boone County farm product.

In the case at bar, we conclude, as did the district court, that the hay in question when sold by Southern Hills no longer had the status of a growing crop or a crop to be grown, which would require that the security agreement include a description of the property on which the crop was grown in order to perfect the security interest. When the crop was harvested and baled, it became a farm product, and the filing requirements were met by the filing of Farmland's security agreement in Lincoln County, where Franzen lived.

The lease between Franzen and Southern Hills provided that it could be considered and construed as a security agreement under the U.C.C. The lease was for cash, not a share of Franzen's crops. However, nothing in the record indicates that Southern Hills took any action to perfect the lease as a security agreement. Since Southern Hills' lien was a landlord's lien based on contract, Southern Hills had to comply with the filing requirements of the U.C.C. in order to perfect its security interest. See *Todsen v. Runge*, 211 Neb. 226, 318 N.W.2d 88 (1982).

[3] Pursuant to § 9-401 (Reissue 1992), in order to perfect its security interest, Farmland was required to file its security agreement in Lincoln County, the county of Franzen's residence. We conclude that Farmland's security interest in the collateral became

perfected when the hay was harvested and became a farm product. Therefore, Farmland's perfected security interest has priority over Southern Hills' unperfected security interest. Southern Hills converted property belonging to Farmland. Conversion is any unauthorized or wrongful act of dominion exerted over another's property which deprives the owner of his property permanently or for an indefinite period of time. See *Cattle Nat. Bank v. York State Bank*, 229 Neb. 720, 428 N.W.2d 624 (1988). It was not necessary that the security agreement contain a legal description of the property on which the hay was to be grown. At no time did Southern Hills have an ownership interest in the hay by virtue of its lease agreement, as was the case in *Cattle Nat. Bank*. The lease was a cash rent agreement, and Southern Hills never had a perfected security interest in the hay. The party who is first to perfect a security interest has a priority over all unperfected security interests. See *Todsen v. Runge, supra*.

CONCLUSION

Since the hay at issue was no longer a growing crop, a description of the land in Blaine County on which the hay was grown and stored was not required in order to perfect Farmland's security interest. Because Farmland had a perfected security interest in the hay, it was entitled to judgment as a matter of law against Southern Hills for conversion of the hay.

For the reasons set forth herein, the judgment of the district court is affirmed.

AFFIRMED.

MARILYN JESSEN, PERSONALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ALFRED S. JESSEN, DECEASED, APPELLANT, V. RAJESH MALHOTRA AND KEARNEY COUNTY, A POLITICAL SUBDIVISION DOING BUSINESS AS KEARNEY COUNTY HEALTH SERVICES AND KEARNEY COUNTY MEDICAL CLINIC, APPELLEES.

665 N.W.2d 586

Filed July 18, 2003. No. S-02-671.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **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.
4. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.
5. **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.
6. **Political Subdivisions Tort Claims Act: Jurisdiction.** While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Political Subdivisions Tort Claims Act.
7. **Political Subdivisions Tort Claims Act: Notice.** With regard to a claim's content, substantial compliance with the statutory provisions supplies the requisite and sufficient notice to a political subdivision under the Political Subdivisions Tort Claims Act.
8. ____: ____. The 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.

Appeal from the District Court for Kearney County: STEPHEN ILLINGWORTH, Judge. Affirmed.

E. Terry Sibbernsen and Mandy L. Strigenz, of E. Terry Sibbernsen, P.C., for appellant.

Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellee Kearney County.

William L. Tannehill and Corey L. Stull, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee Rajesh Malhotra.

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

MCCORMACK, J.

NATURE OF CASE

Marilyn Jessen (Jessen), personally and as special administrator of the estate of Alfred S. Jessen, appeals from an order of the district court granting summary judgment in favor of the appellees, Dr. Rajesh Malhotra and Kearney County. We affirm the district court's decision because Jessen failed to submit a claim within 1 year of the accrual of such claim in accordance with the Political Subdivisions Tort Claims Act (Tort Claims Act), Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997).

BACKGROUND

In her petition filed in the district court, Jessen alleged that on October 14, 1998, Malhotra was employed as a medical doctor by Kearney County when he examined Alfred at the medical clinic operated by Kearney County, known as Kearney County Health Services and Kearney County Medical Clinic. Malhotra allegedly diagnosed Alfred as having atypical chest pain and indicated that he would follow up with Alfred at a later date. Alfred died on October 16, 1998. Jessen further alleged that an autopsy revealed that Alfred suffered from atherosclerotic coronary artery disease and died of a myocardial infarction. Two weeks after Alfred's death, Jessen sent a handwritten letter to Malhotra. The letter, dated October 30, 1998, states in full:

> Dr. Malhotra,
>
> Al Jessen was in to see you on Wed., Oct. 14th for terrible pain in the chest area.
>
> You told him to go home and take Motrin — that he looked too good for it to be his heart. . . . He died Oct. 16th.
>
> The autopsy report says the infarction was 3-5 days old. He was in your care at the time he was having this and you

> sent him home. This is malpractice . . . We are very angry.
> Family of Al Jessen

On February 22, 2000, Jessen filed a negligence action against Malhotra in the U.S. District Court for the District of Nebraska. The complaint did not allege compliance with the Tort Claims Act. In his amended answer, Malhotra alleged that he was employed by Kearney County Health Services, a governmental subdivision of Kearney County. Malhotra further alleged that Jessen had failed to comply with the Tort Claims Act. On September 8, 2000, the federal district court granted summary judgment in favor of Malhotra and dismissed Jessen's action without prejudice for failing to comply with the Tort Claims Act. See *Jessen v. Malhotra*, 112 F. Supp. 2d 917 (D. Neb. 2000).

On October 12, 2000, Jessen filed a petition in the district court for Kearney County against Malhotra and Kearney County. In addition to the factual allegations recited above, the petition alleged it was filed within 6 months of the federal district court's determination that the Tort Claims Act provided the exclusive remedy for Jessen's claim. See § 13-919(2). In their respective answers, Malhotra and Kearney County admitted that Malhotra was employed as a medical doctor by Kearney County and again alleged that Jessen failed to comply with the notice requirements of the Tort Claims Act. However, Kearney County later filed an amended answer alleging that Malhotra was an employee of Kearney County Health Services, which was a political subdivision separate and distinct from Kearney County. After the amended answer was filed, Jessen filed written notices of claim with Kearney County and Kearney County Health Services on April 26, 2001.

Malhotra and Kearney County filed motions for summary judgment. On May 23, 2002, the district court granted Malhotra's and Kearney County's motions for summary judgment and dismissed the case, finding that the action was barred by the doctrines of res judicata and collateral estoppel. Jessen appeals.

ASSIGNMENTS OF ERROR

Jessen assigns that the district court erred in (1) ruling that Jessen's case was barred by the doctrine of res judicata, (2) ruling that Jessen's case was barred by the doctrine of collateral

estoppel, (3) not reaching an independent conclusion on the issue of notice, (4) determining that Jessen did not comply with § 13-919(2), (5) not ruling that the appellees should be estopped from asserting a violation of the Tort Claims Act, (6) not determining that a genuine issue of material fact exists with regard to Malhotra's employment status, and (7) not allowing Jessen to file her third amended petition and/or in dismissing with prejudice her third amended petition.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003). 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.*

ANALYSIS

[3] The district court determined that Jessen's action in state court was barred by the doctrines of res judicata and collateral estoppel and granted summary judgment in favor of Malhotra and Kearney County accordingly. We have held that 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. *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002). Such is the situation before us now. We decline to apply the doctrines of res judicata and collateral estoppel because the record demonstrates that Malhotra and Kearney County are entitled to summary judgment for reasons different than those utilized by the district court, as we explain below.

[4,5] The Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees. *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003). It is undisputed that Kearney County Health Services, a county-owned hospital created pursuant to Neb. Rev. Stat.

§ 23-3501 et seq. (Reissue 1997 & Cum. Supp. 2002), and Kearney County are political subdivisions subject to the Tort Claims Act. While Jessen argues on appeal that the district court should have found the existence of an issue of material fact regarding Malhotra's employment status, our review of the record reveals no instance prior to appeal in which she took the position that Malhotra was an independent contractor rather than an employee, and thus not subject to the provisions of the Tort Claims Act. 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. *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. 944, 653 N.W.2d 240 (2002).

[6] While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Tort Claims Act. *Keller v. Tavarone, supra*. Section 13-920(1) provides, in relevant part:

> No suit shall be commenced against any employee of a political subdivision for money on account of damage to or loss of property or personal injury to or the death of any person caused by any negligent or wrongful act or omission of the employee while acting in the scope of his or her office or employment . . . *unless a claim has been submitted in writing to the governing body of the political subdivision within one year after such claim accrued* . . . .

(Emphasis supplied.)

Jessen's claim for medical malpractice accrued on October 14, 1998. Under § 13-920(1), Jessen was required to submit a written claim to the appropriate political subdivision by October 14, 1999. She argues that her October 30, 1998, letter to Malhotra was such a claim. Assuming without deciding that the letter was filed with an individual or office designated in the Tort Claims Act as an authorized recipient of a claim, we conclude that the content of the letter was insufficient to satisfy the requirements of § 13-905.

[7] The requisite content of a written claim is addressed in § 13-905, which requires that all claims "shall be in writing and shall set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are

known to the claimant." We have held that with regard to a claim's content, substantial compliance with the statutory provisions supplies the requisite and sufficient notice to a political subdivision. *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999).

In addition, we have previously construed the predecessor to § 13-905 to require that a written claim make a demand upon a political subdivision for the satisfaction of an obligation rather than merely alerting the political subdivision to the possibility of a claim. *Peterson v. Gering Irr. Dist.*, 219 Neb. 281, 363 N.W.2d 145 (1985). See, also, *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988). The purported claim filed in *Peterson* gave notice that the claimants would hold the political subdivision liable for " 'whatever damages may result as a result of' " the political subdivision's negligent act, without specifying the damages the claimants sought to recover. (Emphasis omitted.) *Peterson v. Gering Irr. Dist.*, 219 Neb. at 284, 363 N.W.2d at 147. We held that the claim did not make a demand against the political subdivision and therefore did not satisfy the provisions of the Tort Claims Act. *West Omaha Inv. v. S.I.D. No. 48, supra*, illustrates a written claim that passed statutory muster. There, the claimant filed a claim pursuant to the Tort Claims Act " '*for the property loss*' " caused in part by the political subdivision's negligence, and thus made a proper demand to the political subdivision. (Emphasis supplied.) *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. at 788, 420 N.W.2d at 294.

[8] The written claim required by the 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. *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002). Without a proper demand of the relief sought to be recovered, a written claim fails to accomplish one of its recognized objectives: to allow the political subdivision to decide whether to settle the claimant's demand or defend itself in the course of litigation.

Evaluating Jessen's October 30, 1998, letter against this rule, we conclude that the content of the letter was not sufficient to satisfy the requirements of a written claim under § 13-905. The letter stated that Alfred had been examined by Malhotra and further implies that Malhotra negligently failed to diagnose Alfred's condition, a condition which led to Alfred's death. The letter accuses Malhotra of malpractice, but does not make a demand upon Malhotra for the satisfaction of any obligation or convey what relief is sought by Jessen. The content of the letter does not satisfy the requirements of § 13-905. There is no other evidence that a written claim was timely filed with any political subdivision. Thus, Jessen failed to comply with a condition precedent to the commencement of a suit under the Tort Claims Act. See *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). In addition, Jessen's federal court action was filed more than 1 year after the accrual of her claim. Under our recent holding in *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003), the savings clause of § 13-919(2) affords her no additional time to make a claim. Although our reasoning differs from that of the district court, the court did not err in finding that Malhotra and Kearney County were entitled to judgment as a matter of law. Because this holding is dispositive, we need not address Jessen's other assignments of error. The judgment of the district court is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

CHAD MASON, DOING BUSINESS AS CHAD MASON PRODUCTIONS, APPELLEE AND CROSS-APPELLANT, V. CITY OF LINCOLN, NEBRASKA, ET AL., APPELLEES AND CROSS-APPELLEES, AND STATE OF NEBRASKA ATHLETIC COMMISSIONER WALLY JERNIGAN, APPELLANT AND CROSS-APPELLEE.

665 N.W.2d 600

Filed July 18, 2003. No. S-02-750.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.

2. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
3. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
4. **Appeal and Error.** In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.
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. **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.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded with directions.

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

Mark T. Bestul and Vincent M. Powers, of Vincent M. Powers & Associates, for appellee Chad Mason.

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

WRIGHT, J.

NATURE OF CASE

Chad Mason, doing business as Chad Mason Productions, filed a declaratory judgment action in the Lancaster County District Court, seeking a determination that "fight contests," which are events consisting of mixed martial arts, kickboxing, and submission wrestling, fall under the jurisdiction of the State Athletic Commissioner and do not violate any statute or ordinance. The district court found that fight contests are under the jurisdiction of the commissioner and that it is necessary for a promoter to obtain a license from the commissioner prior to conducting such events. The commissioner appeals.

SCOPE OF REVIEW

[1] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

FACTS

In April 2001, Mason began promoting weekly fight contests at the Royal Grove nightclub in Lincoln. Prior to the contest scheduled for July 19, Mason was informed by Lincoln Police Chief Thomas Casady that participating in and promoting such contests constituted the commission of a crime and that Mason needed to obtain a license from the commissioner. Mason canceled the contests scheduled for July 19, 21, and 26.

The parties stipulated to the following definitions: Mixed martial arts is "[u]narmed combat involving the use of any combination of combative techniques from different disciplines of the martial arts, including punching, striking, kicking, choking, kneeing, joint locks, 'throws', and take-down maneuvers." Kickboxing is "[a] combative form of martial art combining punches and martial arts kicks." Submission wrestling is "[a] combative form of fighting involving grappling techniques and submission holds associated with martial art forms, including the use of 'choke holds', 'armbar', 'shoulder lock', 'wrist lock', or 'ankle lock' techniques."

Participants in the fight contests included audience members who agreed to fight an experienced contestant. No specific weight categories were recognized or established, and no limits were imposed concerning the frequency of one's participation in the contests. Participants were not required to demonstrate any fight experience or training or any minimum physical capabilities. Participants were not required to undergo a physical examination by a licensed physician either prior or subsequent to engaging in the contests, nor were they subject to visual acuity testing prior to the contests. Participants were allowed to fight barefoot and were not required to wear "foul-proof groin protectors," mouthpieces, or protective headgear, but such equipment was highly recommended. Participants were not subject to alcohol or drug testing.

Mason did not require the presence of a licensed physician or trained emergency medical personnel, nor did he provide insurance for the participants' benefit. Referees were not required to receive any specific training or to meet any established standards, nor were they licensed or certified by any recognized organization. Judges did not score the fight contests. The contests were

not sanctioned or regulated by any government agency or generally recognized interscholastic, amateur, or professional body or organization that had established and enforced standards, rules, and requirements providing a reasonable degree of protection for the health and safety of participants and attempting to minimize the risk of serious injury.

Participants signed a release form providing that Mason and the nightclub were released from liability for any bodily injury or personal injuries arising from participation in the fight contests. The form also released medical professionals and the promoter's employees from any claim based on first aid or treatment provided during participation in the contests. The form stated that the participant "has been informed and is well aware of the nature of the event and acknowledges that [the participant] risks serious injury or death by participating in" a contest.

The parties stipulated that if called to testify, Casady would state that he determined that the fight contests involved elements of wrestling and boxing and fell under the regulation of the commissioner. Casady directed a police officer to contact the owner of the Royal Grove to inform him that operation of the contests was illegal without a license and that if the owner continued to host them, he would receive a criminal citation.

Mason subsequently contacted Casady and was also informed as to Casady's belief concerning the need for a license. Mason told Casady that the commissioner would not issue a license because the commissioner had concluded that the fight contests did not fall under his jurisdiction. Mason alleged that Casady informed him that even if he obtained a license from the commissioner, he would be subject to arrest for violating Neb. Rev. Stat. § 28-310(2) (Reissue 1995), which is third degree assault while engaging in a fight entered into by mutual consent.

When Mason contacted the commissioner about licensing a fight contest, the commissioner told Mason that such contests do not fall under the categories of boxing or wrestling and that, as such, the contests are not sanctioned. The commissioner determined he could not issue Mason a promoter's license because the contests, which allow the use of combative techniques, are not permissible within the statutes and regulations governing boxing and wrestling.

The parties stipulated that if called to testify, Kevin Neumann, a copromoter of the fight contests at the Royal Grove, would state that he has been involved in boxing, interscholastic wrestling, and mixed martial arts. He would testify that the safety of the participants is the main concern and that some states have adopted rules governing the conduct of such events. Concerning videotapes of fight contests received into evidence, Neumann would note that a contestant seen in one of the videotapes kneeing another contestant in the head has not been allowed to participate in subsequent contests. The referee in that match has not been allowed to officiate at any other contests promoted by Mason. Neumann stated that contests can be stopped at any time when a fighter submits, when a corner person throws in the towel, or when the referee stops the fight because a fighter can no longer defend himself or herself.

In his petition for declaratory judgment, Mason claimed that he had promoted such sporting activities in Omaha and had been informed that the promotions were not against any law or ordinance and could continue. He claimed that he had lost income from cancellation of the events and that the audience base was in danger of dissipating if the events were canceled.

In response to Mason's petition, the commissioner alleged that he lacks jurisdiction to license or regulate fight contests because they do not involve professional wrestling or boxing, which may lawfully be licensed and regulated pursuant to Neb. Rev. Stat. §§ 81-8,128 to 81-8,142.01 (Reissue 1996 & Cum. Supp. 2002). He further alleged that by promoting and conducting such contests, Mason is subject to prosecution for aiding, abetting, procuring, or causing consensual third degree assault pursuant to § 28-310(2). He also asserted that the fight contests constitute a public nuisance which should be enjoined.

The district court found that the fight contests are within the jurisdiction of the commissioner and that in order to promote and conduct future contests, Mason must obtain a license from the commissioner. The court stated:

> Notwithstanding the parties' arguments, it is evident that the fight contests are akin to "boxing," as that term is commonly understood. Like "boxing," which is defined as "the art of attack and defense with the fists practiced as a sport,"

> the fight contests consist, in part, of attacking and defending with the fists. . . . Similarly, the fight contests are akin to "wrestling," as that term is commonly understood. Like "wrestling," which is defined as "to contend by grappling with and striving to trip or throw an opponent down or off balance," the fight contests consist, in part, of various "grappling techniques," such as holds, throws, and takedowns. . . . Finally, the fight contests also might fit in the broad category of "exhibition," which is commonly understood to mean "a public showing (as of works of art, objects of manufacture, or athletic skill)." . . . The fight contests are a public showing of punching, kicking and grappling techniques which, to be generous, together could be argued to approximate something like "athletic skill."

(Citations to Internet Web sites omitted.)

The district court declined to reach additional issues raised by the parties, including whether the fight contests involve third degree assault, which is subject to criminal prosecution pursuant to § 28-310(2); whether the fight contests constitute a public nuisance that should be enjoined; and whether prosecuting or threatening to prosecute Mason for aiding and abetting assault due to his involvement in the contests, when promoters and participants in other sports involving physical contact are not subjected to or threatened with criminal prosecution, either constitutes unconstitutional selective enforcement of the assault statutes or renders the application of § 28-310(2) to such activities unconstitutionally overbroad or void for vagueness. The court found these issues to be moot, although it noted that the issues could arise again if Mason promoted and conducted fight contests without a license.

ASSIGNMENTS OF ERROR

The commissioner assigns as error the district court's finding that fight contests (including mixed martial arts, kickboxing, and submission wrestling) promoted and conducted by Mason fall under the jurisdiction of the commissioner and that the commissioner must license and regulate such fight contests pursuant to §§ 81-8,128 to 81-8,142.01.

On cross-appeal, Mason assigns as error the district court's failure to determine that the fight contests do not constitute

assault and its failure to determine that prosecution for assault in connection with the fight contests is unconstitutional.

ANALYSIS

The issue is whether fight contests consisting of mixed martial arts, kickboxing, and submission wrestling fit within the definitions of professional wrestling and boxing, amateur boxing, sparring matches, or exhibitions, which are subject to regulation by the commissioner.

[2] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003). This case involves statutory interpretation, which presents a question of law. See *Maxwell v. Montey*, 265 Neb. 335, 656 N.W.2d 617 (2003). In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court. *Spanish Oaks v. Hy-Vee, supra.*

The statutes considered here, §§ 81-8,128 to 81-8,142.01, are those which establish the office of the commissioner and define the commissioner's responsibilities. The parties disagree as to the interpretation of these statutes. The commissioner asserts that the district court was wrong in finding that fight contests fall under his jurisdiction and that he must license and regulate the contests. He argues that the contests promoted by Mason do not meet the definitions of professional wrestling and boxing, amateur boxing, sparring matches, or exhibitions. Mason asserts that the court was correct in construing the statutes to govern fight contests.

The primary statute to be considered is § 81-8,129, which provides:

> The State Athletic Commissioner shall have sole direction, management, control, and jurisdiction over all professional wrestling and boxing, amateur boxing, and sparring matches, and exhibitions to be held within the state, except such as are conducted by universities, colleges, high schools, the military, and recognized amateur associations for contestants under sixteen years of age. No professional boxers or wrestlers, or amateur boxers who have

> attained the age of sixteen, shall participate in a match or exhibition for a prize or purse, or at which an admission fee is charged, either directly or indirectly, in the form of dues or otherwise, in this state except by a club, association, organization, or person licensed by the commissioner, as provided in section 81-8,130, and in pursuance of a license granted by the commissioner for such match or exhibition.

The commissioner asserts that the Legislature's determination to permit and regulate professional wrestling and boxing was not intended to allow the commissioner to sanction the fight contests promoted by Mason, which involve mixed martial arts and include punching, striking, kicking, choking, kneeing, joint locks, throws, and takedown maneuvers. The commissioner also argues that the reference to sparring matches and exhibitions in § 81-8,129 is not intended to include the fight contests.

We first note the definitions of the following terms: Wrestling is defined as "a sport in which two opponents struggle hand to hand in order to pin or press each other's shoulders to the mat or ground, with the styles, rules, and regulations differing widely in amateur and professional matches." Webster's Encyclopedic Unabridged Dictionary of the English Language 1647 (1989). Boxing is defined as "the art of attack and defense with the fists practiced as a sport." Webster's Third New International Dictionary, Unabridged 263 (1993). Sparring is defined as "to make offensive and defensive gestures without landing a blow in order to draw one's opponent and find or create an opening" or "to engage in a practice or exhibition bout esp[ecially] boxing with a sparring partner." *Id.* at 2182. Webster's defines an exhibition as "a public show or showing," as in "a public display of athletic or other skill often in the form of a contest or game but usu[ally] without importance with respect to winning or losing." *Id.* at 796. The commissioner suggests that sparring matches and exhibitions, as those terms are used in § 81-8,129, must be construed to refer specifically to professional wrestling and boxing, and amateur boxing.

[3] The district court determined that the terms used in § 81-8,129 are ambiguous, which required the court to construe them. We disagree. In the absence of anything to the contrary,

statutory language is to be given its plain and ordinary meaning. *Morello v. Land Reutil. Comm. of Cty. of Douglas*, 265 Neb. 735, 659 N.W.2d 310 (2003).

Although state law does not define professional wrestling and boxing, we determine that the fight contests promoted by Mason do not qualify as professional wrestling or boxing matches or exhibitions as those terms are commonly understood. The commissioner has jurisdiction over professional wrestling and boxing, and he has no authority to issue a license for events such as those promoted by Mason. The commissioner is not authorized to license activities that combine both professional wrestling and boxing, which are separate and distinct activities.

The statutes in question are intended to ensure the safety of participants in sporting events which had previously been unregulated and which involve professional wrestling and boxing techniques. However, the statutes are not intended to sanction the type of fighting promoted and conducted in these fight contests. While we acknowledge that boxing has an inherent risk of serious injury or even death, the combination of actions involved in a fight contest, as stipulated to in the record, clearly exacerbate the risks to the contestants.

Offered into evidence were two videotapes of representative fight contests. The videotapes show contestants in a ring of the type commonly used for boxing or professional wrestling matches. The contestants are not wearing protective headgear. Some of the contestants are wearing gloves. The contestants exhibit a combination of moves, some similar to those commonly used in professional wrestling and boxing. In addition, participants trade kicks. In one match, a contestant is seen kneeing the other in the head.

Section 81-8,129 provides that the commissioner has jurisdiction over "all professional wrestling and boxing, amateur boxing, and sparring matches, and exhibitions," except those conducted by educational institutions, the military, and amateur associations for contestants under the age of 16. The statute is clear concerning the type of activity which is intended to be governed by it. No interpretation is needed because the statute's language is not ambiguous. Thus, the district court resorted to interpreting state law when that was not necessary.

The only type of wrestling included in § 81-8,129 is professional wrestling, a form of entertainment in which "wrestlers battle each other in matches that are scripted and rehearsed beforehand." See Microsoft Encarta Online Encyclopedia 2003, *Professional Wrestling*, http://encarta.msn.com (accessed July 10, 2003). Professional wrestling and amateur wrestling are "not closely related," and "[p]rofessional wrestlers are skilled athletes," who "perform as entertainers and not as competitors." *Id.* Professional wrestlers attend training to "learn . . . how to decrease the danger of becoming injured while falling or being hit by another wrestler." *Id.*

The sport of boxing involves two opponents of approximately equal weight who exchange punches with their fists. The hands are padded by the use of what are commonly known as boxing gloves. Specific rules govern the course of conduct by the opponents, and the rules are enforced by a referee. Each contest is made up of a limited number of rounds, and each round is limited in time. Hitting below the belt is prohibited, as are kicking, head-butting, wrestling, choking, biting, kidney punches, and certain other physical contact. The object is to defeat one's opponent by a knockout, a technical knockout, or outscoring the opponent. The scoring is usually done by three judges who assess the skill of each opponent and score the rounds accordingly.

While some of the activities prohibited in boxing are permitted in professional wrestling, the participants are trained to entertain and to avoid injury. It is the combination of these activities and their use by untrained and unregulated amateurs that sets the fight contests at issue apart from professional wrestling and boxing, and amateur boxing.

We conclude as a matter of law that the commissioner does not have jurisdiction under § 81-8,129 to license fight contests such as those promoted by Mason. Mixed martial arts, kickboxing, and submission wrestling are not activities described in § 81-8,129. Thus, the district court erred in finding that these activities fall under the purview of the commissioner, and the court's determination is reversed.

CROSS-APPEAL

In his cross-appeal, Mason asserts that the district court erred in failing to determine that the fight contests do not constitute

assault and in failing to determine that prosecution for assault in connection with the fight contests is unconstitutional.

The district court's pretrial order set forth several controverted and unresolved issues in addition to the question of whether the commissioner has jurisdiction to license fight contests. These issues included: (1) whether the fight contests involve third degree assault subject to criminal prosecution pursuant to § 28-310(2), (2) whether the fight contests constitute a public nuisance which should be enjoined, and (3) whether prosecuting or threatening to prosecute Mason for promoting the fight contests constitutes unconstitutional selective enforcement of the assault statute or renders § 28-310(2) unconstitutionally overbroad or void for vagueness.

After the district court determined that the commissioner has jurisdiction to license fight contests, the court declined to address the remaining issues, finding them to be moot. The court noted that only the jurisdictional question was before it and that the remaining issues could arise at a later time if Mason promoted and conducted fight contests without a license.

[4-6] In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002). An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Id.* A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *Id.* This court declines to consider the issues raised in Mason's cross-appeal, and we remand the cause to the district court for consideration of those issues.

CONCLUSION

The district court erred in finding that the fight contests promoted by Mason come under the jurisdiction of the commissioner, and its judgment is reversed. The issues raised on cross-appeal were not considered by the district court, and this court declines to review them. Thus, we remand the cause with directions that the district court determine those issues.

REVERSED AND REMANDED WITH DIRECTIONS.

STANLEY JACOX, APPELLANT, V.
ROBERT PEGLER, APPELLEE.
665 N.W.2d 607

Filed July 18, 2003. No. S-02-907.

1. **Juries: Discrimination: Appeal and Error.** A trial court's determination of whether a party has established purposeful discrimination in jury selection is a finding of fact and is entitled to appropriate deference from an appellate court because such a finding will largely turn on evaluation of credibility. The trial court's determination that there was no purposeful discrimination in the party's use of his or her peremptory challenges is a factual determination which an appellate court will reverse only if clearly erroneous.
2. ____: ____: ____. A trial court's determination of the adequacy of a party's "neutral explanation" of its peremptory challenges will not be reversed on appeal unless clearly erroneous.
3. **Juries: Discrimination: Proof.** With respect to a claim of purposeful discrimination in the use of a peremptory strike of a juror from the venire, the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
4. **Juries: Discrimination.** Private litigants in a civil case may not use peremptory challenges to exclude jurors on account of their race.
5. **Trial: Juries: Discrimination.** Trial courts should make specific findings on the record at each step of a challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Mark T. Bestul and Vincent M. Powers, of Vincent M. Powers & Associates, for appellant.

Timothy E. Clarke, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this appeal from a motor vehicle personal injury action, Stanley Jacox asserts that the district court for Lancaster County erred when it rejected his claim of discrimination in the use of a peremptory challenge employed by appellee, Robert Pegler. Jacox claims that the potential juror, who was African-American, was struck from the venire because of his race, in violation of the

Equal Protection Clause of the U.S. Constitution. Finding no merit to this sole assignment of error, we affirm.

STATEMENT OF FACTS

Jacox and Pegler were involved in a traffic accident in Lancaster County on July 27, 2000. Jacox filed a petition against Pegler seeking damages for injuries he incurred in the accident, and Pegler filed a counterclaim against Jacox.

The case proceeded to trial. Jury selection began on July 26, 2002. During voir dire, Jacox informed the court outside the hearing of the potential jurors that he was claiming that Pegler's use of a peremptory challenge to strike juror No. 9 was discriminatory. Jacox asserted that Pegler "struck Juror No. 9 because of race." Jacox also asserted that he needed only to show that juror No. 9 was African-American and that then the burden was upon Pegler "to articulate a particularly non-discriminatory reason for striking him." The court excused the potential jurors in order to consider the matter outside their presence.

In support of his claim, Jacox reiterated that he challenged the striking of juror No. 9 because juror No. 9 was African-American. Pegler's attorney responded to this claim as follows:

> First, and most importantly, on two separate occasions during voir dire examination I noticed [juror No. 9] had his eyes closed as if he was dozing or nodding off and not paying attention.
>
> My concern in this case, Judge, is there will be all sorts of talk about Jury Instructions and burden of proof and if the jurors can follow the Jury Instructions. And, most importantly, there is going to be critical testimony from both the plaintiff and the defendant as to what happened. And I don't want a juror who can't even get through voir dire examination without closing his eyes to be one of the individuals who is responsible for deciding my client's case.
>
> Even during [Jacox's attorney's] examination, I think he had asked a question of [juror No. 9] and [juror No. 9] was looking off somewhere else. And he said, [juror No. 9], I'm asking a question of you, and brought his attention back to [Jacox's attorney] and then answered the question.
>
> That's the sole and only reason I struck [juror No. 9].

Jacox's attorney thereafter stated:

> I don't think that is a legitimate non-discriminatory reason. For example, as I recall my question of — of [juror No. 9], I didn't pronounce his name properly and once I did, he responded. I also had my eyes closed during parts of . . . voir dire [by Pegler's attorney]. I was thinking. Perhaps that's true, he was thinking as well.
>
> . . . It's been my experience when there is a . . . juror who is inattentive or sleeping, that's something that the Court notes, it's the Court's job. I don't think that's the situation here.
>
> This particular juror was as attentive as the majority of the white jurors . . . .

On the record before us, Jacox's allegation of discrimination in the use of a peremptory challenge is not supported by sworn testimony, exhibits, stipulations, admissions, or judicial notice. Neither counsel nor the court recited into the record information regarding the racial or other relevant breakdown of the venire, the challenges by both parties, or the jury actually selected. Without comment, the district court announced that Jacox's challenge was overruled.

Jury voir dire then continued. A jury was impaneled and sworn in, and the trial proceeded. Following deliberation, the jury returned a verdict in favor of Pegler on Jacox's claim and a verdict in favor of Jacox on Pegler's counterclaim. The district court entered judgment in accordance with the jury's verdict and dismissed the case with prejudice. Jacox appeals.

ASSIGNMENT OF ERROR

Jacox asserts that the district court erred in overruling his challenge to Pegler's striking of juror No. 9 from the venire and in failing to make a determination on the record as to the adequacy of Pegler's proffered nondiscriminatory explanation for such striking.

STANDARDS OF REVIEW

[1] A trial court's determination of whether a party has established purposeful discrimination in jury selection is a finding of fact and is entitled to appropriate deference from an appellate court because such a finding will largely turn on evaluation of

credibility. *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). The trial court's determination that there was no purposeful discrimination in the party's use of his or her peremptory challenges is a factual determination which this court will reverse only if clearly erroneous. *State v. Pratt*, 234 Neb. 596, 452 N.W.2d 54 (1990).

[2] A trial court's determination of the adequacy of a party's "neutral explanation" of its peremptory challenges will not be reversed on appeal unless clearly erroneous. *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

ANALYSIS

On appeal, Jacox's assignment of error relates solely to the rejection of his claim that Pegler's use of a peremptory challenge to strike from the venire juror No. 9 was discriminatory. Following our review of the record, we determine that Jacox failed to meet his burden of proving purposeful discrimination and that therefore, the district court's ruling rejecting his claim of discrimination by Pegler in the use of his peremptory challenge was not clearly erroneous.

In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the U.S. Supreme Court held that the Equal Protection Clause forbids prosecutors from using peremptory challenges to strike potential jurors solely on account of their race. In *Batson* and cases subsequent thereto, the Court set up a three-step process for evaluating a claim by a defendant that a prosecutor had used peremptory challenges in a racially discriminatory manner. Initially, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. If the requisite showing has been made, the prosecutor must then articulate a race-neutral explanation for striking the juror in question. Finally, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination. See *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

In *Batson*, the Court stated that in order to establish a prima facie case of purposeful discrimination in jury selection, the defendant must show (1) that he or she is a member of a cognizable racial group, (2) that the prosecutor exercised peremptory

challenges to exclude from the venire members of the defendant's race, and (3) that these facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude potential jurors on account of their race. However, in *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the Court held that a defendant, regardless of his or her race, could object to a prosecutor's race-based exclusion of potential jurors. The Court reasoned that a race-based exclusion violated the equal protection rights of the excluded juror and that a defendant had third-party standing to raise the excluded juror's equal protection claim. The Court indicated that racial identity between the defendant and the excused potential juror, which it had emphasized in *Batson*, might make it easier to establish a prima facie case of wrongful discrimination but that racial identity might not be relevant in other cases and was not a prerequisite to making a prima facie case of purposeful discrimination.

With regard to the burden on the prosecution to come forward with a race-neutral explanation, the Court stated in *Purkett v. Elem*, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), that "[t]he second step of [the *Batson* test] does not demand an explanation that is persuasive, or even plausible." Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

[3] The Court stated that it was not until the third step of the *Batson* test that the persuasiveness of the proffered race-neutral explanation became relevant. At that stage, the trial court must determine whether the opponent of the strike from the venire has carried his or her burden of establishing purposeful discrimination, and implausible or fantastic justifications may be found to be pretexts for purposeful discrimination. The Court emphasized that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. at 768.

In *Hernandez v. New York, supra*, the Court held that a trial court's finding on the issue of discriminatory intent in connection with a *Batson* challenge would not be overturned on appeal unless the determination was clearly erroneous. The Court stated:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because . . . the finding "largely will turn on evaluation of credibility." . . . In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

(Citations omitted.) *Hernandez v. New York*, 500 U.S. 352, 365, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

[4] In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), the Court extended the holding in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), to civil cases. The Court held that private litigants in a civil case may not use peremptory challenges to exclude jurors on account of their race. The Court reasoned that such exclusion violated the equal protection rights of the challenged jurors and that a private litigant's use of peremptory challenges in a civil case constituted "state action" because such use had its source in state authority and the litigant made extensive use of the state's procedures with overt, significant assistance from the state. 500 U.S. at 623. In reasoning consistent with *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the Court also held that litigants in a civil case had standing to raise the equal protection claims of jurors excluded on account of their race. Finally, the Court stated that the three-step approach set forth in *Batson* for determining whether racial discrimination has been established is applicable in the civil context and that determining whether a prima facie case has been established requires consideration of all relevant circumstances, including whether there has been a pattern of strikes against members of a particular race.

In Nebraska, this court has heretofore considered *Batson* challenges in the context of criminal cases. By virtue of this opinion, we now apply the principles initially announced in *Batson* and

subsequently expounded upon in federal and Nebraska cases to civil actions.

[5] Jacox assigns error to the trial court's overruling of his challenge and in particular to the trial court's failure to make a specific determination regarding whether Pegler's proffered explanation was a legitimate nondiscriminatory reason for excluding juror No. 9. With regard to the lack of findings, we take this opportunity to encourage trial courts to make specific findings on the record at each step of a *Batson* challenge, but nevertheless observe that the failure to do so does not in and of itself require reversal. In this regard, we note that where the trial court has failed to make specific *Batson* findings, we have implied such findings where the record permits. See *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 (1988). Employing the reasoning in *Walton*, we determine that although the trial court did not explicitly state that Pegler's proffered explanations were race neutral, the trial court in this case impliedly found that Pegler had articulated race-neutral explanations when it effectively proceeded to the third step under *Batson* and overruled Jacox's challenge.

With respect to Jacox's argument that the trial court erred in rejecting his claim that Pegler's use of a peremptory challenge was discriminatory, we note that the trial court's ruling on the *Batson* challenge in this case is to be reviewed under a clearly erroneous standard. See, *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999). In the instant case, the trial court did not specifically comment on the adequacy of Jacox's prima facie case of discrimination. However, whether Jacox made a prima facie showing is a moot issue in this case because Pegler immediately offered a race-neutral explanation before the trial court could comment on the sufficiency of Jacox's prima facie showing. The U.S. Supreme Court has stated that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. at 359. See, also, *Goode v. Shoukfeh*, 943 S.W.2d 441 (Tex. 1997) (making

similar statement in civil case). We adopt this reasoning, and given the fact that Pegler offered a race-neutral explanation, we do not comment on the adequacy of Jacox's prima facie showing of discrimination.

With regard to the second step of the *Batson* test, as we have discussed above, the trial court impliedly found that Pegler's proffered explanations were race neutral. Under the U.S. Supreme Court's holding in *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), the proffered explanation in the second step need not be persuasive or even plausible, it simply needs to be race neutral. Pegler asserted that he struck the juror from the venire because the juror's eyes were closed during part of the voir dire and the juror appeared inattentive. These explanations were race neutral, and the trial court did not err regarding the second step of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

In prior criminal cases, this court and the Nebraska Court of Appeals have determined that where a juror was struck from the venire because the State was concerned about the juror's ability to pay adequate attention during trial, such race-neutral explanation was adequate. See, *State v. Myers, supra* (prosecutor concerned about elderly and disabled juror's ability to pay attention during trial and to follow directions); *State v. Pratt*, 234 Neb. 596, 452 N.W.2d 54 (1990) (prosecutor concerned that juror who appeared tired would not pay attention); *State v. Edwards*, 2 Neb. App. 149, 507 N.W.2d 506 (1993) (prosecutor concerned about juror's ability to process evidence where juror was not alert and was unable to clearly answer questions). The explanation given by Pegler in this case was clearly race neutral. Whether the explanation was a pretext for discrimination was a matter to be considered in the third step of the *Batson* test.

Proceeding to the third step of *Batson*, the burden was on Jacox to prove facts necessary to show the existence of discrimination. See *Purkett v. Elem, supra*. The district court's rejection of Jacox's claim of discrimination embodies an implied finding under the third step of the *Batson* test that Jacox did not carry his burden of proving purposeful discrimination. On the record before us, we cannot say that the trial court clearly erred in this regard.

The third step under *Batson* necessarily involves evaluating the strike proponent's proffered race-neutral explanation in the context of the jury selection as it actually occurred in the case. See, generally, *Batson v. Kentucky, supra*. The U.S. Supreme Court has given the following illustrative examples of circumstances which could give rise to an inference of discrimination: "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson v. Kentucky*, 476 U.S. at 97. Although the record before us indicates that juror No. 9 was African-American, the record provides no other facts or a context from which we are able on appeal to infer purposeful discrimination. There is no indication in the record with respect to the racial or other relevant breakdown of the venire, of the challenges by both parties, or of the jury actually selected. It is fundamental that a party claiming discrimination in the use of peremptory challenges make a record which supports an inference of discriminatory purpose. See 50A C.J.S. *Juries* § 456 (1997). "Facts must be included in the record by sworn testimony, exhibits, stipulations, admissions, or judicial notice." *Id.* at 494. In the absence of such a record, we cannot say that the trial court was clearly erroneous in rejecting Jacox's *Batson* challenge.

CONCLUSION

On the record before us, we determine that the district court was not clearly erroneous in rejecting Jacox's *Batson* challenge to Pegler's use of a peremptory challenge to strike a potential juror from the venire who was African-American. We therefore affirm the order of the district court.

AFFIRMED.

IN RE APPLICATION OF ALBERTO SILVA FOR ADMISSION TO THE NEBRASKA STATE BAR ON EXAMINATION.

665 N.W.2d 592

Filed July 18, 2003. No. S-34-020003.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** Under Neb. Ct. R. for Adm. of Attys. 15 (rev. 2000), the Nebraska Supreme Court considers the appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
3. ____: ____. The Nebraska Supreme Court has delegated administrative responsibility for bar admissions solely to the Nebraska State Bar Commission.
4. **Attorneys at Law.** Abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is a proper basis for the denial of admission to the bar.
5. **Attorneys at Law: Prior Convictions: Proof.** Although a prior conviction is not conclusive of a lack of present good moral character, particularly where the offense occurred a number of years previous to the applicant's request for admission, it adds to the applicant's burden of establishing present good character by requiring convincing proof of rehabilitation.

Original action. Affirmed with directions.

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

William T. Wright for Nebraska State Bar Commission.

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

PER CURIAM.

Alberto Silva appeals a decision of the Nebraska State Bar Commission (Commission) denying his application to take the July 2002 Nebraska bar examination. Silva contends that the Commission erred in concluding that he did not meet the character and fitness requirements for admission.

FACTUAL BACKGROUND

Silva was born on September 11, 1964. He is divorced and resides in Omaha with his minor daughter. From August 1991

until May 1995, Silva attended the University of Nebraska at Kearney. Silva majored in Spanish and criminal justice and received a bachelor of arts degree summa cum laude upon his graduation in 1995. Silva applied to Creighton University School of Law and was accepted in 1999. He graduated with a juris doctor degree in May 2002.

On his law school admission application, Silva gave an affirmative response to a question asking if he had "ever been convicted of any crime other than a minor traffic violation." As instructed in the application form, he attached a separate sheet listing the "dates, cause, outcomes, and circumstances" pertaining to his criminal convictions. This document disclosed that during a period from October 1988 until January 1995, Silva was convicted in the State of Colorado on misdemeanor charges of disturbing the peace, criminal mischief, fight by mutual consent (twice), consuming alcohol on state property, littering, driving while intoxicated, and third degree assault. Each conviction resulted in a fine ranging from $25 to $200, as well as probation and a license suspension on the driving while intoxicated conviction.

On or about March 26, 2002, Silva applied for admission by examination to the Nebraska bar. He responded affirmatively to a question on the application form which asked: "Have you ever, either as an adult or a juvenile, been cited, arrested, charged or convicted for a violation of any law (except moving traffic violations . . . and except minor parking violations)?" As instructed in the application, Silva attached forms providing detailed information concerning this response. These forms listed the convictions which Silva had disclosed on his law school application, plus 10 additional Colorado misdemeanor convictions preceding the date of that application. These included a conviction for third degree assault in 1979; three convictions for being a minor in possession in 1981, 1982, and 1983; a conviction on charges of flight to avoid arrest in 1982; a conviction for operating a motor vehicle to avoid arrest in 1983; two convictions in 1992 and 1993 for having no proof of insurance; a 1993 conviction for failing to stop and furnish information; and convictions for third degree assault and domestic violence in December 1995. In addition, Silva disclosed that he had been found not guilty on

Nebraska charges of assault and battery and disorderly conduct in April 2000 and convicted in Nebraska of driving under the influence in December of that year.

At about the time that Silva completed his application for admission to the bar, he informed Creighton University School of Law that he had given an incomplete account of his prior criminal history on his law school admission application. At the same time, Silva disclosed that he had previously applied unsuccessfully for admission to other law schools, but because of a misunderstanding, he had unintentionally omitted that fact when he responded to a question on the application form. Silva admitted to Creighton University School of Law officials that he intentionally omitted some of his misdemeanor convictions from his law school admission application because he feared that full disclosure would result in rejection of his application. After meeting to consider the information disclosed by Silva in 2002, the law school's admissions committee determined that it could not conclusively find that Silva would have been denied admission if the information had been disclosed at the time of his application. Patrick Borchers, the dean of the law school, advised Silva that on the basis of this determination, Silva would be permitted to remain in school to complete the requirements for his law degree and that the law school would advise the bar examiners of the matter.

Upon receipt of his application, the Commission advised Silva that it would continue its investigation into his character and fitness pursuant to Neb. Ct. R. for Adm. of Attys. 3 (rev. 2000). The Commission identified Silva's criminal and credit history as the areas of concern and scheduled an informal interview. Following the interview, the Commission, in a letter dated June 25, 2002, denied Silva's application to take the bar examination based upon what it perceived as "significant deficiencies" in several essential eligibility requirements enumerated in rule 3.

Silva requested a formal hearing to respond to the denial of his application. In response to Silva's request for clarification, the Commission provided Silva with a letter outlining its reasons for denial of permission to take the bar examination. The letter stated in relevant part:

> 1. You misrepresented to Creighton Law School in your law school application dated January 21, 1998, your criminal history in that you failed to disclose several important elements of that history and most importantly:
>
> a. Your December, 1995, conviction in Case 95F002516, The People of the State of Colorado v. Alberto Silva, on charges of 3rd Degree Assault and Domestic Violence, both misdemeanors under Colorado law; and
>
> b. A variety of misdemeanor/juvenile charges which occurred in the 1980's.
>
> When questioned about these failures to disclose during the course of an informal interview before the Bar Commission on June 21, 2002, you advised that you purposely did not disclose this information because you believed that such disclosure would cause Creighton University to reject your application to law school. . . .
>
> . . . .
>
> 2. Your criminal history as reflected in your application for admission and shown on the list attached hereto as Exhibit "A", and in particular that history which reflects either prosecutions or convictions for assault, demonstrate a less than adequate respect for the law generally during the course of the last fifteen years. . . .
>
> . . . .
>
> While you, in your interview before the Commission on June 21, 2002, expressed remorse for, and disapproval of, your prior violent lifestyle, an insufficient amount of time has passed in the opinion of the Commission to have allowed you to fully demonstrate that you presently have the ability to live within the bounds of the conduct expected of attorneys in the State of Nebraska.

On October 24, 2002, the Commission held a formal hearing on Silva's appeal. Catherine Mahern, director of the Creighton Legal Clinic, and Borchers, dean of the law school, testified on Silva's behalf. Both attested to Silva's good character and his fitness to practice law. Mahern testified that she became acquainted with Silva when he enrolled in the spring 2002 clinical program and that after his graduation, she hired Silva to work in the clinic on a part-time basis as a translator. Mahern described Silva's

demeanor as quiet, serious, and mature. She stated that Silva has a "good ear for facts," that he is "very compassionate," and that the clinic clients "appreciate him and enjoy working with him." Mahern testified that Silva's bilingual fluency was valuable to the clinic in addressing the legal needs of the South Omaha community. Mahern stated: "If I was the least concerned about [Silva's] future clients, I would be here testifying otherwise. But I'm not." She strongly recommended that the Commission grant Silva the opportunity to sit for the bar examination.

Borchers testified that in his opinion, Silva's character was such that he should be permitted to take the bar examination. Borchers stated that he was unaware of any reason why Silva could not be "put in a position of trust with other people's interests" and that in his opinion, Silva would pose no risk to his future clients. Borchers suggested, however, that because of Silva's previous misdemeanor convictions, it would be appropriate that his admission to the bar be on a probationary basis for a specified period of time. Borchers certified that Silva completed the requirements for his juris doctor degree on May 10, 2002, and that he was conferred that degree by the Creighton University School of Law on May 18, 2002.

Testifying on his own behalf, Silva stated that he is a role model for his daughter as well as his nieces and nephews. At the time of the hearing, Silva worked for the law school legal clinic, for a nonprofit immigration clinic known as Justice for Our Neighbors, and as an independent interpreter and translator for court hearings and social service agencies. Silva testified that there would be a need for his services as an attorney in the Hispanic community and that he was willing to accept any conditions on admission which the Commission deemed appropriate. Silva acknowledged making bad decisions in the past, but stated that he had reached a point in his life where such behavior would not be repeated. In support of his appeal, Silva submitted letters from legal educators, lawyers, judges, clergy, and others attesting to his good character and fitness to practice law.

By letter dated October 25, 2002, the Commission advised Silva that it had rejected his appeal, stating, "It is the decision of the commission that you have failed to show you possess the

proper character and fitness to be admitted to the bar of Nebraska at this time and your application to take the bar examination is herewith denied." Silva timely perfected his appeal of this decision to this court pursuant to Neb. Ct. R. for Adm. of Attys. 10 (rev. 2000).

ASSIGNMENT OF ERROR

Silva assigns that the Commission erred in finding that he did not have sufficient good character to qualify to take the bar examination.

STANDARD OF REVIEW

[1] Under Neb. Ct. R. for Adm. of Attys. 15 (rev. 2000), the Nebraska Supreme Court considers the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before the Commission. *In re Application of Converse*, 258 Neb. 159, 602 N.W.2d 500 (1999).

ANALYSIS

[2,3] The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. *In re Application of Converse, supra.* Nebraska statutory law further provides: "No person shall be admitted . . . unless it is shown to the satisfaction of the Supreme Court that such person is of good moral character." Neb. Rev. Stat. § 7-102(1) (Cum. Supp. 2002). We have delegated administrative responsibility for bar admissions solely to the Commission. *In re Appeal of Stoller*, 261 Neb. 150, 622 N.W.2d 878 (2001).

In rule 3 of our rules governing the admission of attorneys, we have described the applicable standards for character and fitness of attorneys as follows:

> An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency by an applicant in one or more of the following essential eligibility requirements for the practice of law may constitute a basis for denial of admission. In addition to the admission requirements otherwise established by these rules, the essential eligibility

requirements for admission to the practice of law in Nebraska are:

(a) The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;

(b) The ability to conduct oneself diligently and reliably in fulfilling all obligations to clients, attorneys, courts, and others;

(c) The ability to conduct oneself with respect for and in accordance with the law and the Code of Professional Responsibility;

(d) The ability to communicate clearly with clients, attorneys, courts, and others;

(e) The ability to reason, analyze, and recall complex factual information and to integrate such information with complex legal theories;

(f) The ability to exercise good judgment in conducting one's professional business;

(g) The ability to avoid acts that exhibit disregard for the health, safety, and welfare of others;

(h) The ability to use honesty and good judgment in financial dealings on behalf of oneself, clients, and others;

(i) The ability to comply with deadlines and time constraints;

(j) The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

Appendix A to our rules governing the admission of attorneys further clarifies the character and fitness standards and provides in part:

> The primary purposes of character and fitness screening before admission to the bar of Nebraska are to assure the protection of the public and to safeguard the justice system. . . . The public is adequately protected only by a system that evaluates character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their attorneys.

Our rules place on the applicant "the burden of proving good character by producing documentation, reports, and witnesses in support of the application." *Id.* "A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission." *Id.* Our character and fitness standards list the following as relevant conduct that should be treated as cause for further inquiry before the Commission decides whether an applicant possesses the character and fitness to practice law:

1. misconduct in employment;
2. acts involving dishonesty, fraud, deceit, or misrepresentation;
3. abuse of legal process, including the filing of vexatious lawsuits;
4. neglect of financial responsibilities;
5. neglect of professional obligations;
6. violation of an order of a court, including child support orders;
7. evidence of mental or emotional instability;
8. evidence of drug or alcohol dependence or abuse;
9. denial of admission to the bar in another jurisdiction on character and fitness grounds;
10. disciplinary action by an attorney disciplinary agency or other professional disciplinary agency of any jurisdiction.

Id. When there is evidence that an applicant has engaged in any such conduct, the Commission is required to determine whether "the present character and fitness of an applicant qualify the applicant for admission" based on the consideration of the following factors:

1. the applicant's age at the time of the conduct;
2. the recency of the conduct;
3. the reliability of the information concerning the conduct;
4. the seriousness of the conduct;
5. the factors underlying the conduct;
6. the cumulative effect of the conduct or information;
7. the evidence of rehabilitation;
8. the applicant's positive social contributions since the conduct;

9. the applicant's candor in the admissions process;

10. the materiality of any omissions or misrepresentations.

Id.

[4,5] Obvious and serious concerns in this case are the nature and frequency of Silva's misdemeanor offenses which amount to a history of assaultive behavior. This court and others have held that "abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is a proper basis for the denial of admission to the bar." *In re Appeal of Lane*, 249 Neb. 499, 512, 544 N.W.2d 367, 375 (1996). In *In re Application of Majorek*, 244 Neb. 595, 605, 508 N.W.2d 275, 282 (1993), we adopted the principle that " '[a]lthough a prior conviction is not conclusive of a lack of present good moral character, particularly where the offense occurred a number of years previous to the applicant's request for admission, it adds to [the applicant's] burden of establishing present good character by requiring convincing proof of . . . rehabilitation.' " Quoting *In re Application of Allan S.*, 282 Md. 683, 387 A.2d 271 (1978). Although Silva's record includes several offenses committed as a juvenile, his most recent and most serious convictions in 1995 cannot be characterized as "the act of a naive and callow youth." See *In re Application of Majorek*, 244 Neb. at 603, 508 N.W.2d at 281. We further note that Silva had several alcohol-related misdemeanor offenses prior to beginning his law studies and a conviction for driving under the influence during his second year of law school. However, the record includes an outpatient chemical dependency evaluation dated April 19, 2001, which concludes that while Silva could benefit from an alcohol education program, he "does not meet criteria for treatment."

An additional factor reflecting adversely on Silva's character and fitness to practice law is his failure to fully disclose the extent of his prior misdemeanor convictions when he applied for admission to law school. We have noted that a similar lack of candor in completing an application for admission to the bar may constitute grounds for a finding of lack of requisite character and fitness. See *In re Application of Majorek, supra.* Silva eventually admitted his lack of candor to law school officials and forthrightly stated that he intentionally concealed portions

of his record out of fear that full disclosure would result in rejection of his application. However, Silva's admission did not occur until his final semester of law school, at a time when he probably realized that the information submitted in his bar application would reveal his previous concealment.

There is also evidence in the record, however, which reflects favorably on Silva's character and fitness. The testimony of Borchers and Mahern, as well as letters of support submitted by several of Silva's law professors and classmates, suggest that Silva was a diligent law student who developed strong and positive relationships with those around him. Of particular significance are Mahern's favorable observations of Silva's performance in a clinical setting during his final year of law school and her willingness to employ him as an attorney at the law school's legal clinic if he is admitted to the bar.

Other persons who have had contact with Silva in his role as an interpreter and translator share Mahern's favorable assessment of his character and fitness in letters written on his behalf which are included in the record. An attorney employed by the law school's legal clinic described Silva as "extremely competent and professional" while working as an interpreter in Douglas County courts. The clinic's office manager wrote that Silva treated "clients and associates respectfully and with consideration" and that he was "thorough," "prompt," and "very attentive to the details of his work" at the clinic. An Omaha attorney who worked with Silva at the clinic and in a subsequent volunteer position wrote that Silva "repeatedly demonstrated an exceptional level of integrity and honesty." A vocational rehabilitation counselor who utilized Silva as an interpreter for his Spanish-speaking clients wrote that Silva provided "timely, accurate, and highly professional interpreting services" and that if Silva were admitted to the bar, he would not hesitate to refer his clients who required legal assistance to Silva. A prosecutor who had utilized Silva's services as an interpreter described him as "professional, both in demeanor and appearance," and noted that Silva has "demonstrated fidelity to his oath as a translator and shown compassion for those to whom he provides service." A district judge who had observed Silva's performance as a senior certified law student and as an interpreter described him as "extremely professional, competent, responsible,

and . . . very well respected among the judges and court staff" and expressed his opinion that Silva should have an opportunity to sit for the bar examination.

Viewing the entire record, we conclude that the Commission did not err in determining that Silva should not be permitted to sit for the July 2002 bar examination. Silva's numerous misdemeanor offenses and his failure to fully disclose them at the time of his application for law school admission raised legitimate character and fitness issues which were of sufficiently recent origin that the Commission properly concluded in 2002 that Silva had not demonstrated "present character and fitness" to qualify for admission to the bar. However, we also conclude that Silva's transgressions should not permanently disqualify him from sitting for the bar examination for two basic reasons. First, Silva acknowledged and took full personal responsibility for his lack of candor in not fully disclosing his misdemeanor record on his law school application. Second, we are impressed by the high esteem in which Silva is held by educators, legal professionals, and others whom he has encountered as a student and court interpreter. These persons have publicly expressed their belief that Silva possesses the requisite character and fitness to serve the public as a lawyer, and we conclude that he should be given an opportunity to show himself worthy of that trust.

Accordingly, we conclude that Silva will be eligible to make application to sit for the Nebraska bar examination to be given in July 2004, 2 years after the examination for which he first applied. The application must be made in full compliance with Neb. Ct. R. for Adm. of Attys. 2, 3, and 4 (rev. 2000). If Silva makes application to sit for the July 2004 bar examination, or any subsequent examination, the Commission shall conduct a character and fitness investigation as it deems appropriate. However, unless such investigation discloses adverse character and fitness information which is not included in the present record, the Commission shall permit Silva to sit for the examination. Should the investigation disclose additional information reflecting adversely on character and fitness, the Commission shall follow its normal policies and procedures in evaluating the application, and Silva will have full rights of review under rule 10.

AFFIRMED WITH DIRECTIONS.

LORI J. SHIPFERLING, APPELLANT, V. CAROLYN G. COOK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GALE D. COOK, DECEASED, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND CITY OF LINCOLN, THIRD-PARTY DEFENDANT, APPELLEE.

665 N.W.2d 648

Filed July 25, 2003. No. S-02-348.

1. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
2. **Appeal and Error.** Errors assigned but not argued will not be addressed on appeal.
3. **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.
4. **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.
5. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed.
6. **Juries: Verdicts: Negligence: Jury Instructions: Appeal and Error.** Where a jury, using a special verdict form, finds no negligence on the part of the defendant and, accordingly, does not reach the question of the plaintiff's contributory negligence, any error in giving a contributory negligence instruction is harmless and does not require reversal of a verdict in favor of the defendant.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Kenneth Cobb, of Law Office of Kenneth Cobb, P.C., for appellant.

Gary J. Nedved, of Keating, O'Gara, Davis & Nedved, P.C., L.L.O., for appellee Carolyn G. Cook.

James D. Faimon, Assistant Lincoln City Attorney, for appellee City of Lincoln.

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

McCORMACK, J.

NATURE OF CASE

Lori J. Shipferling brought a negligence action against Carolyn G. Cook, individually and as personal representative of the estate of Gale D. Cook, deceased, for injuries sustained on Cook's property. The City of Lincoln (City) was joined as a third-party defendant for purposes of allocating negligence in accordance with Nebraska's comparative negligence laws, Neb. Rev. Stat. § 25-21,185.07 et seq. (Reissue 1995). The jury rendered a verdict in favor of Cook. Shipferling appeals.

BACKGROUND

On September 7, 1996, Shipferling, a U.S. postal worker, attempted to deliver a package to the front door of a townhouse that is the Cooks' rental property. The Cooks have owned the property since the mid-1970's, but never lived in the townhouse. Shipferling parked next to the curb and stepped out of her vehicle. Her left foot stepped on the edge of a water meter cover. As she tried to take another step, the cover slipped, causing her to fall. Shipferling's left leg went down into the meter vault up to an inch below her kneecap. As a result of the fall, Shipferling suffered a cut on her left leg and a torn anterior cruciate ligament in her left knee. She underwent several months of physical therapy and eventually had surgery to repair the torn ligament. Shipferling returned to restricted duty approximately 9 months after the accident.

PROCEDURAL BACKGROUND

On October 25, 1999, Shipferling filed a personal injury action against the Cooks (hereinafter Cook). She alleged that she was injured while attempting to deliver mail to Cook's residence when she fell as a result of Cook's negligence. In her amended petition, Shipferling alleged that pursuant to a city ordinance, Cook had a duty to maintain the meter cover. Shipferling further alleged that Cook breached her duty to maintain the meter cover in that (1) she failed to warn of the hazard, (2) she failed to notify the City of the defective and dangerous condition, and (3) she failed to correct the defect in the meter cover. Shipferling prayed for $27,902.13 plus general damages and costs. Cook generally

denied the allegations and alleged that Shipferling was negligent in failing to keep a proper lookout.

On January 3, 2001, Cook filed an amended third-party petition against the City, alleging that the City's negligence was the proximate cause of the accident resulting in Shipferling's injuries. The City filed a demurrer. The district court sustained the demurrer and dismissed the third-party petition with prejudice. The court reasoned that the third-party petition did not state a cause of action against the City due to its failure to comply with the time requirements of Neb. Rev. Stat. § 13-919 (Reissue 1997) of the Political Subdivisions Tort Claims Act.

Cook then sought leave of the court and filed a second amended third-party petition, naming the City as a third-party defendant. Cook again alleged that the City's negligence was the proximate cause of Shipferling's accident. Cook prayed for relief in that the City's negligence be considered by the fact finder and that the jury have the opportunity to allocate any negligence of the parties in accordance with the comparative negligence laws. The City filed a special appearance, objecting to the court's jurisdiction, but failed to have it set for a hearing. Shipferling then filed a motion to strike, asking that the second amended third-party petition be stricken because the negligence of the City was not a defense to the action against Cook.

In its order dated November 2, 2001, the district court overruled Shipferling's motion to strike. The court determined that regardless of the fact that Shipferling could not collect from the City, the City could be properly named as a third-party defendant because there was a question of whether the City was negligent in maintaining the water meter cover on which Shipferling stepped. The court designated the trial as a special proceeding outside the Political Subdivisions Tort Claims Act and compelled the City to participate solely for the purpose of allowing the jury to allocate negligence between the defendants. The district court held that Neb. Rev. Stat. § 25-331 (Reissue 1995) allows a defendant, as a third-party plaintiff, to file a third-party petition against a person who is not a party, but who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant. The district court also determined that § 25-21,185.10 allows allocation of liability between joint tort-feasors so long as

there are multiple defendants in a case at the time the case is submitted to the fact finder. It also concluded that the plaintiff's ability to collect from the third-party defendant does not affect the application of § 25-21,185.10.

In January 2002, a jury trial was convened on the personal injury action. At the close of all the evidence, the City moved for a directed verdict and Shipferling joined in the City's motion. The City claimed that Cook failed to meet its burden of proof as a matter of law and that the court lacked jurisdiction over the City. The district court overruled the City's motion. The court determined that the City could be compelled to be a party in a special proceeding solely for the purpose of allowing the jury to allocate negligence between the parties.

At the close of the trial, the jury was given three verdict forms along with jury instructions to complete one of the forms in the following manner:

(1) Verdict form No. 1: If Shipferling has not met her burden of proof, then the verdict must be for Cook. On the other hand, if Shipferling has met her burden of proof, then the jury must consider Cook's defenses.

(2) Verdict form No. 2: If Shipferling has met her burden of proof and Cook has not met her burden of proof, then the verdict must be for Shipferling, and the negligence apportioned between Cook and the City accordingly.

(3) Verdict form No. 3: If Shipferling and Cook have both met their burdens of proof, then the jury must compare their negligence and apportion the negligence between Shipferling, Cook, and the City.

The jury completed verdict form No. 1, finding in favor of Cook. The jury did not allocate negligence between the parties.

ASSIGNMENTS OF ERROR

Shipferling assigns, restated and renumbered, that the district court erred in (1) making the City a third-party defendant; (2) submitting the case to the jury under the comparative negligence statute; (3) failing to grant the City's and Shipferling's motions for directed verdict; (4) instructing the jury that the City could be liable for ordinary negligence; (5) applying the comparative negligence statute; (6) failing to sustain the special appearance of the

City; (7) submitting the issue of contributory negligence of Shipferling (proper lookout); (8) giving jury instruction No. 2, which outlined the issues and burden of proof and effect of findings; (9) failing to give requested instruction No. 4, which stated the violation of an ordinance is evidence of negligence, which the court noted was given in substance; (10) failing to submit Shipferling's requested instruction No. 9; (11) failing to give Shipferling's requested instruction No. 10, which stated that under the common law of Nebraska, governmental subdivisions could not be liable for any negligence in carrying out its duties as a governmental subdivision; and (12) failing to give Shipferling's requested instruction No. 12, which stated ignorance of the law is no excuse.

STANDARD OF REVIEW

[1] Whether a jury instruction given by a trial court is correct is a question of law. *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001); *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001).

ANALYSIS

Errors Assigned But Not Argued

[2] Before addressing the substantive issues raised by Shipferling on appeal, we first determine if the assigned errors are properly before our court. Errors assigned but not argued will not be addressed on appeal. *Hradecky v. State*, 264 Neb. 771, 652 N.W.2d 277 (2002). Shipferling does not argue in her brief, and therefore they will not be addressed by this court, the following assignments of error: No. 4, instructing the jury that the City could be liable for ordinary negligence; No. 6, failing to sustain the special appearance of the City after dismissal of the petition and the refiling of the third-party plaintiff, Cook; No. 10, failing to submit Shipferling's requested instruction No. 9; and No. 11, failing to give Shipferling's requested jury instruction No. 10.

Failure to Object to Jury Instructions

[3-5] Shipferling assigns several errors with the jury instructions, assignments of error Nos. 7 through 12. 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. *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003). 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. *Id.* It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995).

Shipferling specifically claims that jury instruction No. 2, which included the issue of Shipferling's contributory negligence, was given by the court over her objection. However, our appellate review is restricted because the jury instruction conference is not included in the record. The record does not include any objection by Shipferling to the alleged errors regarding jury instructions. Because Shipferling's alleged objections do not appear in the record, we conclude that the assigned errors which pertain to the jury instructions are not preserved for review, and thus we do not consider them. We do not find plain error.

THIRD-PARTY DEFENDANT

Shipferling's remaining assignments of error, properly preserved, assigned, and argued in her appellate brief, specifically No. 1, making the City a third-party defendant; No. 2, submitting the case to the jury under the comparative negligence statute when the City was not a proper party defendant; No. 3, failing to grant the City and Shipferling's motion for directed verdict; and No. 5, applying the contributory negligence statute with a defendant who is a real defendant, can be summarized into one issue. That issue is whether it was error to permit Cook to join the City as a third-party defendant for the purpose of allowing the jury to allocate negligence between the parties pursuant to the comparative negligence laws. Shipferling contends that the district court lost jurisdiction over the City after the original third-party petition was dismissed for failure to comply with the time requirements of the Political Subdivisions Tort Claims Act. She

also asserts that the City was not a proper party defendant because no monetary judgment could be entered against the City. Shipferling claims that it was error to submit the case to the jury with instructions to allocate damages between all the parties because the comparative negligence statute applies to proper party defendants. Shipferling also contends that the issue of contributory negligence confused the jury and deflected the jury's attention from the issue of Cook's negligence. For all these reasons, Shipferling claims that she was prejudiced.

[6] After trial, the jury returned verdict form No. 1. The jury found in favor of Cook because Shipferling had not met her burden of proof. As such, the jury did not consider the allegation of contributory negligence of Shipferling nor the allegation of negligence of the City for the purposes of allocating negligence between the parties pursuant to the comparative negligence statute. The jury did not consider the facts underlying the balance of Shipferling's assignments of error. Where a jury, using a special verdict form, finds no negligence on the part of the defendant and, accordingly, does not reach the question of the plaintiff's contributory negligence, any error in giving a contributory negligence instruction is harmless and does not require reversal of a verdict in favor of the defendant. *Corcoran v. Lovercheck*, 256 Neb. 936, 594 N.W.2d 615 (1999). Because neither the allegation of Shipferling's contributory negligence nor the allegation of comparative negligence against the City for the purpose of allocating negligence between the parties pursuant to the comparative negligence statute was considered by the jury, we conclude that it is not necessary to address Shipferling's assignments of error claiming it was error for the district court to allow Cook to join the City as a third-party defendant.

CONCLUSION

For the reasons set out above, we affirm the judgment of the district court.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. STANLEY POE, ALSO KNOWN AS STANLEY A. POE, APPELLANT.

665 N.W.2d 654

Filed July 25, 2003. Nos. S-02-351, S-02-433.

1. **Trial: Evidence: Appeal and Error.** On an appeal from a proceeding under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Supp. 2001), the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
2. **Appeal and Error.** In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.

Appeals from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded with directions.

Matthew L. McBride for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

HENDRY, C.J.

I. INTRODUCTION

Stanley Poe appeals from an order of the Douglas County District Court denying his motion requesting forensic DNA testing of a cigarette butt found at the scene of a 1990 robbery for which Poe was convicted. Pursuant to Neb. Rev. Stat. § 24-1106(2) (Reissue 1995), we granted Poe's petition to bypass.

II. FACTUAL BACKGROUND

Poe was convicted of robbery after a jury trial on October 11, 1990. After an enhancement hearing, the trial court determined that Poe was a habitual criminal and sentenced him to a term of 15 to 30 years' imprisonment. This conviction was affirmed by the Nebraska Court of Appeals. *State v. Poe*, 1 NCA 379 (1992).

On October 11, 2001, Poe filed a pro se motion for DNA testing pursuant to the DNA Testing Act, as codified at Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Supp. 2001). See 2001 Neb. Laws, L.B. 659 (effective September 1, 2001). The motion requested DNA testing of a cigarette butt found at the scene of the robbery

for which Poe was convicted and further requested that following such testing, Poe be appointed counsel to assist him in "exonerating him[self] of this crime." A hearing was held on Poe's motion on February 20, 2002. In a written order entered March 5, 2002, the district court denied Poe's motion, stating in part:

> The witnesses testified that the robber smoked a filter cigarette.
>
> . . . .
>
> . . . However, testing would not be warranted in this situation because such testing would not produce, could not produce, "non-cumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced." In this case, the investigating officer testified that the cigarette butt was kept for investigative purposes, to see whether it might match the brand that a potential suspect smoked. *I have been unable to find any other evidence in the trial transcript relating this cigarette butt to* [Poe]. For all we, or anyone knows, the cigarette butt has no connection to him at all. It was simply an item that the police retained as part of their investigation.
>
> . . . Poe argues that the state did use this cigarette butt to convict him, as it was marked, offered, and received into evidence. And that's true, but only in a larger sense. The cigarette butt was received into evidence, to show the jury the investigation that the Department did. However, the transcript doesn't show that counsel ever argued that this was [Poe]'s cigarette. It's entirely possible that the cigarette butt didn't belong to [Poe]. DNA testing isn't going to help resolve the issue of [Poe]'s guilt. The jury, in evaluating the eyewitness testimony, resolved that issue.

(Emphasis supplied.) Poe timely appealed. Thereafter, the district court sustained Poe's motion for appointment of counsel to represent Poe in the appellate process.

Poe's 1990 robbery conviction was based on the testimony of two eyewitnesses: Jennifer Annin and Alicia Klabunde. Both witnesses were employees at the retail clothing store Poe was convicted of robbing. Both testified that a male entered the store on the evening of the robbery. Annin assisted the man in looking for a birthday gift for his daughter. The man ultimately purchased a

pair of shorts and left the store. Annin and Klabunde then began to straighten the store in anticipation of closing time.

Approximately 1 hour later, the same man reentered the store, stating he wanted to return the shorts he had just purchased. After the transaction was completed, the man told Annin to "put the money in the bag." Believing the man was referring to the refunded money, Annin complied with the request. However, as Annin attempted to close the cash register drawer, the man put his hand in the drawer and demanded the money from the drawer. Klabunde, who was in the back of the store, observed this encounter and telephoned the 911 emergency dispatch service. Meanwhile, the man struck Annin, knocking her to the ground. The assailant then grabbed the money from the cash register drawer and left the store.

Approximately 2 to 3 weeks after the robbery occurred, Annin and Klabunde were shown a photographic array and each identified Poe as the perpetrator. Annin and Klabunde testified to this identification at Poe's trial. In his defense, Poe called two witnesses who testified that Poe was at a movie theater when the robbery occurred. The jury convicted Poe of the robbery.

The record from Poe's trial was received into evidence in support of Poe's request for DNA testing. The record discloses that the cigarette butt which Poe wants tested was mentioned by Klabunde and investigating officer Susan Clark. Klabunde testified on direct:

> Q. What did you see?
>
> A. I saw him walk in and he was carrying the bag from the purchase earlier. He was wearing sunglasses. He was smoking and wearing a hat, the same dress as he had on before, and he walked to the counter as I walked to the back.
>
> Q. Smoking?
>
> A. Yes.
>
> Q. Had he been smoking before?
>
> A. No.

Officer Clark testified on direct:

> Q. Did you have any other duties in regards to this particular incident?
>
> A. No. The follow-up duties would then come from the detectives in the bureau. Well, I take that back. Any evidence

> that we see at the scene is my duty to place in property. I did take the pair of shorts that were left at the scene. I did take the pair of shorts and they were placed in property. And the suspect, when he originally went to the store, was smoking a cigarette and we believed what we found to be his cigarette butt laying [sic] on the floor because it was getting close to closing time and the girls were starting to clean up a little bit and they definitely said the cigarette butt was not there before he came in. So I did take the cigarette butt and place that into property also to be used as evidence.

On cross-examination, Officer Clark further testified:

> Q. What was the purpose of gathering the cigarette butt and taking it to the station?
>
> A. Usually a suspect will smoke the same brand of cigarettes and it doesn't usually deviate from that type of brand that he smokes. We use that — I took the cigarette butt in an attempt to find out what brand of cigarette this was. And also, it helps our case more if we arrest a suspect that would smoke the same brand of cigarettes that was found at the scene of the crime.

III. ASSIGNMENTS OF ERROR

Poe asserts, rephrased and renumbered, that the district court erred in (1) finding there was no evidence in the record relating the cigarette butt to Poe, (2) denying Poe's request for DNA testing, (3) refusing to appoint counsel to assist Poe in presenting his motion for DNA testing to the district court, and (4) denying Poe's motion for new trial.

IV. STANDARD OF REVIEW

[1] This is the court's first opportunity to consider the DNA Testing Act (hereinafter the Act). As such, we must determine the standard of review to be applied to factual findings made by the court in applying the provisions of the Act. Given that the Act applies to criminal defendants and that questions regarding its application are to be determined by a court "[u]pon consideration of affidavits or after a hearing," § 29-4120(5), it has similarities to a criminal proceeding tried to a court. We shall therefore apply a clearly erroneous standard of review to factual determinations

made during such proceedings. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003) (stating clearly erroneous standard for factual findings in criminal bench trial).

V. ARGUMENT

1. APPLICABILITY OF ACT

(a) Relation of Cigarette Butt to Investigation or Prosecution

In his first assignment of error, Poe challenges the district court's finding that other than in "a larger sense," there was no evidence in the record relating the perpetrator of the robbery to the cigarette butt found at the scene. Such finding is critical given that § 29-4120(1)(a) requires any biological material subject to the provisions of the Act to be "related to the investigation or prosecution that resulted in such judgment."

Although the district court's order references testimony indicating the perpetrator was smoking a cigarette at the time of the robbery, Poe argues that the district court erred in finding that the record contained no specific evidence relating Poe to this cigarette. In support of this argument, Poe directs us to the following testimony from Officer Clark:

> And the suspect, when he originally went to the store, was smoking a cigarette and *we believed what we found to be his cigarette butt laying* [sic] *on the floor because it was getting close to closing time and the girls were starting to clean up a little bit and they definitely said the cigarette butt was not there before he came in.* So I did take the cigarette butt and place that into property also to be used as evidence.

(Emphasis supplied.)

We agree. As a threshold, § 29-4120(1)(a) requires that the biological material be "related to the investigation or prosecution." Officer Clark's testimony clearly relates the cigarette butt found on the floor to the cigarette being smoked by the perpetrator of the robbery. The district court's finding that the record contained no evidence relating the perpetrator of the robbery to the cigarette butt was clearly erroneous. Such determination, however, does not end our inquiry.

(b) Will Testing of Cigarette Butt Produce Noncumulative, Exculpatory Evidence Relevant to Poe's Claim That He Was Wrongfully Convicted or Sentenced?

Section 29-4120(1) states that forensic DNA testing is available for any biological material that

> (a) Is related to the investigation or prosecution that resulted in such judgment;
>
> (b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and
>
> (c) Was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.

Once it is established that the above thresholds have been met, a court is required to order testing only upon a further determination that

> such testing was effectively not available at the time of trial, that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and that such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.

§ 29-4120(5).

In its order, the district court found that "no [DNA] testing was done" at the time of Poe's 1990 conviction and that "DNA testing was not effectively available at the time of [the] conviction." The district court further found that the biological material "has been secured" and that the "County Attorney has filed an inventory of the evidence that was secured in this case." The State has not challenged these findings on appeal. As a result, the unresolved question is whether the "testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced."

The district court's order concluding that the testing requested by Poe could not produce noncumulative, exculpatory evidence relevant to Poe's claim was premised upon the district court's erroneous finding that there was no evidence in the

record relating the cigarette butt to Poe. Having previously concluded that such finding was error, we need not determine whether such testing may ultimately produce noncumulative, exculpatory evidence relevant to Poe's claim. Poe states in his brief, and we agree, that the district court "did not engage in any analysis of why DNA testing would not be relevant to [his] claim." Brief for appellant at 14. Further, "the district court should have examined whether or not this evidence was 'material to the issue of guilt of the person in custody.' " Brief for appellant at 19. See § 29-4119 (defining exculpatory evidence as evidence "favorable to the person in custody and material to the issue of the guilt of the person in custody").

[2] Furthermore, our review of the district court's order shows that it contains no determination of whether DNA testing of the cigarette butt "may produce noncumulative . . . evidence relevant to [Poe's] claim that [he] was wrongfully convicted." See § 29-4120(5). In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002). We therefore remand the cause to the district court for an initial determination, consistent with this opinion, of whether the DNA testing requested by Poe may produce noncumulative, exculpatory evidence relevant to Poe's claim that he was wrongfully convicted.

2. Appointment of Counsel

Poe also assigns as error the district court's failure to appoint counsel for Poe in the district court pursuant to § 29-4122. Poe contends the record before the district court in support of his request for DNA testing shows that the testing may be relevant to his claim of wrongful conviction. Having previously concluded that the district court failed to determine whether the requested DNA testing would be relevant, we further remand this cause to the district court to determine whether, consistent with this opinion, "a showing [has been made by Poe] that DNA testing may be relevant to [Poe's] claim of wrongful conviction," sufficient to require the appointment of counsel. See *id.*

VI. CONCLUSION

The district court erred in finding that the cigarette butt was not related to the investigation or prosecution that resulted in Poe's conviction. As such, the cause is remanded to the district court for further consideration, in light of our decision in this case, to determine the questions of whether Poe is entitled to forensic DNA testing of the cigarette butt, as well as appointment of counsel in the district court. Having reached such determination, we find it unnecessary to consider Poe's remaining assignment of error.

REVERSED AND REMANDED WITH DIRECTIONS.

McCORMACK, J., not participating.

MANUEL SALAZAR, APPELLANT, V. SCOTTS BLUFF COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

665 N.W.2d 659

Filed July 25, 2003. No. S-02-656.

1. **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, correct conclusion irrespective of the decision made by the court below.
2. **Rules of the Supreme Court: Pretrial Procedure: Appeal and Error.** The determination of an appropriate sanction under Neb. Ct. R. of Discovery 37 (rev. 2000) rests within the discretion of the trial court and will not be disturbed on appeal 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.
4. **Statutes: Immunity: Waiver.** Statutes that purport to waive protection of the State's sovereign immunity are strictly construed in favor of the sovereign and against the waiver.
5. **Immunity: Waiver.** A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.
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.
7. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.

8. **Judgments: Liability.** An offer of confession of judgment is not binding on an offeror where the offeree does not accept or consent to confession, but elects to litigate the question of the offeror's liability.
9. **Rules of the Supreme Court: Pretrial Procedure: Costs.** A hearing on a motion for expenses pursuant to Neb. Ct. R. of Discovery 37(c) (rev. 2000) is a legal proceeding entirely separate from the underlying proceedings concerning the merits of the case.
10. **Costs: Appeal and Error.** The appellate court reviewing a decision on a motion for expenses is to concern itself solely with the evidence established and produced at that hearing.
11. **Rules of the Supreme Court: Pretrial Procedure: Costs: Proof.** Once the party making a motion for sanctions proves the truth of the matter previously denied and that reasonable expenses were incurred in doing so, the burden then shifts to the nonmoving party to prove, by a preponderance of the evidence, one of the four exceptions enumerated in Neb. Ct. R. of Discovery 37(c) (rev. 2000).

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed in part, and in part reversed.

Maren Lynn Chaloupka and Robert Paul Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Appellant, Manuel Salazar, brought an action against appellee, Scotts Bluff County (the County), under the Political Subdivisions Tort Claims Act (the Act), Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Cum. Supp. 2000). Salazar seeks damages for spinal cord injuries he sustained in an automobile accident. The medical bills to date were $1,009,109.60; his future medical bills reduced to present value were $850,000; his loss of earnings reduced to present value was $200,000; and his total economic damages were $2,075,528.60. At trial, the district court found, inter alia, that the Act restricted the amount recoverable against a governing body to $1 million and thus entered an award in favor of Salazar in the sum of $1 million. Salazar 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).

The primary issue to be decided by this court is whether a political subdivision waives protection of the statutory limit on recovery pursuant to § 13-922 when the political subdivision procures liability insurance pursuant to § 13-916 in excess of the statutory limit.

BACKGROUND

On April 1, 2000, while Salazar's vehicle was stopped in the eastbound lane of U.S. Highway 26, waiting to turn left, a pickup truck struck the rear of his vehicle, pushing him into the oncoming lane of traffic. Salazar's vehicle was then struck by a patrol car driven by a Scotts Bluff County deputy. At the time of the collision, the patrol car was traveling at speeds in excess of 75 m.p.h. in a 50-m.p.h. zone. As a result of the accident, Salazar was paralyzed.

The district court entered a partial summary judgment in favor of Salazar. The court found that the deputy had been negligent as a matter of law; that at the time of the accident, the deputy was acting in the course and scope of his employment; that the deputy's negligence was a proximate cause of the collision; and that the collision was a proximate cause of some damage to Salazar. The parties stipulated that Salazar had duly complied with all notice and claim requirements of the Act.

The matter proceeded to trial on the issues of comparative negligence and damages. The district court found each party's proportion of negligence for the accident to be as follows: Salazar 2 percent, deputy 49 percent, pickup driver 49 percent. The court also determined that Salazar suffered total economic damages of $2,075,528.60 and noneconomic damages of $5 million, for a total of $7,075,528.60. The court further determined that based upon Nebraska's contributory negligence statutes, the County's total liability was $4,484,018. The court determined that § 13-926 of the Act restricted the amount recoverable against a governing body to $1 million for any person for any number of claims arising out of a single occurrence. The court entered an award in favor of Salazar in the sum of $1 million.

After trial, pursuant to Neb. Ct. R. of Discovery 37(c) (rev. 2000), Salazar filed a motion to assess expenses incurred in proving the fairness and reasonableness of his medical expenses. The fairness and reasonableness had been denied by the County in its response to Salazar's request for admissions. The district court overruled Salazar's motion to assess expenses.

ASSIGNMENTS OF ERROR

Salazar assigns that the district court (1) erred by failing to find that the County waived the protection of §§ 13-922 and 13-926 by purchasing insurance coverage in the amount exceeding the statutory cap; (2) erred by failing to find that the County waived the protection of §§ 13-922 and 13-926 by confessing judgment in an amount exceeding the statutory cap; and (3) abused its discretion by failing to assess against the County the costs of proving facts denied in its responses to request for admissions.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below. *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002).

[2,3] The determination of an appropriate sanction under rule 37 rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Kaminski v. Bass*, 252 Neb. 760, 567 N.W.2d 118 (1997). 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 re Interest of J.K.*, 265 Neb. 253, 656 N.W.2d 253 (2003).

ANALYSIS

[4,5] In Salazar's first assignment of error, we are asked to determine if a political subdivision waives protection of sovereign immunity under the Act if it procures insurance in excess of the statutory limit. Statutes that purport to waive protection of the State's sovereign immunity are strictly construed in favor of the sovereign and against the waiver. *Keller v. Tavarone*,

262 Neb. 2, 628 N.W.2d 222 (2001). A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). Our analysis of the Act is guided by its plain language and the presumption against a waiver. No provision within the Act expressly waives the protection of sovereign immunity to the extent liability insurance is procured in excess of the statutory limits. Thus, in order for Salazar to prevail on appeal, waiver must be found by such overwhelming implication of the statutes as will allow no other reasonable construction.

Section 13-916 provides:

> The governing body of any political subdivision, including any school district, educational service unit, or community college, may purchase a policy of liability insurance insuring against all or any part of the liability which might be incurred under the Political Subdivisions Tort Claims Act and also may purchase insurance covering those claims specifically excepted from the coverage of the act by section 13-910. Any independent or autonomous board or commission in the political subdivision having authority to disburse funds for a particular purpose of the subdivision without approval of the governing body also may procure liability insurance within the field of its operation. The procurement of insurance shall constitute a waiver of the defense of governmental immunity as to those exceptions listed in section 13-910 to the extent and only to the extent stated in such policy. The existence or lack of insurance shall not be material in the trial of any suit except to the extent necessary to establish any such waiver. Whenever a claim or suit against a political subdivision is covered by liability insurance or by group self-insurance provided by a risk management pool, the provisions of the insurance policy on defense and settlement or the provisions of the agreement forming the risk management pool and related documents providing for defense and settlement of claims covered under such group self-insurance shall be applicable notwithstanding any inconsistent provisions of the act.

Although procurement of insurance constitutes a waiver of the defense of governmental immunity as to these exceptions listed in § 13-910, the act in Salazar's case is not a § 13-910 event.

Section 13-902 states in part:

> The Legislature hereby declares that no political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees, and that no suit shall be maintained against such political subdivision or its officers, agents, or employees on any tort claim except to the extent, and only to the extent, provided by the Political Subdivisions Tort Claims Act.

Section 13-903(4) defines a tort claim as follows:

> Tort claim shall mean any claim against a political subdivision for money only on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the political subdivision, while acting within the scope of his or her office or employment, under circumstances in which the political subdivision, if a private person, would be liable to the claimant for such damage, loss, injury, or death . . . .

As previously stated, § 13-910 sets out exemptions from the Act, and Salazar's case is not one of those exemptions.

The original Political Subdivisions Tort Claims Act was passed by the Legislature in 1969. See Neb. Rev. Stat. § 23-2401 et seq. (Cum. Supp. 1969). In 1987, the Legislature amended the Act to provide a cap on damages which could be recovered under the Act. See § 23-2416.03 (Supp. 1987). The cap is now set forth in §§ 13-922 and 13-926. In both of these "cap" statutes, the recovery is limited to $1 million for any person for any number of claims arising out of a single occurrence, and $5 million for all claims arising out of a single occurrence.

Originally, the Act had no cap and covered all activities except those listed in § 13-910. For activities exempted by § 13-910, a political subdivision could choose to have no insurance, in which case the subdivision was totally protected by reason of sovereign immunity; or a political subdivision could choose to purchase liability insurance, in which case it waived the protection of sovereign immunity. Salazar's claim, not being

based upon a § 13-910 activity, is limited by the provisions of §§ 13-922 and 13-926. The political subdivision in Salazar's case is liable whether or not it has purchased insurance because the protection of sovereign immunity was waived by the Act. The limit of that liability, however, is set by §§ 13-922 and 13-926 and not by the limit of any liability policy purchased by the political subdivision.

[6,7] 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. *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. 605, 650 N.W.2d 760 (2002); *Spradlin v. Dairyland Ins. Co.*, 263 Neb. 688, 641 N.W.2d 634 (2002). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Guenzel-Handlos v. County of Lancaster*, 265 Neb. 125, 655 N.W.2d 384 (2003); *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002).

We conclude that the statutory language of §§ 13-922 and 13-926 is plain, direct, and unambiguous. We are not called upon, and do not decide, whether §§ 13-922 and 13-926 apply to § 13-910 exemptions. We do, however, determine that the limit of liability for a tort claim not exempted by § 13-910 is $1 million for any person for one occurrence and $5 million for all claims arising out of a single occurrence. This language limits Salazar's claim to $1 million.

Confessed Judgment

[8] Salazar's second assignment of error alleges that the district court erred by failing to find that the County waived protection of §§ 13-922 and 13-926 by confessing judgment in an amount exceeding the statutory caps. An offer of confession of judgment is not binding on an offeror where the offeree does not accept or consent to confession, but elects to litigate the question of the offeror's liability. See *In re Estate of Redpath*, 224 Neb. 845, 402 N.W.2d 648 (1987). The County made an offer of judgment to Salazar's attorney in the amount of $1,000,000.01 on January 16, 2002. The offer was to be withdrawn 5 days after service if no action was taken. Salazar took no action on this

offer, thus the offer stood withdrawn. There being no effective offer to confess judgment in excess of the cap, Salazar's second assignment of error is without merit.

COSTS FOR REQUESTED ADMISSIONS

Salazar's final assignment of error alleges that the district court abused its discretion by failing to assess costs against the County pursuant to rule 37(c), which states:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he or she may, within 30 days of so proving, apply to the court for an order requiring the other party to pay him or her the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that:
>
> (1) The request was held objectionable pursuant to Rule 36(a), or
>
> (2) The admission sought was of no substantial importance, or
>
> (3) The party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or
>
> (4) There was other good reason for the failure to admit.

Prior to trial, Salazar requested 28 admissions from the County, asking it to admit that the medical charges incurred by him arising out of the accident were necessary, fair, and reasonable. In response, the County admitted that the services were necessary, but denied that the amounts billed were fair and reasonable. In order to prove that the bills were fair and reasonable, Salazar deposed some of the medical providers and presented that evidence at trial.

At trial, the County put forth its rationale for denying that Salazar's medical expenses were fair and reasonable. It contended that the proper measure of compensatory damages was limited to the rate of Medicaid reimbursements or reduced pay agreements, and not to the amount actually provided by the medical provider. The district court considered this issue to be a matter of first impression, but ultimately concluded that compensatory damages

depend on the fair and reasonable value of services needed and should not be limited to the amount actually paid to the provider. The district court determined that limiting damages for medical care to amounts received rather than to the value of such medical services would violate Nebraska's collateral source rule.

After trial, pursuant to rule 37(c), Salazar filed a motion to assess the County for the reasonable expenses incurred to prove that the medical expenses were fair and reasonable. The expense incurred totaled $5,822.67. Salazar argued that the issue presented was not a matter of first impression because the rule for compensatory damages in Nebraska has always been fair and reasonable value. Salazar argued that the collateral source rule would tend to indicate that Medicaid prices are generally irrelevant. He also argued that prices were irrelevant in his case regardless of the substantive law because Medicaid reimbursements and reduced pay agreements did not exist in his case. The district court overruled Salazar's motion. The court based its decision on rule 37(c)(3). The court determined that the County had good reason to deny the fairness and reasonableness of the medical expenses because a minority of jurisdictions treats the amount received as the fair and reasonable expense as opposed to the actual value charged.

[9-11] A hearing on a motion for expenses pursuant to rule 37(c) is a legal proceeding entirely separate from the underlying proceedings concerning the merits of the case. *Kaminski v. Bass*, 252 Neb. 760, 567 N.W.2d 118 (1997). The appellate court reviewing a decision on a motion for expenses is to concern itself solely with the evidence established and produced at that hearing. *Id.* The determination of an appropriate sanction under rule 37 rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Id.* Once the party making a motion for sanctions proves the truth of the matter previously denied and that reasonable expenses were incurred in doing so, the burden then shifts to the nonmoving party to prove, by a preponderance of the evidence, one of the four exceptions enumerated in the discovery rule. *Id.*

Applying the foregoing principles of law to the instant case, we conclude that the district court erred in overruling Salazar's motion to assess expenses. As noted previously, rule 37(c) states

that a district court *shall* award expenses incurred in proving a statement previously denied unless one of four exceptions are proved. At the hearing on his motion to assess expenses, Salazar introduced exhibits 555 through 557. The exhibits established that in response to Salazar's request for admissions, the County denied that the medical expenses were fair and reasonable. The evidence also established that Salazar incurred expenses in proving that the expenses were fair and reasonable. The burden then shifted to the County to prove one of the four enumerated exceptions in rule 37(c). The County did not offer any specific evidence at the hearing except to ask "the Court to take [judicial] notice of its own files." The district court finally asked: "Essentially, what I'm understanding, both counsel are asking me to take into consideration all the evidence that we've received previously in this case in either support or opposition to this motion?" Both parties responded affirmatively. Nevertheless, we conclude that the County failed to meet its burden. To ask the court to take judicial notice of its file without specific reference to any evidence necessary to prove one of the four exceptions is not sufficient to meet the nonmoving party's burden. Such evidence fails to provide the court direction either at the original hearing or on appellate review. Because the County failed to meet its burden, the district court was required to award expenses to Salazar pursuant to rule 37(c), thereby making the court's overruling of Salazar's motion an abuse of discretion.

CONCLUSION

For the foregoing reasons, we affirm the district court's judgment in favor of Salazar and against the County in the sum of $1 million. However, we reverse the district court's decision to overrule Salazar's motion for expenses pursuant to rule 37(c) and award Salazar expenses in the amount of $5,822.67 incurred in proving that his medical expenses were fair and reasonable.

AFFIRMED IN PART, AND IN PART REVERSED.