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THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

MAY 21, 2004 and DECEMBER 22, 2004

IN THE

Supreme Court of Nebraska

VOLUME CCLXVIII

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[1]
EVERETT O. INBODY, Chief Judge[2]
JOHN F. IRWIN, Associate Judge[3]
RICHARD D. SIEVERS, Associate Judge
EVERETT O. INBODY, Associate Judge[4]
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
FRANK E. GOODROE . . . . . State Court Administrator

[1]Until September 12, 2004
[2]As of September 13, 2004
[3]As of September 13, 2004
[4]Until September 12, 2004

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund	Beatrice
		Daniel Bryan, Jr.	Auburn
		Johnson, Vicky L.	Wilber
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	Ronald D. Olberding	Burwell
		Mark D. Kozisek	Ainsworth
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James Livingston	Grand Island
		Teresa K. Luther	Grand Island
Tenth	Adams, Harlan, Kearney, 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
		Douglas Luebe	Hartington
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
		Edward D. Steenburg	Ogallala
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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STEPHANIE ERIN ZULKOSKI

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LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-02-896: **Atlantic Mortgage & Invest. Corp. v. Patterson**. Reversed and remanded with directions. McCormack, J.

No. S-02-1265: **Hahn v. Alegent Health**. Affirmed. Connolly, J.

No. S-02-1359: **Bland & Associates v. Melotz**. Affirmed. Stephan, J.

No. S-02-1483: **Frederick v. Frederick**. Appeal dismissed. Connolly J. Wright, J., participating on briefs.

No. S-03-643: **Soukop v. ConAgra, Inc**. Affirmed. Gerrard, J. Stephan, J., not participating.

No. S-03-1108: **Bowley v. Bowley**. Affirmed. Wright, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-01-086: **State ex rel. NSBA v. Monjarez**. Appeal dismissed. See *State ex rel. Counsel for Dis. v. Monjarez*, 267 Neb. 980, 679 N.W.2d 226 (2004).

No. S-03-153: **Grasso v. Cambridge Capacitors**. Appeal dismissed.

No. S-03-160: **Mireles v. Department of Corr. Servs**. Appeal dismissed.

No. S-03-587: **Irwin v. LaMar's Donuts Internat**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-03-793: **Medlock v. Kuhn**. Stipulation allowed; appeal dismissed; each party to pay own costs.

Nos. S-03-1073, S-03-1074: **Peterson v. Big Red Roofing Cos**. Stipulation allowed; appeal dismissed.

No. S-03-1397: **State v. Dean**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-03-1411: **State v. Neal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004); *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

No. S-03-1454: **State v. Contreras**. Motion for summary reversal sustained; reversed and remanded for new trial. See rule 7C.

No. S-04-051: **State v. Patz**. Motion for summary affirmance overruled; appeal dismissed. See rule 7A(2).

No. S-04-075: **State v. McNeill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-177: **In re Guardianship & Conservatorship of Trobough**. Motion of appellee for summary dismissal granted pursuant to rule 7B(1). Order dated January 14, 2004, dealing with disposition of personal property at issue in *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004), is vacated as null and void. See *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004).

No. S-04-178: **In re Guardianship & Conservatorship of Trobough**. Motion of appellee for summary dismissal granted pursuant to rule 7B(1). Order dated February 5, 2004, dealing with personal property at issue in *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004), is vacated as null and void. See *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004). Order dated January 26, 2004, approving special conservator fees is interlocutory and, thus, not appealable. See *In re Estate of Lehman*, 135 Neb. 592, 283 N.W. 199 (1939).

No. S-04-190: **State v. Blueitt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-213: **State v. Barnett**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-462: **State ex rel. Tyler v. Britten**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-468: **State v. Cook**. Motion of appellee for summary dismissal sustained.

No. S-04-481: **Cerny v. Longley**. By order of the court, appeal dismissed for failure to file briefs.

No. S-04-497: **State v. Hessler**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-04-498: **In re Estate of Trobough**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-531: **Hall v. Clarke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-625: **State v. Davlin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-04-640: **State ex rel. Doyle v. Korslund**. Stipulation to remand allowed.

No. S-04-818: **In re Guardianship & Conservatorship of Trobough**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-04-952: **Central Neb. Pub. Power v. Irrigation Well Owners**. Motion of appellee to dismiss for lack of jurisdiction sustained.

No. S-04-1067: **State ex rel. Counsel for Dis. v. Meissner**. Respondent suspended from the practice of law in the State of Nebraska until further order of the court.

No. S-04-1304: **State v. Jeffrey Hessler**. Appeal dismissed for lack of jurisdiction.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-02-052: **Drew v. Davidson**, 12 Neb. App. 69 (2003). Petition of appellant for further review overruled on May 19, 2004.

No. A-02-095: **Allied Prop. & Cas. Co. v. Kreifels**. Petition of appellee for further review overruled on July 8, 2004.

No. A-02-207: **First Nat. Bank of Omaha v. Acceptance Ins. Cos.**, 12 Neb. App. 353 (2004). Petition of appellee for further review overruled on May 19, 2004.

No. A-02-308: **White v. White**. Petition of appellant for further review overruled on June 9, 2004.

No. A-02-621: **State v. Malcom**, 12 Neb. App. 432 (2004). Petition of appellant for further review overruled on July 8, 2004.

No. S-02-688: **Detter v. Miracle Hills Animal Hosp.**, 12 Neb. App. 480 (2004). Petition of appellant for further review sustained on June 30, 2004.

No. A-02-713: **SapaNajin v. Clarke**. Petition of appellant for further review overruled on September 1, 2004.

No. A-02-762: **Vanderpool v. Oakland Memorial Hosp. Dist**. Petition of appellant for further review overruled on June 9, 2004.

No. A-02-778: **Sorber v. Brumbaugh**. Petition of appellee for further review overruled on September 1, 2004.

No. A-02-789: **St. Elizabeth Comm. Health Ctr. v. Penrod**. Petition of appellant for further review overruled on September 1, 2004.

No. A-02-793: **Mendlik v. Board of Adj. for City of West Point**. Petition of appellee for further review overruled on June 23, 2004.

No. A-02-817: **Hedrick v. City of Waverly**. Petition of appellant for further review overruled on June 9, 2004.

No. A-02-933: **State v. Miner**. Petition of appellant for further review overruled on July 14, 2004.

No. A-02-936: **Cole v. State**. Petition of appellees for further review overruled on September 22, 2004.

No. A-02-970: **Freeman v. Griffin**. Petition of appellant for further review overruled on May 26, 2004.

No. A-02-995: **Worthon v. Southeast Community College**. Petition of appellant for further review overruled on June 9, 2004.

No. A-02-1012: **Reeg v. Leal**. Petition of appellant for further review overruled on September 15, 2004.

No. A-02-1020: **Santo v. Neth**. Petition of appellant for further review overruled on June 9, 2004.

No. A-02-1096: **Jacob v. State**, 12 Neb. App. 696 (2004). Petition of appellant for further review overruled on September 22, 2004.

No. A-02-1117: **State v. Lee**. Petition of appellant for further review overruled on May 13, 2004.

No. A-02-1138: **Smith v. Smith**, 12 Neb. App. 597 (2004). Petition of appellant for further review overruled on September 15, 2004.

No. A-02-1175: **Hoberman Realty v. Lamar Advertising Co**. Petition of appellee for further review overruled on September 1, 2004.

No. A-02-1237: **State v. Patterson**. Petition of appellant for further review overruled on July 14, 2004.

No. A-02-1237: **State v. Patterson**. Petition of appellant pro se for further review overruled on July 14, 2004, as untimely filed.

No. A-02-1276: **Kotinek v. Willard**. Petition of appellant for further review overruled on November 12, 2004, as untimely filed.

No. S-02-1307: **State v. Wiese**. Petition of appellant for further review sustained on October 14, 2004.

No. A-02-1312: **Armagost v. McFarland**. Petition of appellant for further review overruled on November 17, 2004.

No. A-02-1384: **Boyle v. Boyle**, 12 Neb. App. 681 (2004). Petition of appellant for further review overruled on September 22, 2004.

No. A-02-1419: **Madson v. TBT Ltd. Liability Co.**, 12 Neb. App. 773 (2004). Petition of appellee for further review overruled on October 27, 2004.

No. A-02-1429: **State v. Smith**. Petition of appellant for further review overruled on October 22, 2004, as untimely filed.

No. A-02-1490: **State v. Bearshield**. Petition of appellant for further review overruled on May 13, 2004.

No. A-03-001: **Muhlbach v. Muhlbach**. Petition of appellant for further review overruled on October 8, 2004, as filed out of time.

No. A-03-015: **Grahovac v. Grahovac**, 12 Neb. App. 585 (2004). Petition of appellee for further review overruled on September 22, 2004.

No. A-03-019: **Searcey v. Nebraska Dept. of Motor Vehicles**, 12 Neb. App. 517 (2004). Petition of appellant for further review overruled on September 1, 2004.

No. A-03-033: **State v. Jim**. Petition of appellant for further review overruled on September 15, 2004.

No. S-03-160: **Mireles v. Nebraska Dept. of Corr. Servs**. Petition of appellee for further review sustained on May 13, 2004.

No. A-03-216: **Kelley v. Hearthstone Homes**. Petition of appellant for further review overruled on November 10, 2004.

No. A-03-247: **State v. Koncaba**, 12 Neb. App. 378 (2004). Petition of appellant for further review overruled on May 19, 2004.

No. A-03-251: **State v. Muhs**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-268: **State v. Petersen**, 12 Neb. App. 445 (2004). Petition of appellant for further review overruled on May 13, 2004.

No. A-03-288: **State v. Fair**. Petition of appellant for further review overruled on July 14, 2004.

No. S-03-297: **State v. Banes**. Petition of appellee for further review sustained on May 13, 2004.

No. A-03-301: **State v. Bradley**. Petition of appellant for further review overruled on October 27, 2004.

No. A-03-335: **Fraternal Order of Police v. County of Douglas**. Petition of appellant for further review overruled on November 10, 2004.

No. A-03-363: **State v. Delano**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-382: **Hemmer v. Hemmer**. Petition of appellee for further review overruled on November 10, 2004.

No. A-03-393: **Medical Enters. v. City of Lincoln**. Petition of appellant for further review overruled on October 27, 2004.

No. A-03-404: **Haag v. Haag**. Petition of appellant for further review overruled on November 10, 2004.

No. A-03-424: **In re Guardianship & Conservatorship of Taya S**. Petition of appellee for further review overruled on September 29, 2004.

No. A-03-437: **Gaston v. Gaston**. Petition of appellee for further review overruled on October 27, 2004.

No. A-03-438: **State v. Conn**, 12 Neb. App. 635 (2004). Petition of appellant for further review overruled on September 1, 2004.

No. A-03-451: **City of Bellevue v. Engler**. Petition of appellant for further review overruled on November 17, 2004.

No. A-03-455: **Ryan v. Galbraith**. Petition of appellant for further review overruled on November 24, 2004.

No. A-03-465: **State v. Luebbert**. Petition of appellee for further review overruled on September 1, 2004.

No. S-03-467: **State v. Wisinski**, 12 Neb. App. 549 (2004). Petition of appellant for further review sustained on June 23, 2004.

No. S-03-481: **Kam v. IBP, inc.**, 12 Neb. App. 855 (2004). Petition of appellee for further review sustained on November 17, 2004.

No. A-03-496: **Bazer v. G & G Mfg**. Petition of appellant for further review overruled on June 16, 2004.

No. A-03-499: **State v. Thompson**. Petition of appellant for further review overruled on May 13, 2004.

No. A-03-502: **Widtfeldt v. Eaton Corp**. Petition of appellant for further review overruled on May 13, 2004.

No. A-03-508: **State v. Brown**. Petition of appellant for further review overruled on June 16, 2004.

No. A-03-523: **State v. Badger**. Petition of appellant for further review overruled on September 22, 2004.

No. S-03-525: **Sweeney v. Kerstens & Lee, Inc.**, 12 Neb. App. 314 (2003). Petition of appellees for further review sustained on May 13, 2004.

No. A-03-549: **Baumbach v. Hauxwell**. Petition of appellee for further review overruled on November 17, 2004.

No. A-03-552: **Martinez-Najarro v. IBP, inc.**, 12 Neb. App. 504 (2004). Petition of appellee for further review overruled on September 1, 2004.

No. S-03-603: **Kellogg v. Department of Corr. Servs.** Petition of appellant for further review sustained on June 9, 2004.

No. A-03-609: **State v. Goettsche**. Petition of appellant for further review overruled on May 13, 2004.

No. S-03-618: **Dyer v. Neth**. Petition of appellant for further review sustained on September 1, 2004.

No. A-03-637: **State v. Huffman**. Petition of appellant for further review overruled on September 1, 2004.

Nos. A-03-650, A-03-652, A-03-653: **In re Interest of Tesia S. et al**. Petitions of appellant for further review overruled on May 19, 2004.

No. A-03-651: **In re Interest of Crystal C.**, 12 Neb. App. 458 (2004). Petition of appellant for further review overruled on May 19, 2004.

No. A-03-656: **State v. Cutshall**. Petition of appellant for further review overruled on November 17, 2004.

No. A-03-657: **State v. Houpt**. Petition of appellant for further review overruled on July 14, 2004.

No. A-03-659: **Farris on behalf of Farris v. Wurtele**. Petition of appellant for further review overruled on June 23, 2004.

No. A-03-672: **State v. Moses**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-682: **Kortum v. Kortum**. Petition of appellant for further review overruled on September 1, 2004.

Nos. A-03-690, A-03-691: **State v. Weiler**. Petitions of appellant for further review overruled on May 19, 2004.

No. A-03-707: **State v. Valasek**. Petition of appellant for further review overruled on October 14, 2004.

No. A-03-711: **Benson v. Casey Industrial**, 12 Neb. App. 396 (2004). Petition of appellee for further review overruled on May 13, 2004.

No. A-03-728: **State v. Velazquez**. Petition of appellant for further review overruled on May 19, 2004.

No. A-03-763: **Delano v. Delano**. Petition of appellant for further review overruled on November 10, 2004.

No. A-03-787: **State v. Nichols**. Petition of appellant for further review overruled on June 23, 2004.

No. A-03-788: **State v. Huff**. Petition of appellant for further review overruled on July 14, 2004.

No. A-03-857: **State v. Trusler**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-871: **State v. Davlin**. Petitions of appellant for further review overruled on May 13, 2004.

No. A-03-879: **State v. Peterson**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-899: **Wagner v. Wagner**. Petition of appellant for further review overruled on October 27, 2004.

No. A-03-912: **In re Interest of Caleb H. & Savannah H.** Petition of appellant and appellee State for further review overruled on June 9, 2004.

No. A-03-912: **In re Interest of Caleb H. & Savannah H.** Petition of appellee Charles H. for further review overruled on June 9, 2004.

No. A-03-925: **State v. Romo**, 12 Neb. App. 472 (2004). Petition of appellant for further review overruled on July 14, 2004.

No. A-03-966: **State v. Hernandez**. Petition of appellant for further review overruled on September 15, 2004.

No. S-03-971: **Zoucha v. Touch of Class Lounge**. Petition of appellant for further review sustained on September 15, 2004.

No. A-03-979: **State v. Dalton**. Petition of appellant for further review overruled on November 10, 2004.

No. A-03-983: **Gressett v. Becton-Dickinson Co**. Petition of appellant for further review overruled on May 13, 2004.

No. A-03-987: **Williamson v. Werner Enters.**, 12 Neb. App. 642 (2004). Petition of appellant for further review overruled on September 1, 2004.

No. A-03-997: **Pserros v. Department of Corr. Servs.** Petition of appellant for further review overruled on November 19, 2004, as untimely filed.

No. A-03-1017: **State v. Hittle**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1019: **State v. Spiehs**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1024: **Kaltsounis v. Chappelear**. Petition of appellant for further review overruled on November 17, 2004.

No. A-03-1041: **Martin v. Department of Corr. Servs.** Petition of appellant for further review overruled on May 13, 2004.

No. S-03-1046: **State v. Petty**. Petition of appellant for further review overruled on September 22, 2004.

No. S-03-1046: **State v. Petty**. Petition of appellee for further review sustained on September 22, 2004.

No. A-03-1119: **State v. Garcia**. Petition of appellant for further review overruled on November 10, 2004.

No. A-03-1122: **Cole v. State**. Petition of appellant for further review overruled on September 1, 2004.

Nos. A-03-1127, A-03-1128: **State v. Bartlett**. Petitions of appellant for further review overruled on September 15, 2004.

No. A-03-1139: **In re Interest of Caleb N**. Petition of appellant for further review overruled on August 20, 2004, as untimely filed.

No. A-03-1141: **Stanfill v. Hansen Transfer**. Petition of appellant for further review overruled on October 14, 2004.

No. A-03-1144: **In re Interest of Cody S**. Petition of appellant for further review overruled on October 27, 2004.

No. A-03-1152: **State v. Murray**. Petition of appellant for further review overruled on May 19, 2004.

No. A-03-1159: **State v. Harper**. Petition of appellant for further review overruled on May 13, 2004.

No. A-03-1165: **Watson v. Watson**. Petition of appellant for further review overruled on September 13, 2004, as untimely filed.

No. A-03-1178: **McAuliffe v. McAuliffe**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1207: **In re Guardianship & Conservatorship of Bowman**, 12 Neb. App. 891 (2004). Petition of appellee for further review overruled on November 24, 2004.

No. A-03-1210: **State v. Johnston**. Petition of appellant for further review overruled on June 23, 2004.

No. A-03-1235: **State v. Schulte**, 12 Neb. App. 924 (2004). Petition of appellant for further review overruled on November 17, 2004.

No. A-03-1246: **State v. Moore**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1247: **Nelsen v. Arrow Distributing**. Petition of appellant for further review overruled on October 27, 2004.

No. A-03-1258: **State on behalf of Hagens v. Moore**. Petition of appellant for further review overruled on September 15, 2004.

No. A-03-1264: **State v. Jefferson**. Petition of appellant pro se for further review overruled on May 26, 2004.

No. A-03-1271: **State v. Chrisman**. Petition of appellee for further review overruled on November 10, 2004.

No. A-03-1293: **State v. Ramirez-Flores**. Petition of appellant for further review overruled on June 9, 2004.

No. A-03-1309: **State v. Pestka**. Petition of appellant for further review overruled on July 14, 2004.

No. A-03-1353: **State v. Johnson**. Petition of appellant for further review overruled on September 29, 2004.

No. A-03-1355: **Reifenrath v. Omaha Pub. Schools**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1357: **State v. Gonzales**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1364: **State v. Woods**. Petition of appellant for further review overruled on July 14, 2004.

No. A-03-1373: **State v. Shouse**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1390: **State v. Rush**. Petition of appellant for further review overruled on October 14, 2004.

No. S-03-1399: **State v. Muro**, 13 Neb. App. 38 (2004). Petition of appellant for further review sustained on December 1, 2004.

No. A-03-1422: **State v. Lopez**. Petition of appellant for further review overruled on July 15, 2004, as untimely filed.

No. A-03-1429: **State v. Coleman**. Petition of appellant for further review overruled on October 27, 2004.

No. A-03-1440: **Collier v. Joslyn Art Museum**. Petition of appellant for further review overruled on September 1, 2004.

No. A-03-1469: **Duff v. State**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-001: **State v. Demauro**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-014: **State v. Moore**. Petition of appellant for further review overruled on May 13, 2004.

No. A-04-024: **State v. Witmer**. Petition of appellant for further review overruled on July 14, 2004.

No. A-04-050: **State v. Martin**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-068: **Widtfeldt v. Holt Cty. Bd. of Equal.**, 12 Neb. App. 499 (2004). Petition of appellant for further review overruled on May 24, 2004, as untimely filed.

Nos. A-04-084 through A-04-086: **State v. Eissler**. Petitions of appellant for further review overruled on September 1, 2004.

No. A-04-088: **State v. Hively**. Petition of appellant for further review overruled on November 10, 2004.

No. S-04-105: **Pope v. Department of Corr. Servs**. Petition of appellant for further review sustained on May 26, 2004.

No. S-04-105: **Pope v. Department of Corr. Servs**. Petition of appellant for further review dismissed on November 10, 2004, as having been improvidently granted.

No. A-04-115: **State v. Goings**. Petition of appellant for further review overruled on May 24, 2004, as premature.

No. A-04-115: **State v. Goings**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-120: **State v. Allen**. Petition of appellant for further review overruled on August 16, 2004, as untimely filed.

No. A-04-125: **Mumin v. Hart**. Petition of appellant for further review overruled on November 10, 2004.

No. A-04-132: **State v. Lang**. Petition of appellant for further review overruled on May 26, 2004.

No. A-04-139: **Tast v. Clark**. Petition of appellant for further review overruled on June 23, 2004.

No. A-04-141: **State v. Uglow**. Petition of appellant for further review overruled on May 13, 2004.

No. A-04-145: **Moore v. Hansen**. Petition of appellant for further review overruled on September 1, 2004.

Nos. A-04-156, A-04-157: **State v. Haynes**. Petitions of appellant for further review overruled on November 24, 2004.

No. A-04-163: **State v. McCall**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-193: **State v. Ware**. Petition of appellant for further review overruled on October 14, 2004.

No. A-04-193: **State v. Ware**. Petition of appellant for further review overruled on October 14, 2004, as untimely filed.

No. A-04-214: **State v. Ziemelis**. Petition of appellant for further review overruled on September 29, 2004.

No. A-04-218: **Mumin v. Clarke**. Petition of appellant for further review overruled on July 14, 2004.

No. A-04-318: **State v. Jones**. Petition of appellant for further review overruled on October 14, 2004.

No. A-04-354: **State v. Ybarra**. Petition of appellant for further review overruled on September 29, 2004.

No. A-04-355: **State v. Dill**. Petition of appellant for further review overruled on September 22, 2004.

No. A-04-360: **State v. Silcock**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-366: **State v. Ivory**. Petition of appellant for further review overruled on October 27, 2004.

No. A-04-375: **Mumin v. Kenney**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-421: **City of Lincoln v. Remmen**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-425: **State v. Lara**. Petition of appellant for further review overruled on November 17, 2004.

No. A-04-463: **State v. Perez**. Petition of appellant for further review overruled on September 22, 2004.

No. A-04-467: **State v. Felder**. Petition of appellant for further review overruled on October 27, 2004.

No. A-04-475: **State v. Henry**. Petition of appellant for further review overruled on October 27, 2004.

No. A-04-496: **State v. Swift**. Petition of appellant for further review overruled on November 24, 2004.

No. A-04-511: **Malchow v. Freeborn**. Petition of appellant for further review overruled on July 26, 2004, as untimely filed.

No. A-04-522: **State v. Flower**. Petition of appellant for further review overruled on November 17, 2004.

No. A-04-545: **State v. Wessling**. Petition of appellant for further review overruled on November 17, 2004.

No. A-04-567: **State v. Warner**. Petition of appellant for further review overruled on September 22, 2004.

No. A-04-568: **State v. Drees**. Petition of appellant for further review overruled on November 24, 2004.

No. A-04-572: **State v. Anderson**. Petition of appellant for further review overruled on October 27, 2004.

No. A-04-577: **State v. Thies**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-583: **State ex rel. Hansen v. Department of Corr. Servs**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-606: **State v. Garcia**. Petition of appellant for further review overruled on September 1, 2004.

No. A-04-612: **Hansen v. Department of Corr. Servs**. Petition of appellant for further review overruled on August 24, 2004, as untimely filed.

No. A-04-690: **State v. Braimah**. Petition of appellant for further review overruled on November 10, 2004.

No. A-04-698: **Caton v. Goracke**. Petition of appellant for further review overruled on September 1, 2004.

No. S-04-706: **In re Interest of Rachel B. et al**. Petition of appellant for further review sustained on September 22, 2004.

No. A-04-763: **State v. Velazquez**. Petition of appellant for further review overruled on November 10, 2004.

No. A-04-772: **Dean v. Department of Corr. Servs**. Petition of appellant for further review overruled on October 14, 2004, as untimely filed.

No. A-04-784: **Schade v. Board of Parole**. Petition of appellant for further review overruled on November 17, 2004.

No. A-04-927: **State v. Garcia**. Petition of appellant for further review overruled on November 24, 2004.

No. A-04-974: **Frain v. Portsche**. Petition of appellant for further review overruled on November 10, 2004.

No. A-04-1054: **Blair v. Clarke**. Petition of appellant for further review overruled on December 13, 2004, as untimely filed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA ON BEHALF OF TAYLAR CHAE PATHAMMAVONG, A MINOR CHILD, APPELLEE, V. SEANGSOURIYAN PATHAMMAVONG, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND MANDY J. STRUEBING, THIRD-PARTY DEFENDANT, APPELLANT.

679 N.W.2d 749

Filed May 21, 2004. No. S-02-1370.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Taxation: Appeal and Error.** An award of a dependency exemption is reviewed de novo to determine whether the trial court abused its discretion.
3. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
4. **Modification of Decree: Child Support.** When a party owes past-due child support, the failure to pay must be found to be a willful failure to pay, in spite of an ability to pay, before an application to modify child support may be dismissed on the basis of unclean hands.
5. **Child Custody.** While an unwed mother is initially entitled to automatic custody of the child, the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child.
6. ____. In determining a child's best interests under Neb. Rev. Stat. § 42-364 (Reissue 1998), courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.

7. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
8. **Paternity: Taxation: Child Custody: Waiver.** A court having jurisdiction in a filiation proceeding shall have the power to allocate tax dependency exemptions as part of a custody order and may order the custodial parent to execute a waiver of his or her right to declare the tax exemptions if the situation of the parties so requires.
9. **Visitation: Appeal and Error.** The matter of travel expenses associated with visitation is initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
10. **Visitation.** There is no immutable standard for the allocation of travel expenses associated with visitation, and instead the determination of reasonableness is made on a case-by-case basis.
11. **Parent and Child: Visitation.** A reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent, and the determination of reasonableness is to be made on a case-by-case basis.
12. **Paternity: Visitation: Jurisdiction: Appeal and Error.** Where, in a filiation proceeding, a noncustodial parent of a child who resides with a custodial parent in another state requests a Nebraska court having jurisdiction to specify his or her visitation rights and parenting time, it is an abuse of discretion not to do so.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed in part, and in part vacated and remanded for further proceedings.

Darik J. Von Loh, of Hernandez, Frantz & Von Loh, for appellant.

Bradley T. Kalkwarf, and, on brief, Vicky L. Johnson for appellee Seangsouriyan Pathammavong.

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

STEPHAN, J.

The appellant, Mandy Struebing (Mandy), and the appellee, Seangsouriyan Pathammavong (Sean), are the natural parents of Taylar Chae Pathammavong (Taylar), a minor child, who was born out of wedlock. Mandy appeals from an order of the district court for Saline County awarding permanent custody of Taylar to Sean.

I. BACKGROUND

Mandy gave birth to Taylar on August 25, 1995. In paternity proceedings instituted by the State of Nebraska on behalf of Taylar, the district court for Saline County entered an order on January 8, 1996, finding Sean to be Taylar's father and ordering him to pay child support.

Mandy, Sean, and Taylar lived together, initially in Nebraska and then in Texas, from the time Taylar was 2 months old until she was approximately 2 years old. In October 1997, Mandy took Taylar to live with her and a male companion in Arlington, Texas, approximately 20 miles from where Sean was then living. They remained there for approximately 1 year and then moved to Mansfield, Texas, located approximately 35 miles from Sean's residence. Mandy returned to Nebraska with Taylar in June 1999, without giving prior notice to Sean. During the ensuing 3 years, Mandy and Taylar lived in at least five different locations in Sprague and Crete, Nebraska.

During this period, the parties had an informal arrangement whereby Sean would have visitation with Taylar at Christmas and one or two other times per year in Nebraska, usually on major holidays. In addition, Taylar would spend between 4 to 8 weeks with Sean in Texas each summer. Sean testified that he would call Taylar approximately twice each month but was often unable to reach her because either the telephone had been disconnected or Mandy had moved without informing him.

On November 26, 2001, Mandy was convicted of driving while under suspension and sentenced to a period of incarceration. On May 1, 2002, while her appeal was pending but in anticipation of her incarceration, Mandy executed a power of attorney authorizing her mother, Cynthia Boshart, to have the care and custody of Taylar for a period of 6 months. Sean was not informed of Mandy's conviction or the possibility of her incarceration. Mandy lost her appeal and was incarcerated for a period of 60 days from June 11 to August 8. Mandy and members of her family concealed this information from Sean. During Mandy's incarceration, Boshart told Sean that Mandy was in Ogallala, Nebraska, taking care of a sick relative and that Taylar's summer visitation was to be limited to only 1 week. When Sean tried to contact Mandy to request more time with Taylar, he was unable to reach her. Sean

kept Taylar in Texas and contacted his former attorney in Nebraska to assist him in determining Mandy's whereabouts. This inquiry led to Sean's discovery of Mandy's incarceration.

When Sean did not return Taylar to Nebraska as Boshart had instructed, she filed a petition in Lancaster County Court seeking to be appointed Taylar's guardian. A hearing was held on the guardianship petition on July 30, 2002, at which both Boshart and Sean appeared. The matter was continued, but was ultimately dismissed before the next scheduled hearing.

On August 5, 2002, Sean filed an ex parte application in the district court for Saline County in which he sought temporary and permanent child custody and child support. The court granted Sean temporary custody and set a permanent custody hearing, which hearing was continued at Mandy's request. At the September 26 hearing, Sean and Mandy presented evidence in support of their respective claims for permanent custody of Taylar. In an order entered on October 30, the district court determined that it was in Taylar's best interests to remain in Sean's custody, subject to Mandy's reasonable rights of visitation. The order directed that Mandy was to "pay her own costs with regard to visitation." However, in ordering her to pay child support in the amount of $215 per month, the court noted that this amount represented a "deviation of $50.00 per month from the Nebraska Child Support Guidelines as a visitation expense for the benefit of [Mandy]." The district court awarded Sean the right to claim the income tax exemption for Taylar. Mandy perfected this timely appeal.

II. ASSIGNMENTS OF ERROR

Mandy assigns, consolidated and restated, that the district court erred in (1) granting Sean's ex parte temporary custody order, (2) awarding Sean permanent custody of Taylar, (3) failing to grant Mandy specific parenting time, (4) granting Sean the income tax exemption for Taylar, and (5) ordering Mandy to provide visitation transportation when it did not grant her a deviation from the Nebraska Child Support Guidelines.

III. STANDARD OF REVIEW

[1] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record

to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994); *Lancaster v. Brenneis*, 227 Neb. 371, 417 N.W.2d 767 (1988).

[2] An award of a dependency exemption is reviewed de novo to determine whether the trial court abused its discretion. See *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

IV. ANALYSIS

1. Ex Parte Temporary Custody Order

Mandy argues that the trial court erred in granting Sean's ex parte temporary custody order because he failed to plead those facts required under Neb. Rev. Stat. § 43-1209 (Reissue 1998), see, currently, Neb. Rev. Stat. § 43-1246 (Supp. 2003) of the Uniform Child Custody Jurisdiction and Enforcement Act, and because he neither requested the court's permission to remove Taylar from Nebraska during the pendency of the action, nor notified the court that he would be doing so.

It is undisputed that the application for temporary and permanent custody filed on behalf of Sean in the Saline County District Court lacked certain information required by § 43-1209, including Taylar's whereabouts for the preceding 5 years and the fact that Sean was living in Texas, not Nebraska. In addition, the application failed to disclose the pending guardianship proceeding in Lancaster County. At the hearing on the ex parte motion, Sean's attorney acknowledged that she had mistakenly failed to include such information.

[3] Sean argues on appeal that the trial court did not err in granting his ex parte temporary custody order, which did not greatly differ from his normal summer visitation schedule with Taylar, and that even if it was erroneous, the temporary order was rendered moot when the permanent custody order was entered on October 30, 2002. A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Rath v. City of*

Sutton, 267 Neb. 265, 673 N.W.2d 869 (2004); *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003). The issue of whether the temporary order was granted in error was relevant only from the time it was ordered until it was replaced by the order determining Taylar's permanent custody placement. Therefore, the issues pertaining to the ex parte order are moot and need not be addressed in order to resolve this appeal.

2. Permanent Custody

Mandy contends that the district court erred in awarding permanent custody of Taylar to Sean because (1) Sean failed to meet the two-part test laid out in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), for removal of a child from the jurisdiction of this state, (2) Sean came before the court with unclean hands because he was over $5,000 in arrears on his child support obligation, and (3) it was not in Taylar's best interests to change custody.

(a) Legal Standard

Mandy argues that the two-part test from *Farnsworth, supra*, most recently applied in *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002), is applicable in this case. The test requires a custodial parent who is seeking permission to relocate to another state with a minor child to prove that the parent has a legitimate reason for leaving the state and that such a move is in the best interests of the child. Unlike *Farnsworth* and *Vogel*, however, this case does not concern parental relocation or the modification of a previous court-ordered custody agreement. The order before us on appeal is the first court order assigning custody to one parent or the other, and therefore modification was never an issue. In addition, the parents in this case have lived over 600 miles apart for a number of years prior to the custody determination. The issue before the district court was not whether one or the other of the parents was free to relocate with the child, but, rather, which parent should be awarded permanent custody of Taylar as a matter of initial judicial determination. This question must be resolved on the basis of the fitness of the parents and the best interests of the child. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994); *Lancaster v. Brenneis*, 227 Neb. 371,

417 N.W.2d 767 (1988). Accordingly, the district court was not required to apply the *Farnsworth* standard in resolving the disputed custody issue in this case.

(b) Unclean Hands

[4] Mandy argues that because Sean was not current on his child support obligation, he should have been barred from seeking custody under the doctrine of unclean hands. With respect to that doctrine, we have stated:

> " ' "Whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." ' "

Marr v. Marr, 245 Neb. 655, 658, 515 N.W.2d 118, 120 (1994), quoting *Voichoskie v. Voichoskie*, 215 Neb. 775, 340 N.W.2d 442 (1983). Generally, issues of child support and custody are treated as separate and distinct issues. See *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). We have also held that when a party owes past-due child support, the failure to pay must be found to be a willful failure to pay, in spite of an ability to pay, before an application to modify child support may be dismissed on the basis of unclean hands. *Marr, supra*; *Voichoskie, supra*.

Mandy relies on *Snodgrass v. Snodgrass*, 241 Neb. 43, 486 N.W.2d 215 (1992), in which a noncustodial father, after having been found to be in willful contempt of court for failure to make child support payments for his two minor children, filed an application to modify the divorce decree. In the application, he alleged that he was not the father of the older child and sought a paternity determination as well as custody of the younger child. The mother of the children successfully contended that the application should be dismissed on the ground that the petitioner had failed to come to the court with clean hands by virtue of the contempt order and child support arrearage. In affirming the district court's dismissal of the application, we determined that it was supported by a record which showed that the "[father's] conduct since the dissolution of the marriage has been to pay no child support unless

compelled by the court" and that it was his "flagrant and continuing contempt of court" which precluded him from obtaining relief. *Snodgrass*, 241 Neb. at 48, 486 N.W.2d at 218.

At the time of the hearing in this case, Sean had recently returned to his job as an airline worker after being furloughed following the September 11, 2001, terrorist attacks. Although Sean had been paying child support for Taylar, he had done so sporadically at times and at the time of trial was over $5,000 in arrears. Since his return to work, however, Sean had been paying his current support obligation as well as making payments on the past-due amounts. Although it is undisputed that Sean was in arrears on his child support, there has never been a finding of contempt or of willful or intentional withholding of support. The record does not reflect that Sean sought custody of Taylar in order to avoid his past-due or current child support obligations. Unlike the circumstances in *Snodgrass*, this record does not reflect willful and contumacious nonpayment of child support which would bar Sean from seeking custody under the unclean hands doctrine.

(c) Best Interests

[5] Mandy contends that the district court erred in determining that it was in Taylar's best interests to be in the custody of Sean. While an unwed mother is initially entitled to automatic custody of the child, the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). In filiation proceedings, we have applied the standards for determination of custody set forth in Neb. Rev. Stat. § 42-364(2) (Reissue 1998), thus disregarding the fact that a child was born out of wedlock in deciding custody disputes between natural parents. *State ex rel. Ross v. Jacobs*, 222 Neb. 380, 383 N.W.2d 791 (1986); *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981). Section 42-364(2) sets forth the following nonexhaustive list of factors to be considered in determining the best interests of a child for purposes of awarding custody:

> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;

(b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;

(c) The general health, welfare, and social behavior of the minor child; and

(d) Credible evidence of abuse inflicted on any family or household member.

[6] In determining a child's best interests under § 42-364, courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004).

Both parents presented evidence in support of their respective claims that it was in Taylar's best interests to be placed in their permanent custody. Mandy testified that since her release from incarceration, she has been living with Boshart and working full time at a telemarketing firm. She testified that Taylar has her own room in Boshart's home. Sean testified that he was working full time at American Airlines and was living with his mother and brother in a four-bedroom home. At the time of trial, Sean was sharing a bedroom with Taylar, but he stated that depending on the outcome of the trial, it was his intention to have Taylar's own bedroom ready within a week.

The record reflects that Taylar does very well in school but that she missed an excessive number of days in kindergarten and first grade while in Mandy's custody. Mandy's explanation for the excessive absences was that Taylar "was sick a lot" and "didn't want to go" to kindergarten. Shari Keola, Sean's sister, testified that Mandy had provided daycare for Keola's four children but

that she terminated the arrangement because Mandy was either late in taking her children to school or they did not go at all. Sean testified that since she has been in his custody, Taylar is healthy and enjoys school. Sean is a member of the PTA, and also works as a substitute teacher. Sean takes Taylar to a Christian church on Sundays and also plans to introduce her to Buddhism because he feels it is important for her to understand his culture.

Each parent presented evidence disparaging the stability and moral fitness of the other. Court records reflect that from February 1994, when Mandy was still a minor, to May 2002, she has been arrested for and convicted of numerous traffic and criminal offenses. The majority of offenses with which she has been charged relate to operation of a motor vehicle and include numerous traffic and speeding violations, as well as five or six occurrences of driving under suspension. In addition, Mandy was arrested once in 2000 and twice in 2002 on charges of possession of marijuana. At the custody hearing, Mandy testified that she no longer uses marijuana and that the last time she had used it was in April of that year. Sean testified that when he visited Mandy in November 2001, he failed to recognize her because of her "weight loss and her scabbed arms and her dingy hair." Sean testified that Mandy's explanation for her appearance was that she had been using methamphetamines.

Mandy married a Mexican national in April 2002. She testified that she has known him for 3 years but that she has never lived with him and that he was deported during her incarceration. Keola testified that Mandy told her she had received $10,000 for marrying this person, but Mandy denied having received any money.

Mandy testified that Sean physically abused her on three occasions. The first occasion was May 18, 1996, when they fought over money and Sean punched or pushed Mandy after she broke a window in his car. Mandy filed a police report following the incident which led to Sean's being convicted of a Class I misdemeanor for assault. Mandy also testified that during Memorial Day weekend in 1996, she and Sean were fighting, and that he punched her in the back of the head while she was driving. Taylar and Mandy's sister were also in the car, and Mandy's sister corroborated the incident. The third incident occurred on Easter in 1997 at Sean's mother's house in Texas when they got into a fight

and Mandy testified that Sean punched her in the face. Mandy did not report either the second or third incidents to police. Sean denied that he was ever aggressive with Mandy other than the May 18, 1996, incident and testified that he feels he made a mistake in that instance and that he has matured since then.

Mandy testified that she would be a better custodial parent than Sean because she has had Taylar in her care for 7 years and that she and her family are all that Taylar knows. Sean testified that it would be in Taylar's best interests to remain in his custody because she is doing well in school, making new friends, and is living in a wholesome environment.

[7] Our task on appeal is to determine whether the trial court abused its discretion in concluding, based upon the evidence we have summarized, that it was in Taylar's best interests to be in the permanent custody of Sean. A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003); *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). The evidence in this case reflects that while neither party has an unblemished personal record, both are fit parents who have established a familial relationship with Taylar. It appears that Taylar did well while in Mandy's custody and has continued to do well in Sean's custody. Nevertheless, there is substantial evidence that Mandy has had an unstable lifestyle marked by numerous law violations, substance abuse, and frequent changes of residence. In light of this evidence, we cannot say that the district court abused its discretion in awarding custody to Sean. See *State ex rel. Ross v. Jacobs*, 222 Neb. 380, 383 N.W.2d 791 (1986) (determining that award of custody to father was not abuse of discretion where there was substantial evidence of mother's past unstable lifestyle).

3. Other Issues

(a) Tax Exemption

[8] Mandy contends that the district court erred in ordering that Sean shall be entitled to claim the income tax exemption for

Taylar commencing in 2002. This award is consistent with the general rule that a custodial parent is presumptively entitled to the federal tax exemption for a dependent child. See, I.R.C. § 152(e) (2000); *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991). We have held that a Nebraska court having jurisdiction in a divorce action shall have the power to allocate tax dependency exemptions as part of the divorce decree and may order the custodial parent to execute a waiver of his or her right to declare the tax exemptions if the situation of the parties so requires. *Hall, supra.* We hold that a court having jurisdiction in a filiation proceeding possesses the same power. However, we find no circumstances in this case which would warrant departure from the presumptive rule by which the dependency exemption is allocated to the custodial parent, and we therefore conclude that the district court did not abuse its discretion in allocating the exemption to Sean.

(b) Visitation Expenses

Mandy also contends that the district court erred in instructing her to "pay her own costs with regard to visitation." She testified that because of her inability to drive, she would have difficulty with transportation for visitation if Taylar were permitted to remain with Sean in Texas, and she requested a deviation from the Nebraska Child Support Guidelines to help her "provide and pay for that cost of transportation." She argues on appeal that the district court abused its discretion when it did not grant her requested deviation.

[9,10] "[T]he matter of travel expenses associated with visitation is initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion." *Vogel v. Vogel*, 262 Neb. 1030, 1040-41, 637 N.W.2d 611, 620 (2002). No case has "[set] an immutable standard for the allocation of travel expenses, and instead the determination of reasonableness is made on a case-by-case basis." *Id.* at 1041, 637 N.W.2d at 620-21.

The order of the district court expressly stated that the $215 per month Mandy was required to pay in child support "is a deviation of $50.00 per month from the Nebraska Child Support Guidelines as a visitation expense" for Mandy's benefit. We are

directed to nothing in the record which would substantiate a claim that the amount of the deviation is inadequate, and we therefore conclude that Mandy was given the relief that she requested with respect to visitation expenses.

(c) Parenting Time/Visitation

[11] Mandy argues that the trial court abused its discretion by awarding her "reasonable rights of visitation" with Taylar rather than specific parenting time. Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent, and the determination of reasonableness is to be made on a case-by-case basis. *Vogel, supra.*

At trial, Mandy requested that she be awarded visitation rights every other holiday, as well as 6 to 8 weeks in the summer in the event Sean was granted permanent custody. The record reflects that when Taylar was in the custody of Mandy, the parties arranged for reasonable visitation with Sean without the necessity of a court order. Mandy testified that she had been "pretty lenient" with Sean, allowing him to see Taylar "whenever he wants," and that she had never denied him visitation. Sean indicated at trial that he likewise had no objections to Mandy's being awarded reasonable rights of visitation. The district court did not explain its reasons for ordering "reasonable rights of visitation" instead of a specific visitation schedule.

[12] Although we have held that the initial custody determination in this case was not governed by the analysis used in parental relocation cases, it nevertheless does involve circumstances where the custodial and noncustodial parents reside in different states hundreds of miles apart. Thus, as in the parental relocation cases, preservation of the familial relationship between the minor child and the noncustodial parent is an important objective in the exercise of the court's equity jurisdiction. In the absence of a stipulation or agreement, the fact that the parties were able to agree upon reasonable visitation before custody became a contested issue provides no assurance that they will be able to do so now that the court has resolved the issue in favor of one parent and against the other. Where, as here, a noncustodial parent of a child who resides with a custodial parent in another state requests

a Nebraska court having jurisdiction to specify his or her visitation rights and parenting time, we conclude that it is an abuse of discretion not to do so. Resolution of this issue as a part of the custody determination serves the best interests of the child, the parents, and efficient judicial administration.

The record does not afford sufficient current information about the circumstances of the parties to enable us to fashion a specific visitation order. Accordingly, we vacate that portion of the decree granting Mandy "reasonable rights of visitation" with Taylar and remand the cause for further proceedings for a determination of Mandy's specific visitation rights and parenting time.

V. CONCLUSION

The judgment of the district court is affirmed in all respects, except that portion of the judgment ordering "reasonable rights of visitation," which is vacated, and the cause is remanded to the district court for the sole purpose of determining the specific visitation rights and parenting time to which Mandy is entitled.

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

KIM L. BURKE, AS MOTHER AND NEXT FRIEND OF TROY JOSEPH BURKE, A MINOR, APPELLANT, V. ROBERT M. MCKAY ET AL., APPELLEES.

679 N.W.2d 418

Filed May 21, 2004. No. S-02-1371.

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 the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence: Words and Phrases.** As currently codified, "assumption of risk" as an affirmative defense means that (1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger.

4. **Negligence.** The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts.
5. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Affirmed.

Maren Lynn Chaloupka and Robert Paul Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

Kimberli D. Dawson and Bruce L. Hart, of Hart, Dawson & Sudbeck, P.C., L.L.O., for appellee The Nebraska High School Rodeo Association.

Robert F. Peterson, of Laughlin, Peterson & Lang, for appellee McKay Rodeo Company.

Curtis D. Ruwe and C.J. Gatz for appellee Robert M. McKay.

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

STEPHAN, J.

This is an action filed by Kim L. Burke, as mother and next friend of Troy Joseph Burke (Burke), seeking damages for personal injuries sustained by Burke while competing in a high school rodeo in Madison, Nebraska, on May 26, 2000 (the Madison rodeo). The action was initially brought against rodeo stock contractor McKay Rodeo Company, Inc. (MRC), and Robert M. McKay, its sole shareholder. The Nebraska High School Rodeo Association (NHSRA) was subsequently joined as a defendant. Based upon its determination that Burke had assumed the risk of injury as a matter of law, the district court for Madison County entered summary judgment in favor of all defendants. Burke's mother filed this timely appeal, which we moved 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).

FACTS

Burke was born on August 20, 1981, and was 18 years old at the time of the Madison rodeo. A resident of Box Butte County, Nebraska, he grew up riding horses and began competing in rodeos when he was 10 or 11 years old. He began participating in bareback riding when he was approximately 15 years old. Burke estimated that he had competed in 60 to 80 rodeos between his sophomore year in high school and the day of his injury, which occurred a week after his graduation. Although Burke had previously been thrown from rodeo animals and had once dislocated his shoulder when riding a bull, he otherwise suffered only "bruises and bumps" prior to the injury which is the subject of this action. At the time of the Madison rodeo, Burke was the defending high school state champion in the bareback event.

The NHSRA is a nonprofit corporation doing business in the State of Nebraska. Its purpose is to offer high school students the opportunity to learn and compete in the sport of rodeo. The NHSRA sanctions 23 to 25 high school rodeos per year which are sponsored by local rodeo committees. Before sanctioning a high school rodeo, the NHSRA must first review and approve the proposal of the local committee with respect to the date and time of the rodeo, the judges, and the rodeo stock contractor.

The NHSRA sanctioned the Madison rodeo held on May 26, 2000. The rodeo was sponsored by the Northeast Nebraska High School Rodeo Club, which contracted with MRC to provide stock for the rodeo. The contract provided in part: "An event director or arena director may declare a particular animal unsatisfactory. Animals used in a contest shall be closely inspected and objectionable ones eliminated." John Mundorf, the director of NHSRA, testified that a stock contractor for a high school rodeo is expected to provide adequate stock which is safe for the participants in the sense that the animal would "not intentionally bring harm to an individual."

Prior to competing in the Madison rodeo, Burke and his parents signed a document entitled "Minor's Release, Assumption of Risk and Indemnity Agreement." This agreement was effective for 1 year beginning August 1, 1999, and was read and signed by Burke and both of his parents. It provided in relevant part:

> [W]e, the undersigned, on behalf of the minor and for ourselves . . . do hereby:
>
> 1. RELEASE, DISCHARGE AND COVENANT NOT TO SUE the . . . rodeo association [and] sponsors . . . (. . . hereinafter collectively referred to as "releasees") from any and all claims and liability arising out of strict liability or ordinary negligence of releasees . . . which causes the undersigned injury, death [or] damages . . . .
>
> 2. UNDERSTAND that minor's entry into the restricted area and/or participation in rodeo events contains DANGER AND RISK OF INJURY OR DEATH TO MINOR, that . . . rodeo animals are dangerous and unpredictable, and that there is INHERENT DANGER in rodeo which we each appreciate and voluntarily assume because the minor and we choose to do so. Each of the undersigned has observed events of the type that the minor seeks to participate in. . . . WE EACH VOLUNTARILY ELECT TO ACCEPT ALL RISKS connected with the minor's entry into the restricted area and/or participation in any rodeo events.

The entry form for the Madison rodeo was signed by Burke and his father. It stated in part that in consideration for Burke's being able to participate, his parents agreed

> to make no claims against the [NHSRA], sponsors of all NHSRA sanctioned activities, or their members or anyone acting through or for them, for any loss or damage, or injury to property, animals, or persons resulting from any cause, including any negligence of any person connected with any of the activities of the rodeo[.]

Signs posted at the Madison rodeo stated the following:

> WARNING
>
> Under Nebraska Law, an equine professional is not liable for an injury to or the death of a participant in equine activities resulting from the inherent risks of equine activities, pursuant to this act.

On the day of the Madison rodeo, the draw for the bareback event was posted approximately 2 hours before the competition began. Upon checking the posting, Burke discovered that he had drawn a horse designated as "No. 18." Burke remembered the number and, after looking at the horse, confirmed his belief that

No. 18 was the same horse that he had seen at a May 1999 rodeo in O'Neill, Nebraska (the O'Neill rodeo). At the O'Neill rodeo, Burke had witnessed horse No. 18 go over backward or "flip" onto its rider, injuring him. Burke testified that after observing this, he formed the opinion that horse No. 18 "just went over by himself." Burke testified that he was concerned about riding horse No. 18 in the Madison rodeo because of the incident he had observed at the O'Neill rodeo. Burke talked to another competitor at the Madison rodeo, Beau Saner, and asked him if he had seen horse No. 18 "buck out" at another rodeo. Saner told Burke that he had seen horse No. 18 at another rodeo and that it "bucked straight out" without any trouble and did not go over backward onto its rider. Burke testified that based on his discussion with Saner, he did not have any apprehension about riding horse No. 18.

Burke's father had participated in rodeos and was aware of the potential for injury in rodeo competition. He attended both the O'Neill and the Madison rodeos. Burke's father witnessed horse No. 18 flip over onto its rider at the O'Neill rodeo. Prior to that time, he had never seen a horse flip over onto a rider, and it made an impression on him. He was aware that Burke had drawn horse No. 18 in the Madison rodeo but did not recognize the horse as the same one he had seen flip in O'Neill until the horse was coming into the chute for Burke's ride. When he realized it was the same horse, he was concerned. Burke's father did not, however, say anything to anyone about his concerns until after the chute had opened. He gave Burke advice about how to approach the ride but did not say anything about his concerns regarding the horse or about the possibility of turning the horse out because he felt that it "would be Troy's decision." Three or four minutes elapsed from the time Burke's father recognized horse No. 18 and when the chute opened. He agreed that both he and Burke knew that horse No. 18 was the same horse involved in the incident at the O'Neill rodeo and that they each had an opportunity to stop the ride, but chose not to do so.

Upon leaving the chute with Burke as its rider, horse No. 18 "stood up on his back legs and threw himself to the rear in such a way that he fell over backwards, suddenly crushing [Burke]

between his back and the ground." Burke suffered injuries as a result.

McKay had acquired horse No. 18 in November 1998 for use in bucking events at rodeos. He testified that he bucked the horse twice with a dummy and once with a rider in the spring of 1999 and observed nothing unusual about the animal. McKay testified that the horse was first used in competition at the May 1999 O'Neill rodeo, where it flipped over onto its rider. McKay's son told McKay that he subsequently took horse No. 18 to a rodeo in Wisner, Nebraska, in July 1999 and that it bucked normally without incident. The horse was subsequently injured during that same month and put out to pasture until March 2000. The horse was not ridden between July 1999 and the Madison rodeo in May 2000. McKay testified that he knows more about horse No. 18 than anyone else and that he believed that the horse was reasonably safe or he would not have brought the horse to the Madison rodeo.

Mundorf testified that he had observed the incident involving horse No. 18 at the O'Neill rodeo. He testified that he asked McKay at that time " 'if he had bucked that horse,' " to which McKay replied that he had and also told Mundorf that " 'the horse was fine.' " Mundorf testified that he then asked McKay not to bring the horse to any more high school rodeos. McKay testified that Mundorf made this request after Burke's injury at the Madison rodeo in May 2000, but not before that event.

The operative second amended petition alleges that Burke's injuries were proximately caused by the negligence of NHSRA in "permitting horse #18 to be used in the rodeo when its employees and representatives knew or should have known the horse was unreasonably dangerous to the foreseeable participants," and by the negligence of McKay in "bringing a horse to the competition which he knew or should have known was unreasonably dangerous to the foreseeable participants" and in "bringing horse #18 to the rodeo competition when he had been specifically instructed by Officers of the [NHSRA] not to bring the horse." In their answers, defendants denied the allegations of negligence and asserted affirmative defenses conferred by Neb. Rev. Stat. §§ 25-21,249 through 25-21,253 (Cum. Supp. 2000),

including assumption of risk, release, and immunity. The affirmative defenses were denied by reply.

Each defendant filed a motion for summary judgment. In its order granting the motions, the district court determined from the uncontroverted evidence that Burke was aware of the general danger inherent in rodeo competition and the specific danger of riding horse No. 18 in light of its history of going over backward at the O'Neill rodeo. The court further determined that Burke understood the danger and voluntarily exposed himself to it by choosing to ride horse No. 18, thereby assuming the risk of injury.

ASSIGNMENT OF ERROR

Burke's mother assigns that the district court erred in granting defendants' motions for summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004); *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003); *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (2003).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003); *Big Crow v. City of Rushville, supra.*

ANALYSIS

[3] Although the answers assert several alternative affirmative defenses, the district court sustained defendants' motions for summary judgment on the basis of its specific determination that Burke assumed the risk of injury. The defense of assumption of risk is derived from the maxim "volente non fit injuria" which means that "where one, knowing and comprehending the danger,

voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom." *Hollamon v. Eagle Raceway, Inc.*, 187 Neb. 221, 224, 188 N.W.2d 710, 711 (1971), *disapproved on other grounds, Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992). As currently codified, "assumption of risk" as an affirmative defense means that "(1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger." Neb. Rev. Stat. § 25-21,185.12 (Reissue 1995). See, also, *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002); *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000). Where the requisite knowledge, understanding, and voluntary exposure are proved, this court has upheld the application of the defense as a bar to the personal injury claim of a minor. *Schmidt v. Johnson*, 184 Neb. 643, 171 N.W.2d 64 (1969).

[4] The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts. *Jay v. Moog Automotive, supra*; *Pleiss v. Barnes, supra*. For example, in *Pleiss*, the plaintiff was injured when a ladder on which he was standing flipped, twisted, and started to slide, causing him to fall. The plaintiff testified that he knew that ladders "could 'get shaky and fall' " but that he had never seen a ladder "flip, twist, and slide" prior to his injury. 260 Neb. at 775, 619 N.W.2d at 829. Applying the subjective standard set forth above, we wrote that

> the question is not whether [the plaintiff] knew that in general ladders could be dangerous, but whether he knew and understood that this particular ladder, either because of its placement or because it was not tied down, created a specific danger that it could flip, twist, and slide, causing him to fall.

Id. at 776, 619 N.W.2d at 830. We determined that because the record did not indicate any such specific knowledge or understanding, the trial court erred in instructing the jury on assumption of risk.

In applying this subjective standard to the facts in this case, we must first identify the specific danger upon which the defense of assumption of risk is predicated. Viewed in a light most favorable to Burke, the evidence reflects that while a horse ridden in a rodeo bareback competition can be expected to throw its rider by bucking, it is unusual for such a horse to flip over backward and land on top of the rider. Thus, Burke's acknowledged familiarity with the general risks of injury inherent in rodeo competition cannot form the basis of the assumption of risk defense with respect to the injury he sustained at the Madison rodeo. Rather, his conduct must be examined with respect to the specific danger that horse No. 18 would not buck normally, but would instead rear up and flip over backward on top of the rider, causing injury.

Our primary inquiry in this regard is whether Burke knew of and understood the specific danger involved in riding horse No. 18 in the Madison rodeo. The undisputed evidence is that horse No. 18 fell backward onto its rider on only one previous occasion, at the O'Neill rodeo in May 1999. Burke and his father were present and witnessed the incident and were aware of the resulting injury to the rider. Both regarded the actions of horse No. 18 as unusual for a bucking horse. Burke did not observe any physical cause for the horse's actions, testifying that "[i]t appeared to me that he just went over by himself." When Burke drew horse No. 18 at the Madison rodeo, he recognized it as the same horse which had gone over backward onto its rider at the O'Neill rodeo. Likewise, his father recognized the horse before Burke's ride. Thus, there is uncontroverted evidence that Burke and his father knew of and understood the specific risk posed by horse No. 18.

The next inquiry is whether, as a matter of law, Burke voluntarily exposed himself to the danger. The record reflects that the draw for the bareback event in the Madison rodeo was posted approximately 2 hours before the competition began. Both Burke and his father admitted that Burke could have elected not to ride horse No. 18. After discussing the horse with Saner, another competitor, Burke concluded that the behavior of the horse at the O'Neill rodeo was a "one-time deal" and assumed that he could ride the animal, a decision which he subsequently characterized as "a mistake." The record thus establishes that

Burke considered the specific risk posed by riding horse No. 18 and made a conscious decision to expose himself to the potential danger by riding the horse in competition. Moreover, it is uncontroverted that the injuries for which damages are sought in this action occurred as a result of this decision.

There is conflicting testimony with respect to whether Mundorf told McKay not to bring horse No. 18 to any high school rodeo events after the O'Neill rodeo incident. Under our standard of review, which entitles the nonmoving party to the benefit of all favorable inferences, we therefore assume that Mundorf did issue this instruction to McKay. However, we conclude that this does not constitute a genuine issue of material fact with respect to the defense of assumption of risk because Mundorf's statement to McKay was based upon information which was fully known to both Burke and his father, namely, the fact that horse No. 18 fell over backward onto its rider during the O'Neill rodeo. There is nothing in the record to suggest that either Mundorf or McKay had knowledge with respect to the bucking tendencies or propensities of horse No. 18 superior to that of Burke or his father. Cf. *Blose v. Mactier*, 252 Neb. 333, 562 N.W.2d 363 (1997) (superior knowledge of invitor is foundation for liability, absent which no liability exists). Mundorf, McKay, Burke, and Burke's father all witnessed the only prior occasion when the horse fell over backward onto its rider during a rodeo competition. While it is true that Burke's injury could have been avoided if McKay had complied with Mundorf's instruction not to bring the horse to future high school rodeos because of what occurred at the O'Neill rodeo, it is equally true that the injury could have been avoided if, based upon his personal knowledge of the same incident, Burke had elected not to ride the horse in the Madison competition. Burke's deliberate, considered, and voluntary decision to ride the horse with full knowledge of the specific risk of danger based upon the animal's prior actions thus constitutes assumption of risk as a matter of law.

[5] An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *J.D. Warehouse v. Lutz & Co.*, 263 Neb. 189, 639 N.W.2d 88 (2002). Because we conclude that all claims asserted in this action are

barred as a matter of law by the defense of assumption of risk as set forth in § 25-21,185.12, we do not reach the issues of whether such claims would be barred by the waiver and release agreement executed by Burke and his parents, or under the provisions of §§ 25-21,249 through 25-21,253.

CONCLUSION

For the foregoing reasons, we conclude that uncontroverted evidence establishes that Burke knew and appreciated the specific danger posed by riding horse No. 18 in the Madison rodeo and that he voluntarily exposed himself to that danger by electing to ride the horse in the rodeo competition. All claims with respect to injuries occurring as a result of such exposure are therefore barred as a matter of law by the doctrine of assumption of risk as codified at § 25-21,185.12, and the district court did not err in entering summary judgment in favor of defendants.

AFFIRMED.

HENDRY, C.J., dissenting.

I respectfully dissent. The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts. The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002). Whether the plaintiff assumed a risk usually presents a question of fact. See *id.*

The Restatement (Second) of Torts § 496 D, comment *e.* at 575 (1965), is in accord:

> Whether the plaintiff knows of the existence of the risk, or whether he understands and appreciates its magnitude and its unreasonable character, is a question of fact, usually to be determined by the jury under proper instructions from the court. The court may itself determine the issue only where reasonable men could not differ as to the conclusion.

See, also, *Mandery v. Chronical Broadcasting Co.*, 228 Neb. 391, 399, 423 N.W.2d 115, 120 (1988) (" '[e]xcept where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of

the existence of the risk and appreciates its unreasonable character, or the danger involved, including the magnitude thereof, and voluntarily accepts the risk' "); NJI2d Civ. 2.02B (defendant has burden to show that "the plaintiff knew of and understood the *specific* danger" (emphasis supplied)).

As the majority notes, shortly after Burke realized he had drawn horse No. 18 at the Madison rodeo, he talked to Saner, a coparticipant. Saner told Burke that he had observed horse No. 18 at another rodeo and that it had "bucked straight out" without any trouble and did not go over backward onto its rider. This evidence is uncontroverted. Based on Saner's statement, Burke concluded that the O'Neill incident, which occurred approximately 1 year earlier, was a "one-time deal with [the rider in O'Neill] . . . and [the horse] would buck fine." Burke stated that after talking to Saner, he did not have any apprehensions about riding the horse and that he also believed McKay would bring suitable livestock to a high school rodeo.

Viewing this evidence in the light most favorable to Burke, and giving him the benefit of all reasonable inferences as we must do, see *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000) (where reasonable minds differ as to whether inference supporting ultimate conclusion can be drawn, summary judgment should not be granted), I am of the view that Burke's conclusion based on Saner's observation creates a genuine issue of fact as to Burke's subjective appreciation and understanding of the specific risk, to wit: that the horse would not buck normally, but would instead rear up and flip over backward. Whether Burke was negligent in reaching that conclusion is not the issue presented by this appeal.

Because I do not believe it is appropriate for Burke's assumption of the risk to be decided as a matter of law, I would reverse the granting of summary judgment on this basis and remand the matter to the district court for further proceedings.

CONNOLLY and GERRARD, JJ., join in this dissent.

BRIAN MOGENSEN, DOING BUSINESS AS PREMIUM FARMS, APPELLANT, V. BOARD OF SUPERVISORS, ANTELOPE COUNTY, NEBRASKA, APPELLEE.

679 N.W.2d 413

Filed May 21, 2004. No. S-02-1408.

1. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
4. ____: ____. When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte.
5. **Administrative Law.** An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.
6. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
7. **Statutes: Legislature: Intent.** When a statutory term is reasonably considered ambiguous, a court may examine the legislative history of the act in question to ascertain the intent of the Legislature.
8. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
9. ____. If a conflict exists between two statutes on the same subject matter, the special provisions of a statute prevail over the general provisions in the same or other statutes.
10. **Political Subdivisions: Appeal and Error.** An appeal from a board of supervisors denying a conditional use permit is to be taken in accordance with Neb. Rev. Stat. §§ 23-168.01 to 23-168.04 (Reissue 1997) and not by a petition in error.

Appeal from the District Court for Antelope County: PATRICK G. ROGERS, Judge. Appeal dismissed.

Rodney M. Confer and Joseph A. Wilkins, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellant.

Michael L. Long, Antelope County Attorney, for appellee.

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

CONNOLLY, J.

This case requires us to decide what is the proper procedure to appeal a county board of supervisors' decision to deny a conditional use permit. Brian Mogensen, doing business as Premium Farms, appeals the dismissal of his petition in error. Mogensen sought to appeal the denial of a conditional use permit by the Antelope County Board of Supervisors (Board of Supervisors). We determine that the district court lacked jurisdiction to hear the petition in error because Mogensen failed to appeal to the Antelope County Board of Adjustment (Board of Adjustment) as required by Neb. Rev. Stat. §§ 23-168.01 to 23-168.04 (Reissue 1997). Accordingly, we dismiss the appeal.

BACKGROUND

Mogensen applied for a conditional use permit to apply nutrients from gray water at a hog confinement lagoon through irrigation pivots or trucks. The Antelope County Planning Commission voted to recommend to the Board of Supervisors that a conditional use permit be granted. The recommendation included conditions about the location Mogensen could pump, a requirement that pumping occur only during the growing season, and a requirement that a neighbor be contacted when there was a south wind, to determine if pumping could be done.

The Board of Supervisors held public hearings on May 7 and 15, 2002. Minutes from the second hearing state that there was discussion on (1) chiseling in the nutrients, spreading them on the ground, and dispersing them through a pivot; (2) untimely waste dispersion by Mogensen during the off season; and (3) downsizing the hog operation. Without stating its reasons, the Board of Supervisors denied the permit. On June 4, the Board of Supervisors clarified its decision denying the permit, stating that it was " 'due to concern of citizens within the set backs.' "

Mogensen filed a petition in error in the district court, assigning five errors. He later dismissed all assigned errors except one. He alleged that the Board of Supervisors, by failing to state reasons for disapproving the permit, violated the Antelope County zoning regulations and acted arbitrarily in denying the permit.

The district court stated that there appeared to be two ways to appeal the ruling of the Board of Supervisors: by petition in

error and by appealing to the Board of Adjustment. The court addressed the matter under the petition in error statute, Neb. Rev. Stat. § 25-1901 (Cum. Supp. 2002). The court determined that Mogensen failed to show that the Board of Supervisors' decision was not supported by relevant evidence. Thus, the court dismissed the petition in error. Mogensen appeals.

ASSIGNMENTS OF ERROR

Mogensen assigns that the district court erred by failing to reverse the denial of the permit because (1) the Board of Supervisors failed to provide an equitable process to obtain a permit under Neb. Rev. Stat. § 23-114.01 (Reissue 1997) and (2) there was no evidence to support a rational basis to deny the permit.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is a matter of law. *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003).

[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. *Mitchell v. French*, 267 Neb. 656, 676 N.W.2d 361 (2004).

ANALYSIS

First we address what is the proper procedure to appeal a denial of a conditional use permit by a board of supervisors. Here, Mogensen filed a petition in error with the district court. The parties, however, do not discuss the procedural issue in their briefs. The court noted that §§ 23-168.01 to 23-168.04 also provide a method for appeal. Thus, the question is whether Mogensen, by filing a petition in error, properly perfected an appeal. If a petition in error is not the proper procedure for appealing the Board of Supervisors' decision, then the court lacked jurisdiction.

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004). When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court

to raise and determine the issue of jurisdiction sua sponte. *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000).

Because of the procedural tension, we must interpret a series of statutes. The petition in error statute states that a "judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court." § 25-1901. But § 23-168.02 states in part:

> (1) An appeal to the board of adjustment may be taken by any person or persons aggrieved, or by any officer, department, board, or bureau of the county affected by any decision of an administrative officer or planning commission. Such appeal shall be taken within a reasonable time, as provided by the rules of the board of adjustment, by filing with the board a notice of appeal specifying the grounds thereof. The officer or agency from whom the appeal is taken shall transmit to the board of adjustment all the papers constituting the record upon which the action appealed from was taken.

In addition, § 23-168.03 provides:

> The board of adjustment shall, subject to such appropriate conditions and safeguards as may be established by the county board, have only the following powers:
>
> (1) To hear and decide appeals where it is alleged by the appellant that there is an error in any order, requirement, decision, or refusal made by an administrative official or agency based on or made in the enforcement of any zoning regulation or any regulation relating to the location or soundness of structures[.]

Finally, § 23-168.04 states in part:

> Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any officer, department, board, or bureau of the county, may present to the district court for the county a petition, duly verified, setting forth that such decision is illegal, in whole or in part, and specifying the grounds of the illegality.

Section 23-168.03(1) gives a board of adjustment the power to hear appeals of any "order, requirement, decision, or refusal made by an administrative official or agency based on or made in the enforcement of any zoning regulation." Thus, we must

determine whether the Board of Supervisors is an "administrative official or agency."

[5-7] We have stated that an administrative agency is "a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking." *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 366, 527 N.W.2d 185, 193 (1995). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003). But when a statutory term is reasonably considered ambiguous, a court may examine the legislative history of the act in question to ascertain the intent of the Legislature. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002). Here, however, the statutes do not define whether the Board of Supervisors is an agency.

The Nebraska Court of Appeals recently examined legislative history in determining whether an appeal could be taken to a board of adjustment from a board of supervisors' decision. *Niewohner v. Antelope Cty. Bd. of Adjustment*, 12 Neb. App. 132, 668 N.W.2d 258 (2003). In *Niewohner*, the board of supervisors denied a conditional use permit which was then appealed to the board of adjustment. The board of adjustment determined that it lacked jurisdiction over the appeal. The district court affirmed, and the Court of Appeals reversed, holding that the district court had jurisdiction.

Referring to §§ 23-168.01 to 23-168.04 along with the county zoning regulations that were virtually identical to § 23-168.03, the Court of Appeals determined that the board of adjustment had jurisdiction over the appeal. The Court of Appeals relied heavily on legislative history showing that the Legislature intended the board of adjustment to be the quasi-judicial authority that would review appeals from the board of supervisors.

For example, when introducing the bill, Senator Doug Bereuter stated:

> "The [County Board of Supervisors] implements any regulations [it] might have enacted through the building inspector. . . . If [the building inspector] denies [a building permit,] the citizen can take an appeal to the Zoning Board of Adjustment. . . . [T]he appeal provisions beyond [the Zoning

> Board of Adjustment are] to the district court and on up the court system."

Niewohner, 12 Neb. App. at 136, 668 N.W.2d at 262 (quoting Committee on Government, Military, and Veterans' Affairs, L.B. 186, 85th Leg., 1st Sess. (Feb. 18, 1977)). Senator Bereuter then stated:

> "[T]he Zoning Board of Adjustment . . . is a judicial or quasi judicial body and can do only three things under the existing state law. One, it can interpret boundaries of districts; two, it can grant variances under various specific conditions which are very closely delineated by law, wherefore unusual conditions like topography or the shape of a lot, a strict application of the rules wouldn't permit any kind of construction on that lot. In those cases[,] the variance can be granted. The Zoning Board of Adjustment is the only body that can grant such variance[.] The third area . . . is . . . [the Zoning Board of Adjustment] serves as an appeal mechanism when the citizen feels that the building inspector or the governing body didn't follow their own regulations or perhaps discriminated unfairly against that citizen."

Niewohner, 12 Neb. App. at 137, 668 N.W.2d at 262. Senator Bereuter further commented that under the proposed statutory provisions,

> "the County [Supervisors] may not appoint themselves to the Zoning Board of Adjustment. . . . The reason I feel strongly about this matter is that the Zoning Board of Adjustment is the quasi judicial body. It does serve as an avenue of appeal for the decisions of the [County Board of Supervisors] or the building inspector. Therefore, if you have one of the County [Supervisors] sitting on the [Board of Adjustment] he in fact is ruling on the appeal of a decision he might have made himself. Or certainly his body made."

Id. at 137, 668 N.W.2d at 263.

Considering the statutory provisions, zoning regulations, and the legislative history, the Court of Appeals determined that the board of supervisors was an administrative agency and that the Legislature intended appeals from the board of supervisors to be taken to the board of adjustment. The court found particularly persuasive the concern that a member of the board of supervisors

could not simultaneously serve on the board of adjustment because he or she could face the problem of ruling on the appeal of a decision he or she might have made. Accordingly, the Court of Appeals reversed, and remanded. A petition for further review was not filed in the case.

We agree with the Court of Appeals that an appeal may be taken from a board of supervisors. A question remains, however, whether the procedure in §§ 23-168.01 to 23-168.04 forecloses the ability to appeal through a petition in error under § 25-1901. We determine that it does.

[8,9] The petition in error statutes allow a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions to be reversed, vacated, or modified by the district court. Further, a court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *In re Estate of Eickmeyer*, 262 Neb. 17, 628 N.W.2d 246 (2001). If a conflict exists between two statutes on the same subject matter, the special provisions of a statute prevail over the general provisions in the same or other statutes. *State ex rel. Garvey v. County Bd. of Comm.*, 253 Neb. 694, 573 N.W.2d 747 (1998).

[10] Here, the Legislature considered the Board of Supervisors to be an administrative agency and the Board of Adjustment as a body that performs judicial or quasi-judicial functions. Thus, by adopting a specific method for appeal, the Legislature provided for an appeal specifically outside of the petition in error. Accordingly, we determine that an appeal from a board of supervisors denying a conditional use permit is to be taken in accordance with §§ 23-168.01 to 23-168.04 and not by a petition in error.

CONCLUSION

We conclude that Mogensen should have filed an appeal with the Board of Adjustment. The district court lacked jurisdiction to hear his appeal on a petition in error. Accordingly, we dismiss the appeal.

APPEAL DISMISSED.

STEPHAN, J., not participating.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF W.G. WOLTEMATH, ALSO KNOWN AS WILMER WOLTEMATH, ALSO KNOWN AS WILMER JOHAN GOTLIEB WOLTEMATH, AN INCAPACITATED AND PROTECTED PERSON.

KATHLEEN A. REENTS, APPELLANT, V. ROBERT J. WOLTEMATH, ATTORNEY IN FACT FOR W.G. WOLTEMATH AND TRUSTEE OF THE WILMER G. WOLTEMATH TRUST, APPELLEE.

680 N.W.2d 142

Filed May 28, 2004. No. S-02-550.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. **Attorney Fees: Judgments: Final Orders.** When a motion for attorney fees under Neb. Rev. Stat. § 25-824 (Reissue 1995) is made prior to the judgment of the court in which the attorney's services were rendered, the judgment will not become final and appealable until the court has ruled upon that motion.
4. **Jurisdiction: Appeal and Error.** After an appeal to an appellate court has been perfected in a civil case, a lower court is without jurisdiction to hear a case involving the same matter between the same parties.
5. **Final Orders: Appeal and Error.** A party may appeal from a court's order only if the decision is a final, appealable order.
6. **Appeal and Error.** A notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court.
7. **Judgments: Final Orders: Appeal and Error.** Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2002) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a lower court announces a decision that would be appealable if immediately followed by the entry of judgment.
8. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
9. **Fees: Time: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002), an untimely docket fee has the same effect as an untimely notice of appeal.
10. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
11. **Jurisdiction: Appeal and Error.** An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction.
12. ____: ____. When an appellate court is without jurisdiction to act, the appeal must be dismissed.

Appeal from the County Court for Douglas County: THOMAS G. MCQUADE, Judge. Appeal dismissed.

William E. Seidler, Jr., of Seidler & Seidler, P.C., for appellant.

Gregory C. Scaglione, of Koley Jessen P.C., L.L.O., for appellee.

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

GERRARD, J.

BACKGROUND

Kathleen A. Reents (Kathleen), the appellant, and Robert J. Woltemath (Robert), the appellee, are the adult children of W.G. Woltemath (W.G.). In 1995, W.G. executed a series of estate planning documents prepared by an attorney from the Koley Jessen law firm, which represented W.G. at that time and represents Robert in the current proceeding. In particular, W.G. executed a "springing" durable power of attorney, a health care power of attorney, a last will and testament, and a revocable trust. As pertinent, the durable power of attorney appointed Robert as W.G.'s attorney in fact in the event of his disability or incapacity, and Robert was named cotrustee of the trust in the event that W.G. became incompetent. The power of attorney and trust documents did not provide how W.G.'s disability, incapacity, or incompetence were to be determined.

By January 2001, W.G. was suffering from dementia of the Alzheimer's type, and Robert and Kathleen met to discuss the management of their father's affairs. They disagreed with respect to several issues. In April 2001, Kathleen filed a petition in the county court for appointment of a guardian and conservator for W.G., nominating herself as guardian, and a neutral attorney as conservator. Robert filed a responsive pleading alleging the existence of, and his authority pursuant to, the 1995 documents. Kathleen replied that the 1995 power of attorney was a "Springing" power of attorney that was effective only after a *judicial* determination of W.G.'s disability or incapacity to manage his own affairs and further that there had been no judicial determination of W.G.'s incompetence to manage the revocable trust. Robert replied that a judicial determination was unnecessary to activate his authority pursuant to those documents.

Kathleen also filed a motion to disqualify Koley Jessen from representing Robert, based on an alleged conflict of interest arising from the firm's prior representation of W.G. The county court denied that motion, but appointed independent counsel to represent W.G.

The matter proceeded to trial. Significantly, prior to trial, the parties stipulated that W.G. had properly executed the 1995 documents, that W.G. had become incompetent to handle his own affairs, and that "the Durable Power of Attorney executed by W.G. . . . on December 27, 1995 *has now become effective* due to the agreed upon incompetency of W.G." (Emphasis supplied.) After trial, Robert, joined by counsel for W.G., moved to dismiss Kathleen's petition. The county court granted the motion, finding no evidence, let alone clear and convincing evidence, that appointment of a guardian or conservator was necessary or advisable. After this decision, which was announced from the bench, Kathleen filed a notice of appeal and paid the required docket fee. Subsequently, the court entered a file-stamped order dismissing Kathleen's petition. Kathleen filed another notice of appeal, but this time did not pay the docket fee.

The county court's order dismissing Kathleen's petition specifically reserved the issue of attorney fees, which had been requested in Robert's responsive pleadings pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995). Kathleen's first two notices of appeal preceded the court's ruling on attorney fees. The county court subsequently awarded attorney fees against Kathleen, to Robert in the amount of $42,418.97 and to W.G.'s attorney in the amount of $12,568.72. Kathleen subsequently filed another notice of appeal, but again did not pay the docket fee. At that point, the procedural sequence of events occurring in 2002 stood as follows:

May 7	The county court announced, from the bench, its decision to dismiss the petition, and its intention to award attorney fees, but reserved ruling on the amount and to whom the attorney fees would be assessed.
May 15	Kathleen filed her first notice of appeal and paid the docket fee.

May 21	The county court filed a written order memorializing the decision announced from the bench on May 7, but still reserved ruling on attorney fees.
June 19	Kathleen filed her second notice of appeal, styled as an "Amended Notice of Appeal," purporting to relate to the May 21 file-stamped order. Kathleen did not pay another docket fee.
June 20	The county court filed its order assessing attorney fees against Kathleen.
June 28	Kathleen filed another "Notice of Appeal." Kathleen again did not pay the docket fee.

ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

Kathleen assigns, consolidated and restated, that the county court erred in (1) not appointing a guardian or conservator for W.G. because Robert failed to obtain the judicial declaration necessary to give effect to the springing durable power of attorney, (2) not disqualifying Koley Jessen from representing Robert, and (3) ordering Kathleen to pay attorney fees.

Robert argues that this court lacks jurisdiction because of Kathleen's failure to pay the docket fee for the only notice of appeal she filed with respect to a final, appealable order. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000) (filing of notice of appeal and depositing of docket fee are both mandatory and jurisdictional). Robert also argues that Kathleen has waived her assignment of error respecting the disqualification of Koley Jessen by not seeking timely review of that issue in a mandamus action. See *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004) (appellate action is inadequate means of presenting attorney conflicts of interest for review; party seeking review of order denying disqualification should seek mandamus).

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. *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

ANALYSIS

[2] We first turn to Robert's contention that we lack appellate jurisdiction. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004). Robert contends that we lack jurisdiction because Kathleen's first two notices of appeal were premature, and because her final notice of appeal was not accompanied by the required docket fee. Kathleen argues, in response, that (1) her May 15, 2002, notice of appeal divested the county court of jurisdiction to rule on attorney fees, (2) the notice of appeal filed on May 15 should be treated as filed on June 20 pursuant to Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2002), and (3) the docket fee filed with the May 15 notice of appeal should relate forward to the notice of appeal filed on June 28.

[3] As a preliminary matter, we note, although the parties do not contend otherwise, that the notices of appeal filed on May 15 and June 19, 2002, were premature and not taken from a final, appealable order. When a motion for attorney fees under § 25-824 is made prior to the judgment of the court in which the attorney's services were rendered, the judgment will not become final and appealable until the court has ruled upon that motion. *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002). Kathleen's May 15 and June 19 notices of appeal were not taken from final, appealable orders and failed to confer appellate jurisdiction on this court.

[4-6] This conclusion is also dispositive of Kathleen's first argument with respect to jurisdiction: that the county court was divested of jurisdiction by the May 15, 2002, notice of appeal. Generally, after an appeal to an appellate court has been perfected in a civil case, a lower court is without jurisdiction to hear a case involving the same matter between the same parties. However, a party may appeal from a court's order only if the decision is a final, appealable order. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). A notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court. *Id.*; *Holste v. Burlington Northern RR. Co.*, 256

Neb. 713, 592 N.W.2d 894 (1999). Because Kathleen's first two notices of appeal were taken from a nonappealable order, see *Salkin, supra*, the county court retained jurisdiction to award attorney fees.

Kathleen's argument that the May 15, 2002, notice of appeal should be treated as having been filed on June 20 is also without merit. She relies upon § 25-1912(2), which provides that

> [a] notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.

However, the plain language of § 25-1912(2) provides for the relation forward of a notice of appeal or docket fee only when filed or deposited "after the announcement of a decision or final order," but before "entry of the judgment" pursuant to Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2002). This statute essentially codifies our prior rule, expressed in *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994), that a notice of appeal filed after the trial court announced its decision, but before a judgment has been rendered, is effective to confer jurisdiction on the appellate court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered in accordance with the decision which was announced and to which the notice of appeal relates. See, also, *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *Janssen v. Tomahawk Oil Co.*, 254 Neb. 370, 576 N.W.2d 787 (1998).

As with the rule we set forth in *McDowell, supra*, § 25-1912(2) was not intended to validate anticipatory notices of appeal filed prior to the announcement of a final judgment. See, *General Television Arts, Inc. v. Southern Ry. Co.*, 725 F.2d 1327 (11th Cir. 1984); *Hess, supra*. The language of § 25-1912(2) is functionally identical to that of Fed. R. App. P. 4(a)(2). See *id.* ("notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry"). Under rule 4(a)(2), the relation forward of a premature notice of appeal applies only to a decision that will be appealable once it is entered. See 20 James Wm.

Moore et al., Moore's Federal Practice § 304.12 (3d ed. 2004). "Although an appeal need not be from a final *judgment*, it must be from a final *decision*." *Id.*, § 304.23 at 304-74.

The U.S. Supreme Court, addressing the effect of rule 4(a)(2), explained that the rule permits a notice of appeal filed from certain nonfinal decisions to serve as an effective notice from a subsequently entered final judgment. See *FirsTier Mtge. Co. v. Investors Mtge. Ins. Co.*, 498 U.S. 269, 111 S. Ct. 648, 112 L. Ed. 2d 743 (1991). However, the Court stated that a premature notice of appeal relates forward to the date of entry of a final "judgment" only when the ruling designated in the notice is a "decision" for purposes of the rule. See *id.* Thus, the rule does not permit a notice of appeal from a clearly interlocutory decision. See *id.* Rather, the rule "permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment." (Emphasis in original.) 498 U.S. at 276. Based on that holding, the Court concluded that the notice of appeal at issue in that case related forward, because it had been filed after a bench ruling that purported to dispose of all of the pending claims. See *id.* See, e.g., *American Totalisator v. Fair Grounds Corp.*, 3 F.3d 810 (5th Cir. 1993) (notice of appeal related forward because it was filed after disposition of all outstanding issues). Compare, e.g., *In re Jack Raley Const., Inc.*, 17 F.3d 291 (9th Cir. 1994) (premature notice of appeal did not relate forward under rule 4(a)(2) because matter of prejudgment interest was not decided until after notice of appeal had been filed).

[7] The reasoning of *FirsTier Mtge. Co.* with respect to rule 4(a)(2) is equally applicable to the functionally identical language of § 25-1912(2). See, *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring) (U.S. Supreme Court interpretation of federal statute is persuasive where state law is identical to federal law at issue); *In re Application of Northland Transp.*, 239 Neb. 918, 479 N.W.2d 764 (1992). We also assume that when the Legislature used the language of rule 4(a)(2), it was aware of the U.S. Supreme Court's authoritative explanation of the effect of that rule. Consequently, we hold that § 25-1912(2) permits a notice of

appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a lower court announces a decision that would be appealable if immediately followed by the entry of judgment. See *FirsTier Mtge. Co., supra.*

Based on that holding, we conclude that neither the county court's pronouncement from the bench on May 7, 2002, nor the county court's written order of May 21, announce a "decision or final order" within the meaning of § 25-1912(2). The notices of appeal of May 15 and June 19 were filed before the issue of attorney fees was finally determined and cannot relate forward. In short, the May 7 order was not an "announcement of a decision or final order" within the meaning of § 25-1912(2) because it was not a decision that would have been appealable if immediately followed by the entry of judgment. See, *FirsTier Mtge. Co. v. Investors Mtge. Ins. Co.*, 498 U.S. 269, 111 S. Ct. 648, 112 L. Ed. 2d 743 (1991); *In re Jack Raley Const., Inc., supra*; *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002). The only timely and effective notice of appeal filed in this case was filed on June 28, as it was the only notice filed after the county court announced a final decision and entered a final, appealable order.

We now turn to Kathleen's final contention, and the fundamental issue of appellate jurisdiction presented in this case: whether the docket fee deposited with the May 15, 2002, notice of appeal satisfied the jurisdictional requirements associated with the June 28 notice of appeal. As relevant, § 25-1912(1) provides that

> proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the entry of such judgment, decree, or final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and . . . by depositing with the clerk of the district court the docket fee required by section 33-103.

See, also, Neb. Rev. Stat. § 30-1601 (Cum. Supp. 2002) (appeals from county court in probate cases taken to Nebraska Court of Appeals in same manner as appeal from district court). Section 25-1912(4) further provides, in relevant part, that

> an appeal shall be deemed perfected and the appellate court shall have jurisdiction of the cause when such notice of appeal has been filed and such docket fee deposited in the office of the clerk of the district court, and after being perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional.

[8] We conclude that Kathleen's argument, that the docket fee she paid should relate forward, is inconsistent with the plain language of § 25-1912, and that she was required to deposit the required docket fee after the entry of final judgment in order to perfect her appeal. Section 25-1912(1) requires that an appeal is perfected by filing a notice of appeal and depositing the docket fee "within thirty days *after* the entry of such judgment, decree, or final order." (Emphasis supplied.) See *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002). The plain language of § 25-1912(1) requires that both the notice of appeal and the docket fee must be filed *after* the entry of the final order from which the appeal is taken. See *Haber, supra*. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Estate of Breslow*, 266 Neb. 953, 670 N.W.2d 797 (2003).

[9] Furthermore, Kathleen's argument is inconsistent with § 25-1912(2) and (3). Section 25-1912(2) states that a docket fee deposited after the "announcement of a decision or final order," but before the entry of judgment, shall be treated as deposited after the entry of judgment. Section 25-1912 provides that both the notice of appeal and docket fee are jurisdictional, and the statute establishes identical criteria for determining whether they were timely filed and whether they should relate forward. See *id.* In other words, under § 25-1912, *an untimely docket fee has the same effect as an untimely notice of appeal.* We have already concluded that the May 15, 2002, notice of appeal cannot relate forward, because it was not filed after the announcement of a decision or final order that would have been appealable if followed immediately by the entry of judgment. The May 15 docket fee is subject to the same statutory language, and cannot relate

forward to the June 20 judgment or June 28 notice of appeal for the same reasons.

Similarly, § 25-1912(3) provides that if a party files a motion that terminates the running of the time for filing a notice of appeal, such as a motion for new trial, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect. The statute provides that a new notice of appeal shall be filed after the entry of the order ruling on the terminating motion, but that "[n]o additional fees are required for such filing." *Id.*

[10] 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. *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003). Section 25-1912 expressly provides for the relation forward of a docket fee that has been prematurely deposited and sets forth the circumstances under which such a relation forward is to occur. Were we to conclude that any prematurely filed docket fee relates forward to a subsequently filed notice of appeal, the specific provisions of § 25-1912 would be superfluous. Rather, we must conclude that the Legislature's positive statement of when a relation forward is to occur was intended to foreclose a notice of appeal or docket fee from relating forward under other circumstances. See *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002) (applying principle that expression of one thing is exclusion of others).

[11,12] For the foregoing reasons, we conclude that the jurisdictional requirements of § 25-1912 were not satisfied by the May 15, 2002, docket fee, which was not deposited "within thirty days after" the entry of the final order from which this appeal was taken. Kathleen's appeal, based on the June 28 notice of appeal, was not perfected pursuant to § 25-1912(4), and we consequently lack appellate jurisdiction. An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction. *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994). When an appellate court is without jurisdiction to act, the appeal must be dismissed. *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002).

APPEAL DISMISSED.

CONNOLLY, J., not participating.

IN RE PETITION OF OMAHA PUBLIC POWER DISTRICT. OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLEE, V. TRACT NO. 1 ET AL., APPELLANTS.

680 N.W.2d 128

Filed May 28, 2004. No. S-02-899.

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: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
3. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error.
4. **Trial: Courts: Jury Instructions: Appeal and Error.** It is not necessarily prejudicial error for a court, without notice to and outside the presence of counsel and after deliberations have already begun, to direct the jury to consider the instructions previously given.
5. **Eminent Domain: Damages.** The measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement.
6. **Jury Instructions: Words and Phrases.** A supplemental instruction is one which would have been proper in the first charge.
7. **Trial: Judges: Proof.** With respect to judicial misconduct, the complaining party bears the burden of proving both that an unauthorized private communication occurred and that the complaining party suffered prejudice as a result.
8. **Motions for New Trial: Juror Misconduct.** An application for new trial may properly be based upon allegations of misconduct of the jury.
9. **Motions for New Trial: Juror Misconduct: Proof.** In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence.
10. **Motions for New Trial: Juror Misconduct: Verdicts.** In a motion for new trial, the misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict.
11. **New Trial: Jury Misconduct: Proof.** In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred.
12. **Jury Misconduct: Appeal and Error.** The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion.
13. **Rules of Evidence: New Trial: Jurors: Testimony.** Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1995), does not equate with, or govern, grounds for a new trial, but merely governs the competency of jurors to testify concerning the jury process.
14. **Rules of Evidence: Verdicts: Juries.** Under Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1995), a juror may testify as to whether the jury considered

prejudicial information emanating from a source other than evidence presented at trial, but a juror's testimony may not be used to establish the effect of such information upon the jury or its influence on the jury or jury motives, methods, misunderstandings, thought processes, or discussions during deliberations which entered into the verdict.

15. **Jury Misconduct: Proof.** Extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant.
16. **Rules of Evidence: Jurors.** For purposes of Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1995), while one may not inquire as to whether the presence of the evidence affected the juror's mind, it is proper and necessary that evidence be presented by the objecting party to show that extraneous prejudicial information was improperly brought to the jury's attention.
17. **Damages: Appeal and Error.** On appeal, the fact finder's determination of damages is given great deference.
18. ____: ____. The amount of damages is a matter solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved.
19. ____: ____. An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

William G. Dittrick, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, and J. Patrick Green for appellants.

Roger L. Shiffermiller and Timothy J. Thalken, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Duane J. Dowd, Frances D. Dowd, Frank W. Bemis, Connie B. Bemis, and Roberta F. Bemis, condemnees in a condemnation action brought by the Omaha Public Power District (OPPD), appeal an order denying their motion for new trial following a jury verdict awarding damages in their favor. Condemnees allege that the district court for Sarpy County communicated with the jury after it retired to deliberate, that the jury awarded inadequate damages, and that juror misconduct occurred. We affirm.

II. BACKGROUND

Condemnees are the owners of a tract of land located on the southwest corner of 156th Street and Giles Road in Sarpy County, Nebraska (Dowd/Bemis property). According to testimony at trial, the Dowd/Bemis property is approximately 68 acres, which is adjacent to a very large area of parkland and lake otherwise known as the Chalco Hills Recreation Area. On January 22, 1999, OPPD filed a petition for condemnation to condemn a permanent right-of-way easement consisting of 1.49 acres of the Dowd/Bemis property for the purpose of constructing a 345,000-volt electric powerline along the border of the property. On July 15, condemnees filed an appeal in the district court for Sarpy County. Condemnees alleged that as owners of the Dowd/Bemis property, which property OPPD sought to condemn and acquire by eminent domain, the $30,000 sum awarded for the taking of their property was neither fair nor adequate. The case ultimately proceeded to trial, and the jury returned a verdict in favor of condemnees.

During trial, condemnees produced testimony regarding the nature of the easement and the property subject to the easement. Randal L. Samson, at the time of the condemnation of the Dowd/Bemis property, was the manager of transmission engineering with OPPD. He described the Dowd/Bemis property as having four power poles 135 to 140 feet in height, approximately 3½ feet in diameter, and currently carrying seven total wires. The lines attached to the poles on the Dowd/Bemis property were 345,000-volt lines, which were the largest transmission lines used by OPPD in either Douglas County or Sarpy County. The transmission lines had already been constructed on the Dowd/Bemis property at the time OPPD filed its condemnation action.

Condemnees also called appraisal expert Leroy L. Verschuur. Verschuur testified that the easement placed no limits on the number of poles OPPD could erect on the Dowd/Bemis property, the height of the poles, or the number of wires that could be placed on the poles. Verschuur noted that OPPD had erected four poles on the easement property. Verschuur also testified that the easement placed no limit on how much power OPPD could push through the lines and that the easement gave OPPD control over access to the property. Using the comparable sales approach,

Verschuur calculated the value of the 1.49-acre parcel subject to the easement at $31,290. Calculating damages to the remaining property as a result of the easement at $391,000, Verschuur calculated total damages to condemnees at $422,000. OPPD's expert appraiser, Thomas E. Stevens, agreed that, after the taking, the Dowd/Bemis property no longer had unlimited access rights, but Stevens testified that he did not feel this influenced the value of the property. Instead, Stevens limited his valuation of condemnees' property to current use only and valued condemnees' damages at $29,800.

After considering the evidence, the jury returned a verdict for condemnees of $31,290, on which judgment was entered. Condemnees subsequently filed a motion for new trial alleging, inter alia, juror misconduct, trial court error, and inadequate damages. With respect to their claim of trial court error, condemnees contended that the court, after jury deliberations began and following a written question from the jury, gave an oral explanation of a jury instruction to the jury. This was done without notification to or consent of counsel, and without reducing the explanation to writing. The written question was given back to the jury and has not been located. Condemnees offered juror testimony, and both parties offered juror affidavits in support of their respective positions relative to condemnees' motion for new trial. The trial court denied the motion for new trial. Additional facts relevant to each of condemnees' contentions in this appeal will be discussed later in this opinion. Condemnees timely appealed, 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).

III. ASSIGNMENTS OF ERROR

It is noted that all of condemnees' assignments of error relate to the trial court's order denying condemnees' motion for new trial. Condemnees assign, restated, that the trial court erred in (1) denying their motion for new trial; (2) finding that its decision to confer with the jury in the jury room after deliberations had begun, outside the presence of counsel, without having the jury's question or the court's discussion with the jury recorded, and

without having the court's response permanently memorialized, was not prejudicial; (3) finding that a statement made by a juror, who was an electrical engineer, to the jury during deliberations that a 345,000-volt transmission line and a 161,000-volt transmission line were the same did not go to a material issue in the case and was not prejudicial; (4) concluding that a visit by one of the jurors to the condemnation site was not material and, therefore, not prejudicial; and (5) failing to find the jury awarded inadequate damages, thereby justifying a new trial.

Although condemnees' assignments of error Nos. 2 through 4, as set forth in their brief, claim that the trial court found harmless error, we will examine the actions of the trial court for error and whether such error was prejudicial.

IV. STANDARD OF REVIEW

[1] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Perry Lumber Co. v. Durable Servs.*, 266 Neb. 517, 667 N.W.2d 194 (2003); *Loving v. Baker's Supermarkets*, 238 Neb. 727, 472 N.W.2d 695 (1991).

[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998); *Kaminski v. Bass*, 252 Neb. 760, 567 N.W.2d 118 (1997).

V. ANALYSIS

1. Judicial Misconduct

In restated assignment of error No. 2, condemnees contend that the trial court erred in answering a written question from the jury after the jury had retired, orally and out of the presence of and without notice to counsel, and without a court reporter present to preserve the discussion and the written question and response of the court. Condemnees further claim that because the nature and extent of the court's conversation with the jury is not clear from the record, prejudice should be presumed, thereby necessitating a new trial.

Condemnees offered the testimony and affidavits of jurors J.W. and A.H. in support of their motion for new trial. Juror J.W.'s affidavit states that during deliberations, the jury sent a written question to the trial judge relating to the jury instruction that addressed the " 'full extent of the easement.' " Juror J.W.'s affidavit further states that "[t]he judge then came in and orally talked to the jury about this question." During the hearing on the motion, juror J.W. testified as follows:

> Q Okay. Do you remember what that question was, sir?
> A It had to do with the easement.
> Q Okay.
> A Size of the easement.
> . . . .
> Q Can you tell me, to the best of your recollection, what the question was?
> A As I remember, we were discussing the easement itself, and we wanted to know what it covered exactly.

Juror A.H.'s affidavit states that "[d]uring the actual jury deliberation of this matter, the jury sent a written question to the Judge about the instruction dealing with 'the full extent of the easement' and to what land this applied to. [The trial judge] then orally talked to the jury about this question."

[3] OPPD objected to both jurors J.W.'s and A.H.'s affidavits on the bases of relevance and that the statements therein constitute interdeliberational statements of the jury. The trial court overruled these objections. OPPD did not cross-appeal and assign the trial court's ruling as error, and therefore, we do not consider the objections. See *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003) (to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief of party assigning error).

OPPD offered the affidavits of jurors C.B. and A.W. Jurors C.B.'s and A.W.'s affidavits both state in paragraph 2 that "[d]uring jury deliberation of this matter, the jury sent a written question to the Judge. In response to this question, the Judge came into the jury room and told the members of the jury to refer to the jury instructions previously given." No objection was made to paragraph 2 of these juror affidavits.

The only dispute in this case is damages. Specifically, condemnees contend that the damage award may have been adversely affected by the trial court's failure to notify condemnees and give them the opportunity to request appropriate supplemental jury instructions.

Neb. Rev. Stat. § 25-1115 (Reissue 1995) provides:

> No oral explanation of any instruction authorized by the preceding sections shall, in any case, be allowed, and any instruction or charge, or any portion of a charge or instructions, given to the jury by the court and not reduced to writing, as aforesaid, or a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections, shall be error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein.

Neb. Rev. Stat. § 25-1116 (Reissue 1995) provides:

> After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

Although condemnees have asserted as error a violation of §§ 25-1115 and 25-1116, we have determined that directing a jury to reread properly given instructions is not an instruction as contemplated by § 25-1115. See *Sesostris Temple Golden Dunes v. Schuman*, 226 Neb. 7, 409 N.W.2d 298 (1987) (determining trial court did not further instruct jury when it told them to reread jury instructions previously given). As such, § 25-1115 is inapplicable here. However, pursuant to § 25-1116, we conclude that the trial court committed error (1) in answering the jury's question without notice to the parties or their counsel in violation of § 25-1116 and (2) in addressing the jury's question in the jury room as opposed to open court as required by § 25-1116. However, we will conclude in this opinion that these errors are not prejudicial.

[4] We have previously concluded that it is not necessarily *prejudicial* error for a court, without notice to and outside the

presence of counsel and after deliberations have already begun, to direct the jury to consider the instructions previously given. See, *Sesostris Temple Golden Dunes v. Schuman, supra*; *Hansen v. Hasenkamp*, 192 Neb. 530, 223 N.W.2d 44 (1974); *Anderson v. Evans*, 168 Neb. 373, 96 N.W.2d 44 (1959). In *Sesostris Temple Golden Dunes*, after deliberations began, the jury submitted several questions to the trial court. Without notifying counsel, the trial court responded to the jury's requests by stating, "'Reread the instructions. The answers to your questions can be found there.'" *Sesostris Temple Golden Dunes v. Schuman*, 226 Neb. at 11, 409 N.W.2d at 301. On appeal, plaintiff contended that the trial court erred in failing to notify counsel of the jury's questions submitted during deliberations, resulting in prejudice to plaintiff. Plaintiff contended that counsel should have been given an opportunity to draft clearer instructions or submit a special verdict form. Finding plaintiff's assignment without merit, we noted that the jury instructions initially given to the jury before retiring to deliberations did answer the jury's subsequent questions to the trial court. We concluded that plaintiff was not prejudiced by the court's response to the jury's question. *Id.* Thus, in the instant case, if the jury instructions given were correct, then the trial court's action of directing the jury, without notice to and outside the presence of counsel, to refer to the instructions previously given was not prejudicial.

This condemnation case involves the taking of an easement. As such, NJI2d Civ. 13.06, applicable to easements, is the appropriate instruction.

NJI2d Civ. 13.06 states:

> III. Owner's Compensation
>
> The plaintiff is entitled to recover the difference[, if any,] between the fair market value of the property before the easement was taken and its fair market value after the easement was taken. In addition, the plaintiff is entitled to recover (his, her, its) reasonable abstracting expenses.

The instructions given in this case regarding the method of determining condemnees' damages is contained in instruction No. 2, under "C. Burden of Proof." This instruction states: "The Condemnees are entitled to recover the difference between the fair market value of it's [sic] property before the easement was taken,

and it's [sic] fair market value after the easement was taken." A review of the record shows that condemnees objected to instruction No. 2 on only two grounds. First, condemnees requested that the word "immediately" be added before the phrase "after the easement was taken." Condemnees also objected to the language found in instruction No. 2 relating to the purpose for the condemnation, which is not an issue in this case, and requested that its proposed jury instruction No. 2 be used instead. However, jury instruction No. 2 given by the trial court was the appropriate instruction.

[5] In *Ward v. Nebraska Electric G. & T. Coop., Inc.*, 195 Neb. 641, 240 N.W.2d 18 (1976), we held that the measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement. See, also, *Fulmer v. State*, 178 Neb. 664, 134 N.W.2d 798 (1965). We conclude that instruction No. 2 with regard to the measure of damages correctly states the law, was not misleading, and adequately covered the issue. See, *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001); *Springer v. Bohling*, 259 Neb. 71, 607 N.W.2d 836 (2000).

The trial court's failure to record the jury's question requires us to speculate as to which jury instruction or instructions may have been implicated, if at all, by the jury's question. It is, however, condemnees' contention that the central issue on appeal relates to the jury's failure to award condemnees remainder or severance damages. The instructions to the jury regarding calculation of damages are found in jury instruction No. 2 given by the court. We have already determined that instruction No. 2 comports with NJI2d Civ. 13.06, which sets forth the method of calculating damages in an action involving condemnation of an easement. Therefore, rereading the instructions in this case, as the trial court directed the jury to do, would produce a jury properly instructed.

[6] Condemnees contend that if they had been notified of the jurors' question, they could have requested a supplemental instruction. A supplemental instruction is one which would have been proper in the first charge. *Hofrichter v. Kiewit-Condon-Cunningham*, 147 Neb. 224, 22 N.W.2d 703 (1946). In the instant case, however, we have already determined that the instructions given to the jury in the first charge were the correct instructions.

[7] The complaining party bears the burden of proving both that an unauthorized private communication occurred and that the complaining party suffered prejudice as a result. See *In re Estate of Corbett*, 211 Neb. 335, 318 N.W.2d 720 (1982) (concluding communication between court and jury was harmless error where appellant failed to show prejudice).

As previously stated, we have concluded that an unauthorized communication occurred in this case. We now determine that the condemnees failed to meet their burden of establishing that they were prejudiced by the trial court's errors noted above. Because condemnees failed to meet their burden of proving prejudice, the trial court's decision on restated assignment of error No. 2 was not an abuse of discretion.

2. JUROR MISCONDUCT

[8-12] Condemnees advance two grounds upon which the trial court should have found juror misconduct and granted condemnees' motion for new trial. Condemnees contend, first, that a juror gave expert testimony during deliberations and, second, that another juror made an unauthorized viewing of the Dowd/Bemis property. An application for new trial may properly be based upon allegations of misconduct of the jury. See, Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002); *Leavitt v. Magid*, 257 Neb. 440, 598 N.W.2d 722 (1999). In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). The misconduct complained of must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict. *Smith v. Papio-Missouri River NRD, supra*. In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred. *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992). The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion. See, *id.*; *Auer v. Burlington Northern RR. Co.*, 229 Neb. 504, 428 N.W.2d 152 (1988).

(a) Juror's Statement Based on Personal Knowledge

Condemnees argue that juror C.B., who was an electrical engineer, impermissibly testified as an expert in the jury room to facts contrary to those brought forth at trial. Specifically, condemnees contend that juror C.B. told the other members of the jury during deliberations that he was an electrical engineer and that there was no difference between 345,000-volt and 161,000-volt transmission lines. Juror J.W.'s affidavit states that "[d]uring the deliberations, there were statements made by the electrical engineer on the jury about the sameness of 161KV lines and 345 KV lines." During the hearing on the motion, juror J.W. testified that juror C.B. told the jury that there was no difference between 345,000-volt and 161,000-volt lines with respect to their effect on people living near them and that juror J.W. responded by calling juror C.B. a liar. Juror A.H.'s affidavit states that "[d]uring the deliberations, there were statements made by the electrical engineer on the jury that there was no difference between 161KV lines and 345 KV lines. There was a heated discussion about this statement."

Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1995), provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

[13] Rule 606(2) does not equate with, or govern, grounds for a new trial, but merely governs the competency of jurors to testify concerning the jury process. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

[14,15] Under rule 606(2), a juror may testify as to whether the jury considered prejudicial information emanating from a source other than evidence presented at trial, but a juror's testimony may not be used to establish the effect of such information upon the jury or its influence on the jury or jury motives, methods, misunderstandings, thought processes, or discussions during deliberations which entered into the verdict. *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992); *Rahmig v. Mosley Machinery Co., supra*. Thus, extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Loving v. Baker's Supermarkets*, 238 Neb. 727, 472 N.W.2d 695 (1991).

In determining whether we may consider that portion of the jurors' affidavits relating to juror C.B.'s statement in support of condemnees' claim of juror misconduct, we analyze whether juror C.B.'s statement constituted extraneous prejudicial information. In its opinion and order, the trial court found that the factual circumstances of this case did not directly relate to the difference between 345,000-volt and 161,000-volt lines. Based upon our review of the record, we conclude that condemnees failed to prove prejudice as required by rule 606(2). Juror C.B.'s statement did not relate to an issue submitted to the jury and, accordingly, could not have affected the verdict.

Condemnees contend that the issue at trial related to "the relative impact of different possible electromagnetic fields on valuation of property." Brief for appellants at 26. Condemnees failed, however, to produce evidence proving any damages resulting from the placement of a 345,000-volt powerline on the Dowd/Bemis property versus a 161,000-volt powerline. The testimony at trial established that the 345,000-volt line is OPPD's largest transmission line in both Douglas County and Sarpy County. Samson, the manager of transmission engineering with OPPD, testified at trial that volts are "the electromotive force that pushes electrons down the wire. The higher the voltage, the higher the force to push them." Thus, volts represent the force behind the power flowing

down the line. Condemnees' evidence did not draw any connection between voltage and the corresponding effect electromagnetic fields may have on property values.

Samson further testified that OPPD has gathered information relating to the public's concern regarding the aesthetics and location of powerlines as well as concerns about electric and magnetic fields. Based on this information, Samson testified that when OPPD plans to site or lay a transmission line, it evaluates the proximity to homes, businesses, and other existing facilities. Condemnees, however, did not produce any testimony or evidence that the public's concerns are heightened and have a greater corresponding impact on property values with the placement of a 345,000-volt line rather than a 161,000-volt line.

Condemnees' expert, Verschuur, testified that developers developing property with 161,000-volt lines have incurred additional costs to visually screen out powerlines, such as by using fences, bushes, and trees. However, condemnees failed to produce evidence that 345,000-volt lines are any different in size or appearance than 161,000-volt lines. Verschuur testified only that a 161,000-volt line is "two and a half times smaller" than a 345,000-volt line. On cross-examination, Verschuur admitted that this comparison had nothing to do with the size of the structures or size of the lines. Verschuur admitted that he had no idea and was not qualified to state whether this comparison had any significance whatsoever other than as a mathematical computation. While Verschuur provided testimony tending to establish that property values are adversely affected by powerlines, condemnees did not put on evidence to establish that a 345,000-volt line has a larger detrimental effect on the market value of property compared to a 161,000-volt line.

The issue at trial in this case centered around the impact on market value of the placement of powerlines on real property. While condemnees did offer some evidence regarding the public's concern regarding electromagnetic fields, condemnees did not offer evidence establishing that higher voltage powerlines lead to heightened public concern regarding electromagnetic fields. Nor did condemnees establish that higher voltage powerlines have a greater detrimental impact on property values. Because of condemnees' failure of proof in this regard, condemnees would not

have been entitled to a damage award on this basis. Juror C.B.'s statement did not relate to an issue submitted to the jury and there is no reasonable possibility that the statement detrimentally affected the verdict.

Condemnees failed to meet their burden of proving prejudice under rule 606(2). Accordingly, the juror affidavits and testimony are not sufficient to impeach the jury's verdict. Because no competent evidence exists to establish condemnees' claim of juror misconduct, the trial court did not abuse its discretion in denying condemnees' motion for new trial.

(b) Unauthorized View of Property

For their fourth assignment of error, condemnees contend that during trial, and contrary to the trial court's admonitions, juror J.W. viewed the Dowd/Bemis property, by himself, without notice to any party, and without being accompanied by any court personnel. Juror J.W.'s affidavit states that "[d]uring the trial of this case, I drove out to the property in question, owned by the Dowd and Bemis families, and looked at the same. I told the other jurors that I had done the same."

As previously observed, in a motion for new trial, allegations of misconduct must relate to a disputed matter that is relevant to the issues in the case and must have influenced the jurors in arriving at the verdict. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998). In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred. *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992).

Juror J.W.'s affidavit constitutes the sole source of support for this claim of juror misconduct. Before we resolve the issue of juror misconduct, however, we must first determine whether juror J.W.'s affidavit is admissible evidence pursuant to rule 606(2). That is, we must determine whether juror J.W.'s affidavit contains information related to one of the two exceptions provided by rule 606(2), i.e., (1) extraneous prejudicial information improperly brought to the jury's attention or (2) outside influence improperly brought to bear on a juror. See *Leavitt v. Magid*, 257 Neb. 440, 598 N.W.2d 722 (1999). Condemnees do

not contend that an outside influence was improperly brought to bear on a juror. Therefore, we must determine whether the allegations contained in juror J.W.'s affidavit constitute extraneous prejudicial information.

[16] For purposes of rule 606(2), while one may not inquire as to whether the presence of the evidence affected the juror's mind, it is proper and necessary that evidence be presented by the objecting party to show that *extraneous prejudicial* information was improperly brought to the jury's attention. *State v. Woodward*, 210 Neb. 740, 316 N.W.2d 759 (1982). In *Woodward*, we stated that where the record failed to establish that extraneous prejudicial information was improperly brought to the jury's attention, a juror's unauthorized view of the scene was not prejudicial. In *Woodward*, the defendant was tried for burglarizing a gas station. During deliberations, the jury traveled to dinner and passed through the intersection where the crime took place. One of the jurors testified that he could not recall any comment being made about the intersection, and another juror did recall that some comment was made about what could or could not be seen, but could not recall specifically what the comment was. We noted that without evidence establishing what was said by the jurors regarding what they saw, there was no way to determine if what they saw was prejudicial.

Likewise, in the instant case, the record does not reveal anything regarding juror J.W.'s unauthorized view of the property. All the record shows is that juror J.W. drove out to the Dowd/Bemis property and looked at it. The record reveals nothing regarding what juror J.W. saw or the observations he may or may not have made. Moreover, to the extent juror J.W. made any observations, he did not communicate them to the other members of the jury.

We also observe that the fact the Dowd/Bemis property appeared as it was described at trial minimizes any claim of prejudice. In *Kohrt v. Hammond*, 160 Neb. 347, 70 N.W.2d 102 (1955), we concluded that a juror's unauthorized view of the scene of an automobile accident was not prejudicial where there was no dispute in the evidence regarding the matters observed by the juror. By contrast, in *Kremlacek v. Sedlacek*, 190 Neb. 460, 209 N.W.2d 149 (1973), we held that an unauthorized view by a

juror was prejudicial error warranting the granting of a new trial where the juror's view of the scene differed from testimony at trial. In *Kremlacek*, an action for damages sustained in an automobile accident, we noted that a crucial issue involved the location of a row of seven red cedar trees on the south side of the east-west road. On a motion for new trial, a juror's affidavit offered and received into evidence stated that he had driven out to the scene of the accident during the trial, had observed the scene of the accident, and that in his opinion, the trees located near the scene of the accident were farther back from the corner of the intersection than the testimony indicated. We concluded that the evidence was amply sufficient to sustain the trial court's finding that prejudicial error occurred.

Unlike *Kremlacek*, juror J.W.'s view of the Dowd/Bemis property would have been entirely consonant with the evidence offered at trial describing the property. Juror J.W. made his unauthorized view of the subject property during the trial of this case. The construction of OPPD's powerlines on the Dowd/Bemis property was completed before this condemnation action was filed. Moreover, there was no dispute at trial regarding the description of the Dowd/Bemis property and its landscape. Accordingly, to the extent juror J.W. drove to and looked at some part of the Dowd/Bemis property, the land would have looked no different than how it was described at trial.

As previously stated, rule 606(2) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). Rule 606(2) does not equate with, or govern, grounds for a new trial, but merely governs the competency of jurors to testify concerning the jury process. *Rahmig v. Mosley Machinery Co., supra.* Because condemnees failed to fulfill their burden of demonstrating prejudice, juror J.W.'s affidavit is not admissible to impeach the jury's verdict. As such, condemnees have no competent evidence with which to establish this claim of juror misconduct. The trial court did not abuse its discretion in denying condemnees' motion for new trial on this basis. We find this assignment of error to be equally without merit.

3. Inadequate Damages

[17-19] For their final assignment of error, condemnees contend that the trial court erred by failing to find the jury awarded inadequate damages thereby justifying a new trial. On appeal, the fact finder's determination of damages is given great deference. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993) (citing *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993)). The amount of damages is a matter solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved. *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). However, an award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

Regarding whether the damages award was supported by the evidence, we stated in *Patterson v. City of Lincoln*, 250 Neb. 382, 388, 550 N.W.2d 650, 655 (1996), a condemnation case, that

> an expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and credibility of what the witness considers in coming to his conclusion is for the jury to determine. . . .
>
> The jury verdict fell in between the two conflicting sets of expert testimony. The expert witness testimony is not binding on the triers of fact. The amount of damages sustained is peculiarly of a local nature and ordinarily is to be determined by the jury, and this court will not ordinarily interfere with the verdict if it was based upon admissible testimony. When the evidence is conflicting, the verdict of the jury will not be set aside unless it is clearly wrong.

Here, Stevens testified that condemnees' total damages were $29,800 and Verschuur valued total damages at $422,000. Thus, the jury's damage award of $31,290, fell between the range of damage estimates proffered by both parties' experts during trial. Moreover, the damages awarded by the jury were identical to the $31,290 Verschuur assigned to the value of the easement. We

conclude, therefore, that the jury's award was supported by the evidence. This assignment of error is also without merit.

VI. CONCLUSION

We conclude that condemnees failed to establish prejudice as a result of the trial court's unauthorized private communication with the jury during deliberations. Moreover, condemnees failed to produce any competent evidence in support of their claims of juror misconduct. Finally, we conclude that the damages awarded were not inadequate. Accordingly, the trial court did not abuse its discretion in overruling condemnees' motion for new trial.

AFFIRMED.

ROBERT W. SADLER, APPELLEE, V. JORAD, INC., A NEBRASKA CORPORATION, APPELLEE, AND CRAIG R. CRAMM AND GEIL E. CRAMM, APPELLANTS.
ROBERT W. SADLER, APPELLEE, V. THE SHOVELHEAD GROUP, L.L.C., APPELLEE, AND CRAIG R. CRAMM AND GEIL E. CRAMM, APPELLANTS.

680 N.W.2d 165

Filed May 28, 2004. Nos. S-02-1212, S-02-1213.

1. **Derivative Actions: Equity: Accounting.** A derivative action which seeks an accounting and the return of money is an equitable action.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, 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. **Derivative Actions: Words and Phrases.** A derivative action is a suit by a shareholder to enforce a cause of action belonging to the corporation.
4. **Derivative Actions: Pleadings: Corporations.** Normally, to maintain a derivative action, a stockholder must allege that he has made demand upon the corporation unless circumstances excuse the stockholder from making such demand.
5. **Corporations: Presumptions: Words and Phrases.** The business judgment rule is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.
6. **Actions: Corporations.** According to the business judgment rule, courts are precluded from conducting an inquiry into actions of corporate directors taken in good

faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.

7. **Corporations: Accounting: Proof.** Although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, where another is in control of the books and has managed the business, that other is in the position of a trustee and must make a proper accounting.
8. **Proof.** The burden of proof is upon the party holding a confidential or fiduciary relationship to establish the fairness, adequacy, or equity of the transaction with the party with whom he holds such relation.

Appeals from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed as modified.

Jeffrey H. Bush for appellants.

Dean F. Suing, of Katskee, Henatsch & Suing, for appellee Robert W. Sadler.

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

WRIGHT, J.

I. NATURE OF CASE

Robert W. Sadler brought suit in the Douglas County District Court against Craig R. Cramm; Geil E. Cramm; Jorad, Inc.; and The Shovelhead Group, L.L.C. (Shovelhead), seeking an accounting and the return of money. Sadler, who held a minority interest in Jorad and Shovelhead, claimed that the Cramms had misused corporate assets. The district court entered judgment in favor of Sadler in a combined amount of $108,350.70, and the Cramms timely appealed. The cases were consolidated for purposes of oral argument and disposition.

II. SCOPE OF REVIEW

[1] A derivative action which seeks an accounting and the return of money is an equitable action. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001).

[2] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, 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. *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003).

III. FACTS

1. JORAD

In 1994, Sadler, who owned an electrical contracting business in Omaha, met Craig Cramm, who was working for a company engaged in asbestos and hazardous material abatement. The men discussed starting up a hazardous material abatement company for which Sadler would provide the primary funding. Sadler, Craig Cramm, and Cramm's wife, Geil Cramm, subsequently formed Jorad. The Cramms owned 80 percent of the stock in Jorad, and Sadler owned 20 percent.

The first meeting of Jorad's board of directors occurred in March 1995. At this meeting, Craig Cramm was elected president, vice president, and chief executive officer of the corporation. Geil Cramm was elected secretary and treasurer. Craig Cramm was to be paid and compensated in an amount not to exceed $75,000 annually during the first 3 years of Jorad's operation. This amount was to include salary and bonuses but did not include the payment of benefits and/or expenses.

At the second meeting of Jorad's board of directors in December 1995, it was determined that Craig Cramm was to be paid a salary of $75,000 for the years 1996 through 1998. In 1996 and 1997, he was to receive a 5-percent bonus based on the taxable income of the corporation at the end of the respective business years. This bonus was reduced to 1.5 percent for 1998.

Jorad operated until 2000. Jorad and Shovelhead have not been dissolved, but their operations have been wound up.

A dispute arose between Sadler and the Cramms concerning the Cramms' handling of funds in the operation of Jorad and Shovelhead. Sadler sued the Cramms, claiming that they had acted illegally, oppressively, and in a fraudulent manner with regard to the operation of the business and that they had committed corporate waste in its operation. Sadler requested equitable relief, including an accounting, the liquidation of corporate assets, and a judgment against the Cramms for funds that were diverted from the business. The Cramms denied all acts of

malfeasance and alleged that Sadler had waived his claims by attending corporate meetings and ratifying their actions.

The district court found that a forensic audit of the year 2000 conducted by Jeffrey Hamernik disclosed that excess salaries had been paid in contravention of the parties' agreement, that excess depreciation had been claimed for assets not related to the operation of the business, that expenses had been charged back to the business during the calendar years 1995 through 1998 which were not ostensibly related to the business of asbestos or lead abatement, and that the Cramms had taken excessive distributions from the operation of Jorad. The court also found that many of the records referred to by the Cramms had been destroyed, were missing, or were not produced by the Cramms for discovery and trial.

Specifically, in its order, the district court noted that although Geil Cramm testified she was a bookkeeper and office manager for Jorad and performed all of the corporation's bookkeeping and accounting functions, Trudy Riggs, a full-time employee from 1996 to 2000, testified that she was doing essentially the same work. The court imputed to Geil Cramm a salary of $30,000 per year but concluded that "the Cramms were using Geil as a balancing entry, and . . . were compensating her essentially whatever they needed that wasn't covered under Craig's compensation."

The district court found that the Cramms were unable to demonstrate a relationship between certain questioned expenses and the necessary and reasonable operation of the hazardous material abatement business. The Cramms also failed to show that the assets for which depreciation was claimed had a connection to the operation of Jorad. The court further found that Sadler had not approved these expenditures and that Sadler, a 20-percent equity owner, was entitled to $83,791.69, which represented his share of the excess compensation, the expenses that were not business related, the excess distributions, and other unnecessary or unreasonable expenses.

2. Shovelhead

Shovelhead was formed in August 1996 for the purpose of purchasing a building where Jorad's business was to be conducted. The building was located on development property owned by

Sadler. As was the case with Jorad, the Cramms owned 80 percent of the stock in Shovelhead and Sadler owned 20 percent.

On June 14, 2002, the Shovelhead building was sold to a third party, and the proceeds of the sale were $106,000. The district court concluded that because the building had been constructed under an agreement whereby it received tax increment financing (TIF) from the city of Ralston, the moneys due Sadler had never been liquidated. The court noted that the Cramms had taken approximately $50,000 from the sale and placed it in a brokerage account in their names.

The district court found that the TIF credit attributable to the building as of June 30, 2002, was $4,094.57 and that this amount should be shown as a credit against Sadler's share. The court concluded that Sadler's distributive share of the proceeds of the sale was $28,653.58 and that Sadler was entitled to a judgment in the sum of $24,559.01 upon the liquidation of Shovelhead.

3. Judgment of District Court

The district court concluded that the Cramms had a duty to keep an accurate record of the expenses and earnings of both corporations and that the burden of proof was upon the Cramms to establish the fairness and accuracy of the transactions. The court found that the liability of the Cramms was joint and several, and it entered judgment in a combined amount of $108,350.70 in favor of Sadler together with taxable costs and postjudgment interest. The Cramms timely appealed.

IV. ASSIGNMENTS OF ERROR

The Cramms assign the following summarized and restated errors with regard to the district court's judgment in the case involving Jorad: (1) the court's disregard of the business judgment rule, (2) its determination that Sadler had no knowledge of the conduct of the corporation, (3) its exclusion of evidence of corporate meetings in 1996 and 1997, (4) its finding that Geil Cramm's salary was excessive, (5) its imputing a salary of $30,000 per year to Geil Cramm, (6) its finding that the Cramms incurred expenses not related to the necessary and reasonable operation of the business, (7) its finding that the Cramms claimed excessive depreciation, and (8) its finding that the Cramms did not make any capital contributions in the form of cash.

The Cramms assign the following restated errors with regard to the district court's judgment in the case involving Shovelhead: (1) the court's disregard of the purchase agreement between the parties, (2) its failure to retain jurisdiction over Shovelhead so that the proceeds of the TIF could be computed and paid to the interested parties, and (3) its failure to consider the settlement of water damages in calculating the amount owed to Sadler.

V. ANALYSIS

1. JORAD

The issue with regard to Jorad is whether the Cramms are personally liable for the purported misuse of corporate funds. The Cramms have grouped their arguments into essentially four areas: (1) the failure of the district court to apply the business judgment rule, (2) the court's errors with respect to findings of fact, (3) the court's findings as to excessive compensation and bonuses, and (4) the court's findings regarding expenses not related to the business and depreciation.

[3] Before addressing the Cramms' arguments, we note that this is a derivative action brought by a minority shareholder against the remaining two shareholders, who are the officers and directors of the corporation. A derivative action is a suit by a shareholder to enforce a cause of action belonging to the corporation. *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 507 N.W.2d 665 (1993). A derivative action which seeks an accounting and the return of money is an equitable action. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001).

[4] Normally, to maintain a derivative action, a stockholder must allege that he has made demand upon the corporation unless circumstances excuse the stockholder from making such demand. See, *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990); *Kowalski v. Nebraska-Iowa Packing Co.*, 160 Neb. 609, 71 N.W.2d 147 (1955); *Association of Commonwealth Claimants v. Hake, supra*. However, we conclude that requiring Sadler to make a demand on Jorad would be futile.

Jorad consists of only three shareholders, and Sadler, the minority shareholder, claims that the Cramms, the other two shareholders, have misused corporate funds. Therefore, Sadler

could bring this derivative action without first having made demand upon Jorad to bring the action. A shareholder is not required to make such an effort if it would be unavailing. See *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983).

(a) Business Judgment Rule

[5] The Cramms argue that their corporate activities were protected by the business judgment rule and that the district court erred in disregarding the rule. The business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled in part on other grounds, Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). The Cramms assert that it was Sadler's burden to overcome the business judgment rule and that he failed to establish that Jorad suffered harm under their management. They claim that Sadler also had the burden to prove that their actions were not in good faith or in the best interests of the corporation. The Cramms argue that in the absence of fraud, gross negligence, or transgression of statutory limitations, the court should not have interfered merely to overrule and control the discretion of the directors on questions of corporate management, policy, or business. See *Royal Highlanders v. Wiseman*, 140 Neb. 28, 299 N.W. 459 (1941).

[6] According to the business judgment rule, courts are precluded from conducting an inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. *Association of Commonwealth Claimants v. Hake, supra.* "Within the limits of their authority directors possess full discretionary powers, and in the honest and reasonable exercise of such powers are not subject to control by stockholders or by courts at the instance of stockholders." *Royal Highlanders v. Wiseman*, 140 Neb. at 38, 299 N.W. at 464.

In 1995, Nebraska adopted the Business Corporation Act, which can now be found at Neb. Rev. Stat. § 21-2001 et seq. (Reissue 1997, Cum. Supp. 2002 & Supp. 2003). The Legislature

codified the business judgment rule as § 21-2095, which provides standards of conduct for corporate directors:

> (1) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:
>
> (a) In good faith;
>
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (c) In a manner he or she reasonably believes to be in the best interests of the corporation.
>
> . . . .
>
> (4) A director shall not be liable for any action taken as a director, or any failure to take any action, if he or she performed the duties of his or her office in compliance with this section.

In summary, the Cramms argue that to prevail in this action Sadler had to prove that their activities with regard to Jorad were contrary to § 21-2095. We disagree. Instead, the Cramms had the burden to establish the fairness and reasonableness of their operation of the corporation.

In *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983), a dispute arose between the minority and majority shareholders of a two-shareholder corporation. We recognized that where the intimate relationships of the parties are involved, an adequate remedy is available only within the equitable jurisdiction of the court. We pointed out that in *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578, 328 N.E.2d 505 (1975), the court held that stockholders in a close corporation owed one another the same fiduciary duty as that owed by one partner to another in a partnership.

We conclude that the district court did not err with regard to the application of the business judgment rule in the case at bar. As early as *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548, 556, 54 N.W. 830, 833 (1893), we recognized that "the relation of directors to the corporation of which they are officers is of a fiduciary character" and that "dealings with respect to the corporate property will be carefully scrutinized by the courts."

[7] Although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, where another is in control of the books and has managed the

business, that other is in the position of a trustee and must make a proper accounting. *Anderson v. Clemens Mobile Homes, supra.* The Cramms maintained control of Jorad's books and managed the business. They each held the position of trustee and were required to make an accounting of the business activities and expenses of the corporation.

In *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001), the parties were married to each other. George Woodward, a minority shareholder, alleged that Nancy Andersen, the president of the corporation, mismanaged the corporation and wrongfully withdrew funds therefrom. We held that under such circumstances, Andersen, an officer and director of the corporation, owed a fiduciary duty to the corporation and its stockholders and was considered a trustee, citing *Evans v. Engelhardt*, 246 Neb. 323, 518 N.W.2d 648 (1994). Once Woodward presented evidence of an alleged breach of Andersen's duty, the burden shifted to Andersen to prove the fairness of those transactions.

[8] *Evans* was a derivative action by a minority shareholder who alleged that the majority shareholders had paid themselves unreasonable salaries. The minority shareholder sought an accounting and the return of money. We held that an officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and is treated by the courts as a trustee. We noted that the burden of proof is upon the party holding a confidential or fiduciary relationship to establish the fairness, adequacy, or equity of the transaction with the party with whom he holds such relation, citing *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944). We concluded in *Evans* that it was the burden of the majority shareholders to show that their salaries were reasonable.

Sadler presented evidence that the Cramms had allegedly breached their fiduciary duty to him. Accordingly, the burden shifted to the Cramms to establish by a preponderance of the evidence the fairness, adequacy, and equity of their actions. See *Woodward v. Andersen, supra.*

The Cramms were required to show that the actions they took as directors and officers of the corporation were performed in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a

manner that they reasonably believed to be in the best interests of the corporation. See § 21-2095. They failed to do so. Thus, the Cramms' argument that the district court misapplied the business judgment rule is without merit.

(b) Findings of Fact

The Cramms assert that the district court erred in finding that Sadler had no knowledge of the Cramms' conduct in running the corporation and that Sadler had been oppressed by the Cramms. They claim that the court improperly excluded evidence of corporate meetings. We conclude that there is no merit to this claim.

The judgment of the district court was based upon its determination that the Cramms had misappropriated corporate funds. The court found that the Cramms had breached their fiduciary duties by acting in a manner that was detrimental to the value of the business and the assets of the corporation. The court also found that the Cramms misappropriated assets and moneys belonging to Jorad.

The Cramms argue that the district court erred in finding that Sadler had no knowledge of the activities of the corporation and in excluding evidence of corporate meetings for the years 1996 through 1998. When the Cramms attempted to offer the notices and minutes of said corporate meetings, Sadler objected because the exhibits had not been included in the documents requested during discovery. The court sustained the objection, and the Cramms made an offer of proof to show that Sadler was present at the annual corporate meetings in February 1996 and 1997. We note that the offer of proof for 1997 is not consistent with the corresponding exhibit. The exhibit does not show that Sadler was present at the 1997 meeting. No one contends that Sadler was present for the 1998 meeting.

Although the district court stated that Sadler testified that there were no corporate meetings in 1996 or 1997, whether there were corporate meetings in 1996 or 1997 is not material to the decision in this case. The minutes of the meetings merely reflected who was present and who was elected to serve as the officers and directors of the corporation. Therefore, even if the court should not have excluded the evidence of the corporate meetings in 1996 and 1997, we conclude it was harmless error.

The judgment of the court was based upon the Cramms' misuse of corporate funds. The court found that the Cramms had breached their fiduciary duties to Jorad and Shovelhead by acting in a manner that was detrimental to the value of the business and assets of the corporation. It was upon this activity that the court found against the Cramms.

In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, 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. *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003). The evidence as to the manner in which the Cramms ran the corporation was in conflict, and we accept the district court's findings of fact regarding these issues.

(c) Excessive Compensation

The Cramms argue that the district court erred in finding that Geil Cramm's salary was excessive. They claim that Sadler presented no expert testimony regarding industry standards for the compensation of executives in the hazardous material abatement business. Sadler testified that he believed $25,000 per year was a reasonable salary for Geil Cramm.

During the peak years of its operation, Jorad had 27 employees, and the Cramms set the salaries of the employees. Craig Cramm testified that he set the salary for Geil Cramm and that he generally used industry standards and the experience of the individual to set the appropriate salary. He claimed that he set Geil's salary based upon her level of involvement with the corporation's activities.

During 1997, Geil Cramm worked away from the office at the site of a new building project. Riggs testified that in January 1997, she took over the work that Geil Cramm had been doing prior to that time. Hamernik, who testified on behalf of Sadler, stated that based upon Jorad's bylaws and his discussions with Riggs, it was his opinion that Geil Cramm should not have been paid any amount in 1997.

Testimony was presented at trial which established that a large portion of Geil Cramm's compensation stemmed from the payment of periodic bonuses. Craig Cramm testified that he consulted one of Jorad's accountants before any of these bonuses were paid to Geil Cramm and that the purpose behind the bonuses was to pay estimated taxes.

The district court imputed a salary of $30,000 per year to Geil Cramm. The forensic audit showed that she was paid $36,445, $68,867, $104,790, and $36,372 in 1995 through 1998 respectively. The audit showed that for the same years, Craig Cramm was paid $113,235, $75,992, $75,490, and $137,369. The court concluded that the Cramms were using Geil Cramm's salary as a balancing entry and "were compensating her essentially whatever they needed that wasn't covered under Craig's compensation." It was the combination of salary paid and bonuses received that led the court to conclude that Geil Cramm's compensation was excessive.

Where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *id.* We accept the district court's findings, and we conclude that the Cramms' argument regarding Geil Cramm's salary is without merit.

(d) Expenses Not Related to Business and Depreciation

The Cramms argue that the district court erred in its findings regarding expenses not related to the business and depreciation. With respect to the expenses, Craig Cramm testified that the Internal Revenue Service (IRS) had reviewed the Cramms' tax statements for the years 1996 through 1998 and that while some of the expenses listed as business deductions were not allowed, the majority were allowed. His accountant testified that there was an IRS examination in the summer of 1997 which resulted in no changes to the corporation's tax liability.

Our review of the record shows that there is little, if any, evidence to support the Cramms' testimony as to these expenses. Exhibits 64 and 86, which were introduced by the Cramms on this issue, do not show what expenses were examined by the

IRS. The Cramms had the burden of proof to establish the fairness, adequacy, and equity of the transactions in question.

With regard to the questioned expenses, the district court was faced with a conflict in the evidence, and it elected to give more credence to Hamernik's report than to the evidence offered by the Cramms. The court noted that many of the records referred to by the Cramms had been destroyed or were missing. The court accepted one version of the facts as opposed to another, and we conclude that it did not err in this respect.

Regarding the excess depreciation, Hamernik's report shows that these figures were based on a number of automobiles that the Cramms claimed were used as corporate vehicles. The Cramms argue that the district court erred in failing to find that the automobiles for which the depreciation was claimed had a connection to the operation of Jorad.

The record indicates that the district court included this depreciation when calculating the monetary damages awarded to Sadler. The court found that the total depreciation claimed for assets not related to the operation of the business was $51,750.51, and it awarded Sadler 20 percent of this amount, or $10,350.10. We conclude there is no evidence that would establish how this depreciation would equate with a direct cash loss of $10,350.10 to Sadler. We therefore reduce the judgment with regard to the claim involving Jorad from $83,791.69 to $73,441.59.

2. Shovelhead

As to Shovelhead, the Cramms have asserted three assignments of error. The first two involve the district court's calculation of the amount owed Sadler due to the sale of the property formerly owned by Shovelhead and the winding up of the affairs of the company.

First, the Cramms argue that the district court disregarded exhibit 61, the purchase agreement whereby Shovelhead purchased property from Sadler and his wife. In particular, the Cramms believe that the court failed to give credence to the following language:

> The parties agree and confirm that a Tax Increment and Financial application has been approved by the [C]ity of Ralston on behalf of the Sadler Business Park Development.

> It is the intent of the party [sic] that One Hundred percent of the benefits from the tax increment financing apportioned according to the amount of property owned by The Shovelhead Group L.L.C., as a percentage of the development shall be payable to purchaser in accordance with the ownership interests in Shovelhead Group L.L.C. which has been established in accordance with Nebraska Law. The disbursements made by the City of Ralston as a result of the T.I.F. shall be paid out in accordance with the ownership interests of the L.L.C. no more than ten (10) days after receipt from the local government entity. Payments shall be made directly from purchaser to the shareholders of the L.L.C. in accordance with their percentage of ownership.

According to the Cramms, this language sets no limitation on the payments to be made to Shovelhead as a result of the TIF.

Sadler testified that the TIF was to last for 15 years. The Cramms assert that Sadler has never paid any portion of the TIF to Shovelhead. The Cramms consider Sadler's distribution from the sale of the Shovelhead property and the winding up of Shovelhead to be equivalent to the TIF which was to be paid over the entire 15-year period. They believe that they are holding this amount in trust for Shovelhead and its interest holders.

The Cramms' second assignment of error pertains to the district court's failure to retain jurisdiction over Shovelhead so that the proceeds of the TIF can be computed and paid out over the 15-year period. When the court made its calculations regarding Shovelhead, it started with the figure it had calculated to be Sadler's distributive share as of June 30, 2002. This was the end of the month during which the Shovelhead property was sold to a third party. The court then discounted this figure by the amount of the TIF still owed to the Cramms as of the end of June.

A review of the purchase agreement finds this method of calculating Sadler's distribution to be correct. While the Cramms contend that the agreement contains no language limiting the payments to be made as a result of the TIF, the agreement clearly states that the TIF is to be paid in proportion to the amount of the property owned by Shovelhead. Since Shovelhead ceased owning the property as of June 14, 2002, that was the appropriate time for the TIF payments to Shovelhead to cease. The district

court did not err in this respect, and the Cramms' first two assignments of error have no merit.

The Cramms' final assignment of error pertains to the district court's failure to consider a settlement related to water damage to the Shovelhead property in calculating Sadler's distribution. Craig Cramm testified that the Shovelhead property experienced water damage due to the faulty installation of a wall and that Sadler was aware of this damage. When the Shovelhead property was sold to a third party, a settlement was reached as to this damage in the amount of $4,000.

The Cramms argue that Sadler was never held responsible for his share of the $4,000 settlement, which would be $800. However, since the $4,000 was deducted from the sale price of the property, Sadler has been held responsible for his share of the settlement via the discounted sale price. Accordingly, the district court did not err in its failure to discount Sadler's distribution by this amount.

VI. CONCLUSION

For the above-stated reasons, the decision of the Douglas County District Court is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
JAMES R. WORM, APPELLANT.

680 N.W.2d 151

Filed May 28, 2004. No. S-02-1506.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.
4. **Convicted Sex Offender: Sentences: Appeal and Error.** Under Neb. Rev. Stat. § 29-4005 (Cum. Supp. 2002), the lifetime registration requirement for an offender convicted of an aggravated offense under the amended provisions of Nebraska's Sex

Offender Registration Act is part of the sentencing court's judgment for purposes of filing an appeal.

5. **Constitutional Law: Convicted Sex Offender: Police Officers and Sheriffs: Appeal and Error.** A sex offender's constitutional challenges to the notification provisions of Nebraska's Sex Offender Registration Act are not ripe for appellate review before the Nebraska State Patrol has assessed the offender's notification level.
6. **Statutes: Constitutional Law: Sentences.** Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
7. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.
8. **Criminal Law: Other Acts: Time.** Retroactive application for civil disabilities and sanctions is permitted; only retroactive criminal punishment for past acts is prohibited.
9. **Convicted Sex Offender: Constitutional Law: Statutes: Legislature: Intent.** In analyzing whether Nebraska's Sex Offender Registration Act is "punishment" for purposes of an ex post facto challenge, it is necessary to determine whether the Legislature intended statutory sanction to be criminal or civil and whether the statutory sanction is so punitive in purpose or effect as to negate an intent to create a civil regulatory scheme.
10. **Criminal Law: Statutes: Appeal and Error.** Whether the Legislature intended a statutory scheme to be civil or criminal is primarily a matter of statutory construction. However, an appellate court must also look at the statute's structure and design.
11. **Convicted Sex Offender: Statutes: Legislature: Intent.** The Legislature intended Nebraska's Sex Offender Registration Act to be a civil regulatory scheme to protect the public from the danger posed by sex offenders, which intent is not altered by the statute's structure or design.
12. **Statutes: Legislature: Intent.** In analyzing whether the purpose or effect of a civil sanction statute is so punitive as to negate the Legislature's intent, the following factors are considered: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.
13. **Criminal Law: Convicted Sex Offender.** The registration provisions of Nebraska's Sex Offender Registration Act do not impose criminal punishment.
14. **Due Process.** Procedural due process limits the government's ability to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause.
15. ____. The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections.
16. **Constitutional Law.** Reputational damage caused by state action which results in a person's stigmatization can implicate a protected liberty interest, but only if it is coupled with some more tangible interest such as employment.

17. **Constitutional Law: Convicted Sex Offender.** A sex offender fails to show he or she has been deprived of a protected liberty interest when a claim of reputational damage is related to community notification, the level and application of which has not yet been determined.
18. **Sentences: Probation and Parole: Appeal and Error.** Whether the sentence imposed is probation or incarceration is a matter within the trial court's discretion, whose judgment denying probation will be upheld in the absence of an abuse of discretion.
19. **Sentences: Appeal and Error.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
20. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

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

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

Jon Bruning, Attorney General, Mark D. Raffety, and Jeffrey J. Lux for appellee.

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

CONNOLLY, J.

I. INTRODUCTION

James R. Worm appeals his sentence for attempted first degree sexual assault on a child and the district court's finding that he was subject to the amended provisions of Nebraska's Sex Offender Registration Act (Act), Neb. Rev. Stat. §§ 29-4001 to 29-4013 (Cum. Supp. 2002). The court determined that Worm had committed an aggravated offense under an amendment that was not a part of the Act when the offense occurred. Worm contends that the court's finding violated the ex post facto clause and that he was denied procedural due process. We affirm.

II. BACKGROUND

In April 2002, the State filed an information against Worm, charging him with first degree sexual assault on a child, a Class II felony. The victim was the 7-year-old daughter of the woman that Worm was then dating. The offense occurred on March 29, 2002.

In August, under a plea agreement, the State amended the information to charge Worm with attempted first degree sexual assault on a child, a Class III felony. At the hearing, the court informed Worm of the factual basis for the charge and the possible imprisonment terms, fines, and collateral consequences of a plea of guilty, including that he would be subject to the Act's terms and conditions. Worm pleaded guilty, and the court accepted his plea. Worm was also committed to the Lincoln Regional Center for psychiatric observation and treatment not to exceed 60 days.

In November 2002, after the 2002 amendments were in effect, Worm appeared for sentencing. Worm argued that the offense had occurred before the Act was substantively changed by the April 2002 amendments, which became effective July 20, 2002, see 2002 Neb. Laws, L.B. 564, and that the amended provisions should not be applied retroactively. The hearing was continued on this issue until December 13. When the hearing reconvened, the court determined the law's purpose was regulatory rather than punitive and that, therefore, the amendment was applicable to Worm. Also, the court found that Worm had committed an aggravated offense under § 29-4005(4)(a)(ii), but that the evidence did not show he was a sexually violent predator. The court informed Worm that because he had committed an aggravated offense, he must register for life, and explained his duties under the Act. The court sentenced him to 8 to 12 years' imprisonment, with credit given for time served.

III. ASSIGNMENTS OF ERROR

Worm assigns that the district court erred in (1) determining that he had committed an aggravated offense under the amended Act in violation of the Ex Post Facto Clauses of the Nebraska and federal Constitutions, (2) determining that he had committed an aggravated offense under the amended Act without affording him procedural due process, and (3) imposing an excessive sentence.

IV. STANDARD OF REVIEW

[1,2] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court

below. *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Spady*, 264 Neb. 99, 645 N.W.2d 539 (2002).

[3] Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004).

V. ANALYSIS

In April 2002, the Nebraska Legislature amended the Act to bring it in compliance with the federal law. The 1996 original Act required a person convicted of an enumerated sex offense, or its equivalent in another jurisdiction, to register with the Nebraska State Patrol's sex offender registry. Under this Act, the offender had to verify that registration on an annual basis for a period of 10 years after his or her release from a correctional facility or other institution, or after discharge from probation, parole, or supervised release. See §§ 29-4003 to 29-4005 (Cum. Supp. 2000).

In addition, the amendments added new sex offenses, aggravated offenses and repeat offenses, which require the offender to verify his or her registration annually. §§ 29-4003 and 29-4005(2) (Cum. Supp. 2002). An aggravated offense is defined as "any registrable offense . . . which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence or (ii) a victim under the age of twelve years." § 29-4005(4)(a). The amendments require the sentencing court to make the finding of an aggravated or repeat offense as part of the sentencing order. § 29-4005(2).

The amendments also require an offender to provide his or her place of vocation and any school which he or she attends in addition to the previous requirement of providing the offender's address and place of employment. 2002 Neb. Laws, L.B. 564. Under both versions, the Act is retroactive to defendants convicted of or pleading guilty to most registrable offenses on or before January 1, 1997. *Id.*

The amendments, however, did not substantively change the sections concerning community notification. The Nebraska

State Patrol's registration and community notification division is responsible for assigning a notification level after an offender initially registers. The assigned notification corresponds to the offender's assessed recidivism risk, which can be assessed as low, moderate, or high. See § 29-4013(2). If the risk is low, law enforcement officials who are likely to encounter the offender are notified of the registry information. § 29-4013(2)(c)(i). If the recidivism risk is moderate, schools, daycare centers, and youth and religious organizations are additionally notified. § 29-4013(2)(c)(ii). If the recidivism risk is high, individuals likely to encounter the offender must also be notified, in addition to those notified for low and moderate notification levels. § 29-4013(2)(c)(iii). If a risk assessment indicates that public notification is warranted, it can be accomplished by direct contact, news releases, or a method using a telephone system, including an electronic database. *Id.* See, also, 272 Neb. Admin. Code, ch. 19, § 013.06 (2003). The State Patrol maintains a public Web site, which disseminates specified information about offenders only if they are assigned a high-risk notification level.

1. Ripeness

(a) Registration Provisions

The State argues that Worm's constitutional challenges are not properly before this court because the Act's requirements are collateral to the criminal conviction. The State relies on two cases in which we held that the registration provisions were collateral to the defendant's conviction. See *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998), and *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002). Worm, however, contends that his constitutional challenges to the Act are properly before this court, because after the Act was amended, the sentencing court had an affirmative duty to determine whether an aggravated offense had occurred, thus triggering a lifetime registration requirement.

In *Torres*, we held that a defendant who was subject to the registration requirements lacked standing to challenge the Act in a direct appeal from the underlying conviction because the Act's registration requirements were separate and collateral to the sexual offense that had triggered the requirements. We held that "the

district court's order did not address the [Act's] requirements; rather, the [Act's] registration requirements arose solely and independently by the terms of the [A]ct itself only *after* Torres' conviction." (Emphasis in original). 254 Neb. at 95, 574 N.W.2d at 155.

Torres is distinguishable in two respects. First, the defendant in *Torres* argued that the Act constituted an ex post facto law because it *potentially* increased his sentence by imposing an additional penalty if he *failed* to register. He did not argue that the registration requirements themselves violated the ex post facto clause as retroactive punishment.

Second, unlike the 10-year registration requirement for the registrable offense in *Torres*, the lifetime registration requirement for an aggravated offense does not arise solely and independently from the defendant's conviction. Rather, the amendments require the court, as part of the sentence, to determine if the defendant committed an aggravated offense. See § 29-4005(2). As such, the court's finding that Worm committed an aggravated offense was part of the court's judgment. See *People v. Hernandez*, 93 N.Y.2d 261, 711 N.E.2d 972, 689 N.Y.S.2d 695 (1999).

Neither is *Schneider* controlling. In *Schneider*, this court determined that a guilty plea was not involuntary or unintelligent because the trial court failed to inform the defendant of the Act's requirements before accepting his plea. We relied on *Torres* in concluding that the requirements were a collateral consequence of the defendant's plea and that it had no direct effect on the range of the defendant's possible sentences or incarceration periods. *Schneider, supra*. Ripeness, however, was not an issue in that case. We specifically declined to use the intent-effects test for analyzing the penal nature of the statutory scheme because the defendant had not raised a double jeopardy or ex post facto challenge. *Id.*

[4] Thus, we determine that the registration requirement for an offender convicted of an aggravated offense under the Act's amended provisions is part of the sentencing court's judgment for purposes of filing an appeal. Worm's constitutional challenges to the Act's registration provisions are properly before this court.

(b) Notification Provisions

Worm also argues that the Act's notification provisions are punitive and violate his right to procedural due process. Worm, however, is currently incarcerated, and thus, has not yet registered. Under both the original and the Act's amended versions, offenders sentenced to a term of incarceration for a registrable offense are not required to register until they are released, paroled, or placed on probation, unless they are free pending an appeal. See 2002 Neb. Laws, L.B. 564. Because he has not registered, he has not yet been assessed for the applicable level of community notification. See 272 Neb. Admin. Code, ch. 19, § 012.01 (2003).

[5] Worm, however, argues that "[g]iven the district court's determination . . . that [Worm] committed an aggravated offense, the State Patrol is very likely to classify [him] as a high risk offender, and thus subject to having his personal information readily available to the public through the Internet and through print media." Brief for appellant at 13-14. The Act however, does not require a mandatory high-risk assessment for persons who have committed an aggravated offense. Rather, it requires the State Patrol to assess a registrant based on many factors, including the sex offender's response to treatment and behavior while confined. § 29-4013(2)(b). This assessment has not been made, and the notification level that the State Patrol will assign to Worm is mere speculation at this point. Worm's argument demonstrates that his constitutional challenges to the Act's notification provisions are not yet ripe for appellate review. See *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000) (declining to address challenge to statute allowing court to order compliance with alcohol assessment when assessment had not been made). See, also, *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235 (3d Cir. 1996) (determining that constitutional challenges to notification provisions of New Jersey's Sexual Offender Registration Act were not ripe when notification hinged upon risk assessment that had not yet been performed). We limit Worm's constitutional challenges to the registration requirements.

2. Ex Post Facto Challenge

Worm argues that the court's finding that he had committed an aggravated offense violated the ex post facto clause because

an aggravated offense and its attendant requirements did not exist when he committed a registrable offense. He argues that the clause is violated because the amendment is punitive, since he now must register for life, instead of 10 years.

[6,7] Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts. *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003). This court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution. See, e.g., *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999), citing *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

[8,9] Admittedly, the lifetime registration requirement for committing an aggravated offense did not exist when Worm committed his offense in March 2002. See 2002 Neb. Laws, L.B. 564 (approved April 16, 2002, and effective July 20, 2002). However, the retroactive application for civil disabilities and sanctions is permitted; only retroactive criminal punishment for past acts is prohibited. See, *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997). Cf. *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). Here, whether the amendment violates state and federal constitutional proscriptions against retroactive punishment is analyzed under the U.S. Supreme Court's two-prong, "intent-effects" test for analyzing punishment. See *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). If a court determines that the Legislature intended a statutory scheme to be civil, that intent will be rejected " 'only where a party challenging the [statute] provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention.' " *State v. Isham*, 261 Neb. 690, 694, 625 N.W.2d 511, 515 (2001).

We recognized that the intent-effects test can apply to either a double jeopardy or ex post facto challenge to a statutory scheme. *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002). Although we have not applied the test in analyzing an ex post

facto challenge to a statutory scheme, we have applied it to a double jeopardy challenge. See, *Isham, supra*; *Howell, supra*.

(a) Legislative Intent Prong

[10] The Act will pass the intent prong if the Legislature intended to establish a civil regulatory scheme to remedy a present situation and " 'the restriction of the individual comes about as a relevant incident to [the] regulation.' " *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235, 1254 (3d Cir. 1996), quoting *De Veau v. Braisted*, 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960). See *Howell, supra*. Whether the Legislature intended the amendments to be civil or criminal is primarily a matter of statutory construction. However, we must also look at the statute's structure and design. *Isham, supra*; *Howell, supra*.

The Legislature stated two main reasons for enacting the original Act: (1) sex offenders present a high risk to commit repeat offenses and (2) law enforcement agencies' efforts to protect communities, conduct investigations, and quickly apprehend sex offenders had been impaired by a lack of available information about sex offenders who live in their jurisdictions. § 29-4002 (Cum. Supp. 2000). These findings show that the Act has a dual purpose: protecting the public and assisting law enforcement in future efforts to investigate and resolve sex offenses. Moreover, this court has held that promoting public safety evidences a civil regulatory scheme. See, *Isham, supra*; *Howell, supra*.

Worm, however, argues that assisting law enforcement agencies with future investigations and prosecutions evidences a punitive purpose in enacting the law. But assisting future law enforcement efforts by monitoring an offender's whereabouts does not inflict punishment and furthers the legitimate regulatory goal of protecting the public and preventing crime. See, e.g., *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *Artway, supra*.

When looking at the statute's structure and design, the primary consideration is the procedural mechanisms established by the Legislature to enforce the statute. *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). The regulations use an administrative hearing and an appeal process under Nebraska's Administrative Procedure Act for challenging the registration and notification

requirements. See 272 Neb. Admin. Code, ch. 19, § 004 (2003). Thus, the requirement that an offender follow the Administrative Procedure Act for contesting and appealing administrative decisions evidences a civil, nonpunitive statute. See *Howell, supra.*

Moreover, that the sentencing court must find whether an aggravated offense occurred as part of the sentencing order does not indicate an intent to impose punishment because the court has no discretion; the finding is mandatory. The U.S. Supreme Court recently considered an ex post facto challenge to Alaska's sex offender registry in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Alaska's statutes similarly required a sentencing court to set out in the written judgment " 'the requirements of [the Alaska Sex Offender Registration Act] and, if it can be determined by the court, whether that conviction will require the offender or kidnapper to register for life or a lesser period.' " 538 U.S. at 95. The Court determined that this sentencing requirement did not make the registration punitive. It reasoned that using the sentencing court provided a timely and adequate notice to offenders of their registration obligations and the criminal consequences for failing to comply. *Id.*

[11] Similarly in Nebraska—if the offender is not incarcerated pending an appeal or if the offender is sentenced to probation—the registration requirements begin immediately. See 272 Neb. Admin. Code, ch. 19, § 006.03 (2003). Thus, prompt notification of the Act's requirements and its criminal penalty for noncompliance is essential in some cases. As in *Smith*, the Act's mandatory requirement of a finding whether an aggravated offense occurred provides a prompt notification. We conclude that the Legislature intended to create a civil regulatory scheme to protect the public from the danger posed by sex offenders, which intent is not altered by the statute's structure or design.

(b) Effects of Registration Requirements

[12] Next, we analyze whether the purpose or effect of the statute is so punitive as to negate the Legislature's intent. In making that determination, we consider the factors set out by the U.S. Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963):

> "(1) '[w]hether the sanction involves an affirmative disability or restraint'; (2) 'whether it has historically been regarded as punishment'; (3) 'whether it comes into play only on a finding of *scienter*'; (4) 'whether its operation will promote the traditional aims of punishment—retribution and deterrence'; (5) 'whether the behavior to which it applies is already a crime'; (6) 'whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) 'whether it appears excessive in relation to the alternative purpose assigned.' "

State v. Isham, 261 Neb. 690, 695, 625 N.W.2d 511, 515-16 (2001), quoting *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). See, also, *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980).

(i) Relevance of Scienter and Criminal Behavior Factors

In *Smith*, the Court concluded that two factors received little weight in analyzing the effect of Alaska's registry statutes: (1) whether the regulation comes into play only upon a finding of scienter and (2) whether the behavior to which it applies is already a crime. The Court determined that because the statutory concern was recidivism, the offender's past criminal conduct was a necessary beginning point. *Id.* See, also, *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). Here, we agree that the scienter and criminal behavior factors are not relevant to determining whether a criminal registration statute imposes punishment.

(ii) Affirmative Disability or Restraint

The Alaskan statutes considered in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), required registrants who had been convicted of an aggravated offense to verify their registration quarterly for life. But the Court determined that the requirement was not an affirmative disability or restraint because registrants were free to live and work where they wanted without supervision. *Id.* Accord, *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *State v. Ward*, 123 Wash. 2d 488, 869 P.2d 1062 (1994).

Similarly, although Worm must notify law enforcement agencies of changes in his address, occupation, vocation, or school

attendance, the Act does not require him to seek permission. See *Cutshall, supra*. After his initial registration, which must be completed in person, Worm may verify his registration information annually. See 272 Neb. Admin. Code, ch. 19, §§ 006.07 and 009 (2003). These requirements pose a lesser burden than revoking a driver's license or a professional license—sanctions which this court has previously held are civil in nature. See, *Isham, supra*; *State v. Wolf*, 250 Neb. 352, 549 N.W.2d 183 (1996). Further, the statute upheld in *Smith* required offenders who had committed an aggravated offense to verify their registration on a quarterly basis for life. Here, the burden posed by the Act's registration provisions is slight. The annual verification obligation is significantly less burdensome than the quarterly verification obligation upheld in *Smith*. We conclude that Nebraska's registration provisions do not impose an affirmative disability or restraint on the registrant.

(iii) Historically Regarded as Punishment

Sex offender registries are a relatively new occurrence and have not been historically regarded as punishment. See, *Smith, supra*; *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997). The Supreme Court noted in *Smith* that the "imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive governmental objective and has been historically so regarded.' " 538 U.S. at 93, quoting *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). Further, criminal registration in general has not been traditionally viewed as punishment; instead, it serves to make relevant information available to law enforcement. See, *Lambert v. California*, 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957) (felony registration is permissible law enforcement procedure); *People v. Adams*, 144 Ill. 2d 381, 581 N.E.2d 637, 163 Ill. Dec. 483 (1991).

(iv) Traditional Aims of Punishment

Courts generally hold that registration statutes do not promote the traditional aims of punishment: retribution and deterrence. It is true that regardless of a sex offender's risk assessment, local law enforcement will be notified of the offender's presence in

their community. This fact would presumably have some deterrent effect on the registrant's activities, but this effect is minimal when compared to the threat of conviction and incarceration for a new offense. See, *State v. Burr*, 598 N.W.2d 147 (N.D. 1999); *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (1995); *Adams, supra*. Compare *State v. Hansen*, 249 Neb. 177, 189, 542 N.W.2d 424, 433 (1996) (concluding that "substantial remedial purposes underlie the administrative license revocation statutes" which are "not defeated by the fact that the statutes also play a role in deterring others from driving drunk"). See, also, *Smith v. Doe*, 538 U.S. 84, 98, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment").

Further, the registration provisions cannot be said to serve a retributive purpose. We have already determined that the requirement does not impose an affirmative disability. Nor does registration in itself involve public notice. Unless an offender is assessed as having a moderate or high recidivism risk, the registration information is provided only to law enforcement agencies, which already have access to criminal histories. See Neb. Rev. Stat. §§ 29-3501 to 29-3528 (Reissue 1995, Cum. Supp. 2002 & Supp. 2003) (Security, Privacy, and Dissemination of Criminal History Information Act). Thus, registration, considered apart from notification, is unlikely to result in any stigma.

(v) Sanction's Excessiveness in Relation to Alternative Purpose

Finally, the registration requirement is not excessive in relation to its assigned nonpunitive purpose—to protect the public and aid law enforcement. The length of the registration requirement must necessarily correspond to the recidivism risk for that offense classification to carry out the statute's intent. "The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences," particularly for minor conditions such as registration. *Smith*, 538 U.S. at 103-04 (noting that duration of registration requirement is based on empirical research showing that reoffenses can occur as much as 20 years after release).

We determine that the Act's offense categories and related registration periods "are reasonably related to the danger of recidivism" and "consistent with the regulatory objective." See 538 U.S. at 102.

[13] We conclude that Worm has failed to show by the clearest proof that the Act's registration provisions are so punitive in either purpose or effect as to negate the State's intention. Because the registration provisions are not punitive, we defer to the Legislature's determination of what remedial action is necessary to achieve the Legislature's goals. See *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998).

3. Due Process

Worm contends that the Act violated his right to procedural due process because it did not afford him notice and a hearing before the district court determined that he had committed an aggravated offense. This determination increased the applicable registration period for him from 10 years to life. Worm argues that the Act deprives him of a liberty interest in privacy because publicly disclosing his personal information, including employment information, will likely make employers reluctant to hire him.

[14,15] Procedural due process limits the government's ability to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause. Due Process requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections. *Id.*

[16] Reputational damage caused by state action which results in a person's stigmatization can implicate a protected liberty interest, but only if it is coupled with some more tangible interest such as employment. See *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001), quoting *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). This requirement of a tangible interest is referred to as the "stigma plus" test. *Benitez, supra.*

Worm correctly argues that the regulations currently provide that the State Patrol "may" disseminate employment information if an offender is determined to have a high risk classification. See

272 Neb. Admin. Code, ch. 19, § 013.05 (2003). As discussed, however, Worm's risk classification and notification level has not been made. For offenders with a low recidivism risk, the registry information is made available only to the law enforcement agencies in the jurisdiction where an offender lives after release from incarceration or during placement on parole or probation. Thus, at this point, Worm has failed to show that he will be subjected to any public notification, and the issue is not yet ripe for review. Additionally, we note that all offenders are given an opportunity to ask for a hearing on their assigned risk classification level after the State Patrol notifies them. See 272 Neb. Admin. Code, ch. 19, § 015.01 (2003) (allowing offenders 5 days to mail in request for hearing to contest classification after receiving notice).

[17] The only issue currently before this court is the registration requirements, which do not involve public notice. Because Worm's argument for reputational damage is related only to the notification provisions, he has failed to show that he has a liberty interest entitled to due process protection. We conclude that Worm's due process argument must fail. See *Benitez, supra.*

4. Excessive Sentence

Finally, Worm argues that the district court abused its discretion by imposing an 8- to 12-year prison sentence and by not placing him on probation. He further argues that his crime was mitigated by his history of mental health disorders.

[18,19] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). Whether the sentence imposed is probation or incarceration is a matter within the trial court's discretion, whose judgment denying probation will be upheld in the absence of an abuse of discretion. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003).

[20] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and

circumstances surrounding the defendant's life. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

The offense for which Worm was convicted, attempted first degree sexual assault, is a Class III felony. See Neb. Rev. Stat. §§ 28-319(1)(c) and (2) (Reissue 1995) and 28-201(4)(b) (Cum. Supp. 2002). Worm's 8- to 12-year prison sentence is within the statutory limits of Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2000), which provides for a maximum of 20 years' imprisonment for a Class III felony.

Worm's presentence investigation report indicated that he was not a candidate for intensive supervision probation because of the offense, his criminal history, and his risks or needs assessment. His psychiatric examinations and interviews showed a diagnosis of pedophilia, antisocial personality disorder, and other mental health disorders. Although Worm argues that his previous convictions did not involve violent offenses, the presentence investigation report showed an inability to control aggressive and violent behaviors. Worm's presentence report showed he had a moderate risk of future sexual offending and a high risk for general recidivism within a 7- to 10-year timeframe.

We conclude that the trial court did not abuse its discretion in sentencing as it did, nor in refusing to place Worm on probation.

VI. CONCLUSION

We conclude that Worm's lifetime registration requirement for an aggravated offense under the amended provisions of Nebraska's Sex Offender Registration Act is part of the sentencing court's judgment for purposes of filing an appeal. Thus, his constitutional challenges to the registration requirement are properly before this court in his direct appeal. We conclude that his challenges to the Act's notification provisions, however, are not yet ripe for appellate review. We conclude that the registration requirements do not impermissibly impose retroactive punishment and that Worm's due process argument must fail because Worm has failed to show that the registration requirement deprives him of a protected liberty interest. Finally, we conclude that the district court did not abuse its discretion in the sentence it imposed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GREGORY G. HALL, APPELLANT.

679 N.W.2d 760

Filed May 28, 2004. No. S-03-590.

1. **Pleas: Appeal and Error.** A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Pleas.** To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.
4. **Habitual Criminals: Sentences.** In connection with a habitual criminal advisement, the Nebraska Supreme Court has stated that a court must inform a defendant of the possibility of an increased sentence imposed because of a habitual criminal statute.
5. **Sentences.** Under Nebraska law, a defendant must be informed of those consequences which affect the range of possible sentences or periods of incarceration for each charge and the amount of any fine to be imposed as a part of the sentence.
6. **Habitual Criminals: Sentences.** A critical feature of a habitual criminal advisement is that a defendant be informed of the possibility that an increased sentence will be imposed if the defendant is found to be a habitual criminal under the habitual criminal statute.
7. **Habitual Criminals: Prior Convictions: Right to Counsel: Proof.** A showing of the presence of counsel at sentencing will not alone establish the State's case that a defendant's prior conviction was counseled for purposes of the habitual criminal statute.
8. ____: ____: ____: ____. The State's burden of establishing prior, counseled convictions for habitual criminal purposes is the same whether a defendant's prior conviction is based on a plea of guilty, a jury verdict of guilty, or a finding of guilt by a trial court.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, and in part sentence vacated and cause remanded with directions.

Gregory A. Pivovar for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

PER CURIAM.

INTRODUCTION

Appellant, Gregory G. Hall, pleaded guilty to delivery of a controlled substance, a Class III felony. See Neb. Rev. Stat. § 28-416 (Cum. Supp. 2002). After an evidentiary hearing, the district court concluded that Hall was a habitual criminal and sentenced him to 10 years' imprisonment. Hall appealed. Pursuant to Neb. Rev. Stat. § 24-1106(2) (Reissue 1995), we granted the State's petition to bypass. We affirm in part, and in part vacate the sentence and remand the cause with directions.

FACTUAL BACKGROUND

On September 27, 2002, Hall was charged in Sarpy County District Court with four substantive counts: one count of possession of a controlled substance with intent to deliver, one count of possession of a controlled substance, and two counts of delivery of a controlled substance. Hall was also charged as a habitual criminal. The district court explained Hall's rights to him in a group arraignment. After the court had completed the general rights advisory, Hall was individually advised of the penalties associated with the counts for which he had been charged. With respect to the habitual criminal charge, the court advised Hall as follows:

> I'll advise you that also there is a charge of being a habitual criminal and the elements of enhancement will be, as follows: (1) That you have been at least twice previously been [sic] convicted of crimes; (2) That you were sentenced and committed for each crime to prison in this state for a term of not less than one year; and (3) That if you are to become convicted of the charge under Counts I, II, III, or IV, or any lesser charge that is a felony, then the penalty phase is enhanced and the punishment is not less than 10 years nor more than 60 years imprisonment.

The State and Hall subsequently entered into a plea agreement wherein Hall agreed to plead guilty to one count of delivery of a controlled substance, a Class III felony. In return, the State agreed to dismiss the remaining substantive counts against Hall, but did not agree to dismiss the habitual criminal charge. On January 6, 2003, Hall pleaded guilty pursuant to this agreement.

At an evidentiary hearing on the habitual criminal charge, the State introduced evidence of prior convictions from Platte County and Douglas County, Nebraska, and Bernalillo County, New Mexico. The district court found Hall to be a habitual criminal and sentenced him to 10 years' imprisonment. Hall appeals.

ASSIGNMENTS OF ERROR

Hall claims that the district court erred in finding that (1) his plea was knowingly, voluntarily, and intelligently entered and (2) he was a habitual criminal.

STANDARD OF REVIEW

[1,2] A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion. *State v. Smith*, 266 Neb. 707, 668 N.W.2d 482 (2003). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

ANALYSIS

Acceptance of Plea: Habitual Criminal Advisement.

In his first assignment of error, Hall claims that the district court's advisement failed to advise him that a conviction in another state could be used to prove that he was a habitual criminal and that thus, his guilty plea was not freely, intelligently, and voluntarily entered. We reject this argument.

This court has adopted the U.S. Supreme Court's due process requirements for a validly entered guilty plea delineated in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Under *Boykin*, a guilty plea must be knowingly and voluntarily entered because the plea involves the waiver of certain constitutional rights. *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002).

[3,4] We have held that to support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant,

(4) the right to a jury trial, and (5) the privilege against self-incrimination. *State v. Smith, supra.* The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged. *Id.* In connection with a habitual criminal advisement, we have specifically stated that "a court must inform a defendant of the possibility of an increased sentence imposed because of a habitual criminal statute." *State v. Schneider*, 263 Neb. at 324, 640 N.W.2d at 13.

Hall does not argue that the general rights advisory given by the district court was in error. Rather, he argues that the district court's habitual criminal advisement was in error to the effect that the relevant priors consisted of crimes for which he had been "sentenced and committed . . . to prison *in this state* for a term of not less than one year." (Emphasis supplied.) Hall generally claims that this advisement failed to parallel the language of the habitual criminal statute, which applies to persons "twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States," see Neb. Rev. Stat. § 29-2221(1) (Reissue 1995), and specifically failed to alert him to the fact that a prior conviction from another state could be used for purposes of enhancement under the habitual criminal statute. Hall contends that because of these failures, he was not informed as to the total penal consequences of his plea and that, therefore, his plea cannot be said to have been freely, voluntarily, and intelligently entered.

[5,6] This court has held that "under Nebraska law, a defendant must be informed of those consequences which affect the range of possible sentences or periods of incarceration for each charge and the amount of any fine to be imposed as a part of the sentence." *State v. Schneider*, 263 Neb. at 324, 640 N.W.2d at 13. As noted above, a critical feature of a habitual criminal advisement is that a defendant be informed of the possibility that an increased sentence will be imposed if the defendant is found to be a habitual criminal under the habitual criminal statute. *Id.* Although the advisement in this case did not state that convictions in other states could serve as prior convictions, the advisement did inform Hall of the range of penal consequences and was not inadequate.

In this case, Hall was advised by the district court, in relevant part, as follows: "For a violation of a Class III Felony the maximum punishment is 20 years imprisonment, a $25,000 fine, or both, [and] carries a minimum of one year imprisonment." Hall was also advised that

> there is a charge of being a habitual criminal and the elements of enhancement will be [in part] as follows: . . . (3) That if you are to become convicted of the charge under Counts I, II, III, or IV, or any lesser charge that is a felony, then the penalty phase [due to a habitual criminal finding] is enhanced and the punishment is not less than 10 years nor more than 60 years imprisonment.

These advisements alerted Hall to the range of possible sentences and periods of incarceration for the charge to which he pleaded guilty, as well as the amount of any fine that might be assessed against him. The district court's advisement regarding the habitual criminal charge informed Hall that if he was convicted of any of the charges against him, upon proof of two prior convictions, his penalty could be enhanced and that he could be sentenced to 10 to 60 years' imprisonment. We further observe that the information alleged that Hall was a habitual criminal based upon convictions "in this or some other state."

Although it is preferable that a habitual criminal advisement refer to specific in-state, out-of-state, and United States convictions as the relevant prior convictions under § 29-2221, in this case, Hall was adequately advised and the due process requirements were met. The district court did not abuse its discretion in accepting Hall's plea. Hall's first assignment of error is without merit.

Habitual Criminal: Representation by Counsel.

In his second assignment of error, Hall claims that the district court erred in finding that he was a habitual criminal. The district court found that a Platte County, Nebraska, conviction and a New Mexico conviction were eligible to serve as prior convictions under § 29-2221. Regarding the New Mexico conviction, the district court stated that "the judge in the [New Mexico] case entered a judgment of conviction on the date of the sentencing." Hall argues that his New Mexico conviction was not valid for

enhancement under § 29-2221, because the State failed to show that Hall was represented by counsel at the time of his conviction in the New Mexico case. We conclude there is merit to Hall's claim.

Hall concedes that the State met its burden with respect to the Platte County conviction and that this conviction is valid for enhancement purposes. The issue now before us is whether the record demonstrates that the New Mexico conviction is valid for enhancement purposes. In support of his contention that the New Mexico conviction cannot be used for habitual criminal enhancement, Hall relies on this court's decision in *State v. Thomas*, 262 Neb. 985, 1012, 637 N.W.2d 632, 658 (2002), where we stated:

> In a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right. *State v. Nelson*, [262 Neb.] 896, 636 N.W.2d 620 (2001); *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996).
>
> . . . .
>
> The record does not show that the trial court ascertained whether [L.T.] Thomas was represented by counsel or waived his right to counsel at the time of the earlier convictions. The journal entries simply show that Thomas was present with counsel at the time of sentencing, but they do not demonstrate whether he was represented by counsel prior to that time. The evidence offered by the State at the enhancement hearing did not establish that Thomas was represented by counsel or had waived the right to counsel at the time of the prior convictions. We conclude that the evidence was insufficient to prove Thomas' earlier convictions for purposes of sentence enhancement.

Hall notes that, as in *Thomas*, the evidence offered by the State in this case did not establish that he was represented by or had waived counsel at the time of his New Mexico conviction. Hall notes that the evidence merely established that Hall was present with counsel at the time of sentencing. Furthermore, contrary to the district court's observations, Hall was not convicted

and sentenced on the same day, but, rather, was convicted by a jury on July 16, 1981, and thereafter sentenced on September 8. Given these facts, Hall argues that the record fails to show that he was represented by counsel at the time of the New Mexico conviction and that such conviction cannot be used for sentence enhancement purposes.

In opposing Hall's arguments, the State contends that *State v. Sherrod*, 229 Neb. 128, 425 N.W.2d 616 (1988), applies. *Sherrod* states in relevant part that

> the State establishes a prima facie case for proving a prior, counseled conviction by producing appropriate record evidence of a conviction which discloses that at a critical point in the proceedings—arraignment, trial, conviction, or sentencing—the defendant had either intelligently and voluntarily waived counsel or in fact was represented by counsel at one of those times. The defendant then has the burden of coming forward with evidence that in fact his prior conviction was uncounseled.

229 Neb. at 134, 425 N.W.2d at 621. See, *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991) (enhancement for third-offense driving while intoxicated); *State v. Dyke*, 231 Neb. 621, 437 N.W.2d 164 (1989) (enhancement for third-offense driving while intoxicated).

The State claims that it presented evidence that showed that Hall was represented by counsel at the time of his New Mexico sentencing, which is sufficient under *Sherrod*, and that as a result, Hall had the burden of coming forward with evidence to show that he had been uncounseled. Since Hall failed to present any evidence to that end, the State argues its burden had been met and that the New Mexico conviction was valid for enhancement.

[7] This court recognizes that there is tension between our decisions in *Sherrod* and *Thomas*. However, we conclude that *Sherrod* is an incomplete statement of the law and that *Thomas*, which is our latest pronouncement, controls the issue of whether under the habitual criminal statute, § 29-2221, the State can establish its burden of showing a prior, counseled conviction by merely showing that the defendant was represented at the time of sentencing. Under *Thomas*, which we reaffirm, a showing of the presence of counsel at sentencing will not alone establish the

State's case that a defendant's prior conviction was counseled for purposes of § 29-2221.

[8] We note that in *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), we stated that when the State seeks to use prior convictions based on pleas of guilty to enhance a defendant's sentence for habitual criminal purposes, the State has the burden of showing that the defendant had been represented by or had waived counsel. In the instant case, we note that Hall's prior New Mexico conviction was based upon a jury verdict of guilty rather than on a guilty plea. This court has stated that "making a plea of guilty is 'the equivalent of a conviction by trial and verdict or a finding of guilt by the court.'" *State v. Ondrak*, 212 Neb. 840, 842, 326 N.W.2d 188, 190 (1982) (quoting *Stewart v. Ress*, 164 Neb. 876, 83 N.W.2d 901 (1957)). As a result, we conclude that the State's burden of establishing prior, counseled convictions is the same whether a defendant's prior conviction is based on a plea of guilty, a jury verdict of guilty, or a finding of guilt by a trial court.

Given that *Thomas* is the prevailing authority, we apply *Thomas* to the facts of this case when considering whether the State has met its burden. The State in this case introduced into evidence an order entitled "Judgment, Sentence and Commitment" which reflected that Hall was sentenced in New Mexico on September 8, 1981, following his conviction on July 16. The judgment, sentence, and commitment order states that Hall appeared at the sentencing hearing with counsel. However, the record does not contain any evidence to affirmatively show that Hall had been represented by counsel or had waived counsel at the time of the jury's guilty verdict on July 16.

The facts in Hall's case mirror those of *Thomas*, where the State introduced evidence that Thomas had been represented by counsel at his sentencing on an earlier conviction, but the record contained no evidence showing that Thomas had been represented by counsel or had waived counsel prior to sentencing. In *Thomas*, we concluded that the evidence was insufficient to prove the earlier convictions were counseled for the purposes of habitual criminal sentence enhancement.

In this case, the State failed to meet its burden of showing that Hall had been represented by or had waived counsel at the time of

his New Mexico conviction and it was error for the district court to find Hall to be a habitual criminal. As a result, we must vacate Hall's sentence and remand the cause to the district court with directions for a new enhancement hearing and for resentencing following the hearing. In doing so, we observe that no presentence investigation was performed prior to the district court's initial sentencing of Hall, and in fact, Hall notes in his appellate brief that the district court imposed sentence upon him without the benefit of such an investigation. We note that the applicable version of Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2002) stated that "[u]nless it is impractical to do so, when an offender has been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation . . . ." Upon remand, unless the district court determines that it is impractical to do so, the district court shall order a presentence investigation prior to Hall's resentencing.

CONCLUSION

We conclude that the district court did not err in accepting Hall's plea. However, with respect to enhancement, the State did not meet its burden of showing that Hall was represented by counsel at the time of his prior New Mexico conviction, and the district court's finding that Hall was a habitual criminal was error. We therefore vacate Hall's sentence and remand the cause with directions for a new enhancement hearing and for resentencing.

AFFIRMED IN PART, AND IN PART SENTENCE VACATED AND CAUSE REMANDED WITH DIRECTIONS.

PROFESSIONAL BUSINESS SERVICES CO., APPELLANT AND CROSS-APPELLEE, V. STEPHEN J. ROSNO, APPELLEE AND CROSS-APPELLANT.

680 N.W.2d 176

Filed June 4, 2004. No. S-02-1227.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly erroneous.

3. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
4. **Pleadings: Appeal and Error.** As a general rule, an appellate court disposes of a case on the theory presented in the district court.
5. **Trial: Contracts: Evidence: Custom and Usage.** Evidence of custom is admissible when there is a conflict as to the terms of the contract to explain the meaning of the words or phrases used, or where the contract is silent as to certain points which may be inherent in the nature of the contract.
6. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
7. **Principal and Agent.** Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency. This general rule forbids the doing of acts in competition with the principal and taking unfair advantage of the agent's position in the use of information or things acquired by him because of his position as an agent.
8. ____. Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency.

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

Robert R. Otte, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., L.L.O., for appellant.

Jerry L. Pigsley, of Harding, Shultz & Downs, for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Professional Business Services Co. (PBS) appeals from a judgment of the district court for Lancaster County, Nebraska, finding a noncompetition covenant to be greater than reasonably necessary to protect PBS and, therefore, unenforceable. From this and other findings below, PBS appeals and the appellee, Stephen J. Rosno, cross-appeals.

II. BACKGROUND

During the relevant time in question, PBS served primarily the health care industry in essentially four areas: taxes, accounting and payroll, practice management, and billing and claims. PBS contracted with the Dale E. Gruntorad Company accounting firm

(Gruntorad) to operate PBS' tax practice area. From approximately 1987 to 1989, Rosno, employed by Gruntorad, performed a majority of PBS' work related to the tax practice area, including preparing all of the tax returns for and providing tax advice to PBS' clients. Rosno performed his work for PBS onsite, but did not have personal contact with PBS clients. PBS heavily relied upon the Gruntorad firm to provide tax services for PBS' business.

When PBS' founder died in 1989, PBS did not have an established client list. Due to his familiarity with PBS' client base, Rosno assisted PBS by preparing an inventory of PBS' clients. Rosno's role at PBS also began to take on more significance as Rosno became more heavily involved with advising clients for tax purposes. Rosno became a partner in the Gruntorad accounting firm and continued to prepare tax returns for PBS' clients.

Between June and September 1992, Rosno approached Steven Strasheim, one of PBS' principals, on several occasions, requesting that PBS hire Rosno as an employee. Initially, PBS rejected Rosno's requests for employment. Rosno told Strasheim that if Rosno left Gruntorad, pursuant to a noncompetition agreement with the accounting firm, the only way Rosno could continue providing services for PBS was to buy PBS' business from Gruntorad, a transaction Rosno explained he could not afford. Thus, PBS eventually agreed to hire Rosno. During the negotiation of Rosno's employment with PBS, Strasheim told Rosno that at that time, only he and his brother, the only other principal of PBS, had the level of professional experience necessary to maintain client relationships. Therefore, they would be looking to Rosno to help in that area. However, Strasheim and his brother also expressed to Rosno their concerns. If they hired Rosno and allowed him to take over the tax practice area, and begin having individual relationships with PBS' clients, Rosno might later leave PBS and take those clients with him. Rosno responded by suggesting the parties execute a noncompetition agreement to protect PBS.

On October 8, 1992, the parties executed a "Professional Employment Agreement" (employment agreement) drafted by PBS' attorney, which included a noncompete covenant. The effective date of the employment agreement was October 1, 1992; the

day Rosno began working as an employee of PBS. At the time the parties executed the employment agreement, the parties made several handwritten changes, which both parties initialed. One such change included a provision that the postterm noncompetition provision of the covenant "shall not apply to clients listed on Exhibit I." Exhibit I lists approximately 95 clients of PBS. The noncompetition covenant of the employment agreement provides:

> a. In-Term Covenant: The parties agree that during the term of this Agreement and during the term of Rosno's employment by the Employer, the respective clients of the Employer shall remain the clients of the Employer and that Rosno shall not, directly or indirectly, whether as an officer, director, shareholder, partner, advisor, consultant or employee or in any other capacity do business for or with any client of the employer outside of the scope of duties rendered for Employer pursuant to this Employment Agreement.
>
> b. Post-Term Covenant: Rosno further covenants and agrees that in the event of the termination of his employment, for whatever reason, he shall not directly or indirectly solicit, contact or perform services for any of Employer's clients for his own benefit or as an officer, director, shareholder, partner, advisor, consultant or employee of any third party. Said Post-Term Covenant shall continue for a period of two (2) years following such termination or separation for any reason whatsoever and shall include the area located within twenty-five (25) miles of Lincoln, Nebraska. The post-term covenant shall not apply to clients listed on Exhibit I.

The employment agreement's effective dates were October 1, 1992, to September 30, 1993, and included an option to extend Rosno's employment with PBS on a year-to-year basis. The employment agreement addressed issues related to bonuses, vacation time, and sick leave, and included a provision related to termination of the employment agreement:

> 3. Salary and Bonuses: . . . .
>
> Employer may pay Rosno a bonus at any time during the term of the Agreement. However, Rosno shall be paid a bonus of $5,000.00 after Rosno's first year of employment.

. . . .

4. Other Benefits: . . . .

. . . .

In addition to the foregoing, Rosno shall receive three (3) weeks of paid vacation per year a[t] such time as may be reasonable given the professional and work related demands of the Employer during the year.

In addition to the foregoing, Rosno shall have the opportunity to participate in any retirement, health insurance or other employee benefit plan offered by the Employer to its employees generally.

. . . .

6. Termination: Employer may terminate this Agreement with Rosno and Rosno's employment by Employer on September 30, 1993, for any reason upon . . . ninety (90) days advanced written notice to employee.

Additionally, Employer may terminate this Agreement and Rosno's employment by Employer at any time, without notice to Rosno for fraud, misrepresentation, theft, malfeasance, or upon the initiation by the Board of Accountancy of any proceedings to revoke or modify the permit to practice public accounting pursuant to the laws of the State of Nebraska.

Additionally, Employer may terminate this Agreement and Rosno's employment on thirty (30) days notice for failure of Rosno to complete his duties as required herein or reasonably requested by Employer.

Rosno may terminate this Agreement, and Rosno's employment hereunder at any time, for any reason, upon ninety (90) days advanced written notice to Employer.

The employment agreement also contained a provision prohibiting Rosno from using, directly or indirectly, for his own benefit, PBS' trade secrets. These included customer lists or other business operation information deemed by PBS to be secret and held in confidence.

On Friday, November 10, 1995, Rosno gave Strasheim a handwritten notice of termination of the employment agreement. At the time Rosno presented his notice terminating the employment agreement, Strasheim described Rosno as being

very hostile and stated that Rosno was threatening to make disparaging remarks about PBS. Rosno refused to say why he was resigning, but told Strasheim that "his feeling was our employment agreement was not valid and that he would be asking any PBS client he wanted to leave PBS and follow him to his new accounting firm." Strasheim asked Rosno to take the weekend to reconsider his position in that it was grounds for immediate termination. Strasheim met with Rosno the following Monday, at which time, Rosno gave Strasheim a list of clients whom Rosno believed he was entitled to, and intended to, solicit. Many of the clients on the list were not those listed on exhibit I attached to the employment agreement. Strasheim testified that Rosno then stated that " 'I'm going to ask anybody I want to follow me to my accounting firm and leave PBS' " and that he was not going to honor the noncompetition covenant of the employment agreement. At that point, Strasheim terminated Rosno's employment and asked him to gather his belongings and leave. Rosno admitted during cross-examination that his intention, had he been permitted to continue working for PBS during his 90-day notice period, was to continue working for PBS while simultaneously taking PBS' clients. Strasheim testified that this was the most hostile resignation he had ever experienced, that he was completely caught off guard by Rosno's attitude, and that there had been no prior warning signs foreshadowing Rosno's resignation. Following Rosno's termination, PBS copied thousands of client records and gave them to Rosno pursuant to record release forms received from Rosno and signed by PBS clients.

PBS originally filed this action alleging breach of the covenant not to compete and claiming damages pursuant to the liquidated damages provision of the employment agreement. The trial court sustained a demurrer filed by Rosno, finding that PBS' petition failed to set forth facts sufficient to constitute a cause of action. Specifically, the trial court found that the noncompete covenant in the employment agreement was more restrictive than reasonably necessary to protect PBS' legitimate interest and, thus, was invalid and unenforceable.

On appeal to this court, we reversed, and remanded with directions to reinstate the operative petition. See *Professional Bus.*

Servs. v. Rosno, 256 Neb. 217, 589 N.W.2d 826 (1999) (*Rosno I*). We noted the general rule that a covenant not to compete in an employment contract " 'may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact.' " *Id.* at 225-26, 589 N.W.2d at 832. We noted that in its operative petition, PBS alleged that Rosno "had substantial contact with virtually all of PBS' clients." *Id.* at 227, 589 N.W.2d at 833. We also noted that PBS alleged that Rosno "had violated the terms of his contract with PBS by siphoning away PBS' goodwill." *Id.* at 222, 589 N.W.2d at 830. We concluded that the inferences of law and fact from the operative petition were that Rosno was being restricted from working for or soliciting PBS' clients or accounts with whom Rosno actually did business and had personal contact and that in his employment agreement, the covenant not to compete with respect to all of PBS' clients could be enforceable. *Id.* Accordingly, we concluded that PBS should be permitted to present evidence to support the facts. *Id.*

Upon remand, a bench trial ensued and evidence was adduced. Strasheim testified that when Rosno was hired at PBS, he was given the title of "tax specialist," and that PBS hoped Rosno would help the company grow and serve PBS' clients. Around that same time, PBS sent a letter to all of its clients welcoming Rosno to the company and suggesting to clients that they contact Rosno directly with any questions regarding tax or accounting issues. Strasheim testified that during the course of Rosno's employment with PBS, he was involved in PBS' four practice areas of taxes, accounting and payroll, practice management, and billing and claims. Rosno testified, however, that he spent 99 percent of his time in only the taxes, accounting and payroll, and practice management areas.

With respect to the tax practice area, Rosno was responsible for the preparation of every tax return PBS prepared and would have known "quite a bit about a person's life." Rosno was privy to information about client income, expenses, charitable contributions, medical expenses, significant health care issues, business loans, equipment purchases, and would have needed to "understand [a client's] business quite well."

With respect to the other areas of PBS' business, some of Rosno's responsibilities included answering questions from clients and their staff. These questions would be regarding their general ledgers, collecting information from clients to prepare tax returns, and occasionally taking calls from clients regarding billing issues. With respect to the practice management area of PBS' business, Strasheim testified that he began teaching Rosno how to "be sort of a physician specialist." Strasheim also sent him to Kansas City to receive training on how to be a practice management advisor. Strasheim noted that PBS had hired Rosno to supervise the accounting and payroll area, but that this supervisory role never came to fruition for Rosno.

PBS introduced into evidence a series of documents, exhibits 50 through 78, representing correspondence from Rosno to various clients and other documents. Strasheim testified that these exhibits reflect that Rosno had contact with "quite a few clients" and operated in areas other than the tax practice. Specifically, Strasheim testified that exhibits 50 through 78 demonstrated that Rosno was closely involved with PBS' billing practice, was intimately familiar with PBS' billing reports and billing systems, and solicited and marketed PBS' billing services to clients. Rosno testified, however, that he did not provide any services in the billing area of PBS' business. He testified that he did not train clients on their billing system, he did not field billing-related telephone calls, he did not provide any support for the billing system, and he did not engage in computer software development for the computer billing system. Rosno testified that the only involvement he had with PBS' billing and claims practice was in the use and analysis of reports generated by the billing system.

Two sets of client lists, exhibits 42 and 43, were offered by PBS and received into evidence. The parties referred to exhibit 42 as the personal contacts list (PC list) and to exhibit 43 as the list containing those clients who used PBS' billing services only (BO list). Strasheim testified that these two lists combined to make up the complete list of PBS clients at the time that Rosno was terminated.

The PC list contains a list of 359 clients of PBS. This list was produced by PBS in response to an interrogatory requesting that PBS identify those clients with whom Rosno had substantial

personal contact. The PC list contains a list of any client that was billed for accounting, payroll, or income tax services during the period of Rosno's employment with PBS. Strasheim testified that Rosno was the primary client services representative for the areas of accounting and payroll and tax practice. Strasheim testified that Rosno would have had contact with virtually 100 percent of the clients on this list. He would have substantial contact with a majority of the clients on this list either through correspondence, in-person meetings, or telephone calls, or through contact with the information in the clients' accounting and tax files. Rosno testified that with the exception of 10 to 12 clients, he provided tax or accounting services to all of the clients listed on the PC list. However, Rosno further testified that he did not have personal contact with 80 of the 359 clients listed on the PC list.

The BO list is a list of 93 PBS clients and was produced by PBS in response to an interrogatory requesting PBS to identify those clients with whom Rosno did not have substantial personal contact. This exhibit contains a list of the remainder of PBS' clients who were billed during the period of Rosno's employment for services other than accounting, payroll, or income tax work.

Strasheim testified that the clients listed on the BO list were "billing only" clients. Strasheim admitted that Rosno did not have personal contact with 100 percent of the clients listed on the BO list but had personal contacts with only some of the clients listed. Strasheim admitted that he could not prove with which clients on the BO list Rosno did, in fact, have personal contact, because, Strasheim stated, he did not track Rosno's client contacts. Rosno testified that he provided services for only three or four clients listed on the BO list and had personal contact with only two clients on that list.

Exhibit 92, offered and admitted into evidence, consists of copies of the PC and BO lists annotated by Rosno. Specifically, Rosno marked those clients of PBS for whom he provided any type of service or work while employed at PBS, and those clients of PBS for whom he had personal contacts while in PBS' employ. Rosno's annotations indicate he provided services for 4 of the 93 PBS clients listed on the BO list, but did not have personal contact with any of those 4. Rosno's annotations indicate he provided

services for 328 of the 359 clients listed on the PC list, and had personal contact with 151 of them while in PBS' employ.

With respect to the noncompete covenant, Strasheim testified that the employment agreement was important to PBS and that it would not have offered Rosno employment without it. Strasheim testified that he did not want Rosno taking any of PBS' clients and that it did not make any difference to him whether Rosno actually worked for or had personal contacts with them.

Following a bench trial, the trial court issued its order, finding in favor of Rosno on PBS' claim for damages for the alleged violation of the noncompete covenant. The court, finding that PBS failed to show that Rosno had substantial personal contacts with all of PBS' clients, held that the noncompete covenant was greater than was reasonably necessary. The employment agreement restricted Rosno from engaging in services with any of PBS' clients. With respect to Rosno's counterclaim, the trial court found against Rosno on his claim for payment of wages. The court found that when Rosno told Strasheim that he was leaving and would take PBS' clients with him, Rosno's actions constituted malfeasance. As such, the court concluded PBS' decision terminating Rosno's employment was within PBS' rights under the terms of the employment agreement. With respect to Rosno's claim for unpaid vacation and sick leave, the trial court found in Rosno's favor. The trial court found that based upon the employee handbook and PBS' past practices of paying out unused vacation and sick leave upon an employee's termination, Rosno was entitled to receive 32 hours of vacation pay and 72 hours of unused sick leave. The court found against Rosno on his claimed entitlement to a bonus, noting that the employment agreement did not require payment of a bonus, nor was Rosno promised one by PBS. PBS now appeals to this court.

III. ASSIGNMENTS OF ERROR

PBS assigns on appeal six assignments of error, which can be consolidated to four. PBS contends, restated, that the trial court erred in (1) finding the noncompetition covenant greater than reasonably necessary to protect PBS and in failing to correctly apply the three-prong test used to determine the validity of a covenant not to compete, (2) finding Rosno was due any unused

vacation or sick leave pay, (3) failing to apply the covenant of good faith and fair dealing, and (4) failing to find that Rosno anticipatorily breached the noncompetition covenant.

Rosno assigns on cross-appeal, restated, that the trial court erred in (1) failing to find that PBS breached paragraph 6 of the employment agreement with Rosno by terminating the agreement immediately after Rosno gave his 90 days' advance notice pursuant to paragraph 6 and not awarding Rosno his unpaid salary, vacation pay, and sick leave pay during the 90-day notice period and (2) failing to award Rosno his promised $5,000 annual bonus.

IV. STANDARD OF REVIEW

[1,2] A suit for damages arising from breach of a contract presents an action at law. *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly erroneous. *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003); *Anderson Excavating v. SID No. 177, supra.*

[3] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001).

V. ANALYSIS

1. PBS' APPEAL

(a) Noncompete Covenant

PBS contends on appeal that the noncompete covenant in Rosno's employment agreement was no greater than reasonably necessary to protect PBS' legitimate interest. The relevant provision of the covenant not to compete in this case provides: "[I]n the event of the termination of his employment, for whatever reason, [Rosno] shall not directly or indirectly solicit, contact or perform services for *any* of [PBS'] clients for his own benefit or as an officer, director, shareholder, partner, advisor, consultant or employee of any third party." (Emphasis supplied.)

In *Rosno I*, we stated:

> To determine whether a covenant not to compete is valid, a court must determine whether a restriction is reasonable in the sense that it is not injurious to the public, that it is not greater than is reasonably necessary to protect the employer in some legitimate interest, and that it is not unduly harsh and oppressive on the employee. *Moore* [*v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997)]. There is no indication or claim that enforcement of the noncompete clause in Rosno's contract will be injurious to the public or that the restriction is "unduly harsh" as that expression is used in the cases. Accordingly, we focus our analysis on whether or not the restriction of the covenant is no greater than reasonably necessary to protect PBS' legitimate interest as alleged in the second amended petition.
>
> An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee. *Moore v. Eggers Consulting Co.*[, *supra*], citing *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990). In *Moore*, we stated: " ' "To distinguish between 'ordinary competition' and 'unfair competition,' courts and commentators have frequently focused on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers. Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition." ' " *Id.* at 401, 562 N.W.2d at 539, quoting *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).
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> . . . .
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> In *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 668, 407 N.W.2d 751, 756 (1987), this court reviewed several cases involving noncompete covenants and stated the general rule that a covenant not to compete in an

employment contract "may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact." In *Polly*, this court stated that generally, a noncompete covenant is more restrictive than reasonably necessary if it restricts an employee from working for or soliciting all of the former employer's clients or accounts, regardless of whether the former employee actually did business with and had personal contact with those clients. In *Polly*, this court reviewed *Dana F. Cole & Co. v. Byerly*, 211 Neb. 903, 320 N.W.2d 916 (1982), and observed that *Dana F. Cole & Co.*, by virtue of its facts, presented an exception to the general rule.

In *Dana F. Cole & Co., supra*, this court held that based on the evidence at trial, a covenant which restricted a former branch manager of an accounting firm from practicing accounting within 75 miles of the office he had managed was reasonable and enforceable. This court held that such a covenant was valid in light of evidence which showed that branch managers had personal relationships with clients served and that on the basis of past experience, the employer had the need to protect itself from the risk of a branch manager's taking clients with him or her when he or she left its employ.

In *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997), this court affirmed the grant of an employee's motion for summary judgment on a breach of covenant not to compete claim, determining that the scope of the covenant not to compete in that case was greater than necessary to protect a personnel recruiting corporation's legitimate interests and, thus, was unenforceable. In *Moore*, this court repeated the general rule that a covenant not to compete may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and had personal contact. In *Moore*, the covenant involved precluded the employee from entering into business with anyone of whom he had

> knowledge due to his employment with the corporation, rather than those clients of the corporation with whom the employee merely did business and had personal contact. In addition, the covenant in question precluded the employee from working in employment recruitment anywhere in the continental United States. In *Moore*, the summary judgment evidence showed that while with the employer, Moore worked primarily with clients of the employer in the Midwest, indicating that Moore had little personal contact with the employer's clients outside the Midwest. The employer failed to rebut the evidence of overbreadth or otherwise propose a rationale for such a broad restriction. The restriction was, thus, untenable.

Rosno I, 256 Neb. at 223-27, 589 N.W.2d at 831-33.

We continued, stating:

> After reviewing PBS' second amended petition, and liberally construing it as we must, we conclude that PBS' second amended petition taken as a whole states a cause of action. In this regard, we note that PBS has alleged, inter alia, that Rosno has had substantial contact with virtually all of PBS' clients. The inferences of law and fact from the second amended petition are that Rosno is being restricted from working for or soliciting PBS' clients or accounts with whom Rosno actually did business and had personal contact and that in his employment contract the covenant not to compete with respect to all of PBS' clients could be enforceable.

Id. at 227, 589 N.W.2d at 833.

[4] PBS contends in this appeal that in determining whether Rosno violated the covenant not to compete, we must look not only at Rosno's contacts with PBS' clients but also at the client information he acquired while employed with PBS. However, in *Rosno I*, citing to the rule in *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987), we held that a covenant not to compete is valid only if it restricts a former employee from soliciting those clients with whom the former employee actually did business and had personal contact. PBS contended that the noncompete covenant was valid and enforceable under

the facts as alleged in the petition. We limit PBS to the allegations made in its petition and require that it show that Rosno actually did business and had personal contact with "virtually all" of PBS' clients. See *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002) (as general rule, appellate court disposes of case on theory presented in district court).

In its order, the trial court found that PBS failed to meet its burden of showing that Rosno had substantial personal contact with all of PBS' clients. Specifically, the trial court found that the evidence established, inter alia, that PBS admitted Rosno did not have substantial personal contact with those clients listed on the BO list. The trial court found that PBS was unable to definitively substantiate that Rosno had personal contact with all of the clients listed on the PC list. Accordingly, the trial court concluded that the noncompetition covenant of the employment agreement was greater than is reasonably necessary to protect PBS and is unenforceable. Based on our review of the record, we conclude that the trial court's findings are not clearly erroneous. This assignment of error is without merit. Because the noncompetition covenant is greater than reasonably necessary to protect PBS, PBS is not entitled to liquidated damages or any other relief on this basis.

(b) Payment of Vacation and Sick Leave

After the termination of Rosno's employment, PBS refused Rosno's request that he be paid his bonus as well as his earned but unused vacation or sick leave. Rosno's last payroll check stub indicated that Rosno had available 32 hours of vacation and 72 hours of sick leave. PBS argues that the trial court erred in finding that Rosno was entitled to his earned but unused vacation and sick leave pay.

The employment agreement provides, in pertinent part, as follows:

> 4. Other Benefits: . . . .
>
> . . . .
>
> In addition to the foregoing, Rosno shall receive three (3) weeks of paid vacation per year a[t] such time as may be reasonable given the professional and work related demands of the Employer during the year.

> In addition to the foregoing, Rosno shall have the opportunity to participate in any retirement, health insurance or other employee benefit plan offered by the Employer to its employees generally.

PBS contends that the phrase "other employee benefit plan" found in paragraph 4 of the employment agreement does incorporate the provisions of the employee handbook but applies only to plans similar to retirement or health insurance plans, such as dental or vision insurance or profit-sharing plans available to PBS employees.

The employment agreement does not define "employee benefit plan." However, the Nebraska Wage Payment and Collection Act, under which the trial court awarded Rosno his unpaid vacation and sick leave pay, defines "fringe benefits" to include "sick and vacation leave plans, disability income protection plans, retirement, pension, or profit-sharing plans, health and accident benefit plans, and any other employee benefit plans." Neb. Rev. Stat. § 48-1229(3) (Reissue 1998). Thus, vacation and sick leave pay is characterized as an "employee benefit plan" under the terms of the Nebraska Wage Payment and Collection Act. We will refer to PBS' employee handbook to determine whether Rosno was entitled to receive his earned but unused vacation and sick leave pay.

A copy of PBS' employee handbook was offered and admitted into evidence. The provision of the employee handbook relating to vacation pay provides, in relevant part:

> One week paid vacation will accrue after an employee has worked for one full year. No payment of vacation shall be payable for termination prior to the first year's full employment.
>
> Two weeks paid vacation shall accrue after two full years' employment. No payment for vacation shall be payable for termination during the work year with the following exceptions:
>
> 1. If the full two week vacation period is due at termination, the vacation will be paid.
>
> 2. If over seven months of a work year after the first year have elapsed, and the termination is due to illness or pregnancy, one week will be paid.

3. If an employee is terminated and the employee has seven months of the second or later years, the employee will be paid one week termination pay.

No accrual on voluntary termination.

. . . .

You may receive regular pay rate for any unused vacation.

The provision of the employee handbook regarding sick pay, provides, "Any sick leave not used will be paid to the employee at the time of termination."

[5] Evidence of custom is admissible when there is a conflict as to the terms of the contract to explain the meaning of the words or phrases used, or where the contract is silent as to certain points which may be inherent in the nature of the contract. *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994). Because neither the employment agreement nor the employee handbook is ambiguous, we need not consider the parties' respective evidence regarding PBS' current practice relative to payment of vacation and sick leave.

Accordingly, construing the terms of the employee handbook in conjunction with the employment agreement, we conclude that the trial court properly found that Rosno was entitled to his earned but unused vacation and sick leave pay. The employee handbook expressly states that any unused sick leave will be paid out upon termination. Moreover, Rosno began his employment with PBS in October 1992 and was terminated in November 1995. Rosno's termination falls within the third listed exception with regard to vacation pay in the employee handbook, and as such, he is entitled to receive his accrued vacation pay.

(c) Duty of Good Faith and Anticipatory Breach

[6] PBS next contends that the trial court erred in failing to find that Rosno breached his duty of good faith and fair dealing and anticipatorily breached the noncompetition covenant. PBS did not raise either of these arguments in its operative petition, nor did it argue these points to the trial court. Accordingly, we need not address them. See, *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003); *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002) (appellate

court will not consider issue on appeal that was not passed upon by trial court).

2. Rosno's Cross-Appeal

(a) Unpaid Salary and Vacation and Sick Leave Pay During 90-Day Notice Period

Rosno contends on cross-appeal that the trial court erred in failing to find that PBS breached paragraph 6 of the employment agreement with Rosno by terminating the agreement immediately after Rosno gave his 90 days' advance notice pursuant to paragraph 6 and in not awarding Rosno his unpaid salary and vacation and sick leave pay during the 90-day notice period.

The relevant termination provisions in the employment agreement provide:

> Additionally, Employer may terminate this Agreement and Rosno's employment by Employer at any time, without notice to Rosno for fraud, misrepresentation, theft, malfeasance, or upon the initiation by the Board of Accountancy of any proceedings to revoke or modify the permit to practice public accounting pursuant to the laws of the State of Nebraska.
>
> . . . .
>
> Rosno may terminate this Agreement, and Rosno's employment hereunder at any time, for any reason, upon ninety (90) days advanced written notice to Employer.

According to the terms of the employment agreement, Rosno was required to give 90 days' notice of termination. During this time, he would be entitled to any earned salary as well as vacation and sick leave accrued during that time. However, Rosno would not be entitled to receive his salary and earned vacation and sick leave during that 90-day period if PBS properly terminated Rosno for "fraud, misrepresentation, theft, malfeasance, or upon the initiation by the Board of Accountancy of any proceedings to revoke or modify the permit to practice public accounting pursuant to the laws of the State of Nebraska." Thus, we must determine whether Rosno committed any of the aforementioned acts.

[7] The Restatement (Second) of Agency § 387 at 201 (1958) provides that "[u]nless otherwise agreed, an agent is subject to a

duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." This general rule forbids the doing of acts in competition with the principal and taking unfair advantage of the agent's position in the use of information or things acquired by him because of his position as an agent. *Id.*, comments *a.* and *b.*

[8] The Restatement, *supra*, § 393 at 216, further provides that "[u]nless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency." Comment *e.*, § 393 at 218, provides, in relevant part:

> *e. Preparation for competition after termination of agency.* After the termination of his agency, in the absence of a restrictive agreement, the agent can properly compete with his principal as to matters for which he has been employed. . . . Even before the termination of the agency, he is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein. Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete. *He is not, however, entitled to solicit customers for such rival business before the end of his employment* nor can he properly do other similar acts in direct competition with the employer's business.

(Emphasis supplied.)

The trial court found that when Rosno told Strasheim that he was resigning and would take PBS' clients with him, Rosno's actions constituted malfeasance. Indeed, the record reflects that when submitting his termination of employment notice, Rosno told Strasheim that "I'm going to ask anybody I want to follow me to my accounting firm and leave PBS" and that he was not going to honor the noncompetition covenant. Rosno admitted during cross-examination that his intention, had he been permitted to continue working for PBS during his 90-day notice period, was to continue working for PBS while simultaneously taking PBS' clients. This was in direct contravention of his duty of loyalty to PBS. Based on these facts, combined with Strasheim's testimony that Rosno's was the most hostile resignation he had ever experienced, it would have been reasonable for PBS to

conclude that at the time Rosno submitted his termination of employment notice, he intended to and would have solicited PBS' clients during the 90-day notice period. Rosno's expressed intent to breach his duty of loyalty constitutes malfeasance under the terms of the employment agreement. Accordingly, we affirm the trial court's order declining to award Rosno his salary and vacation and sick leave pay that would have accrued during his 90-day notice period.

(b) Unpaid Bonus

With respect to bonuses paid to Rosno while employed with PBS, Strasheim testified that Rosno received a bonus on October 15, 1993, after his first year with PBS and again on December 31, 1994, after his second year with PBS. Thereafter, Rosno did not receive any further bonuses while employed with PBS. Rosno testified that when he met with another principal of PBS, Strasheim's brother, in the summer of 1995 to discuss Rosno's salary review, Rosno asked about his bonus. According to Rosno, Strasheim's brother responded by telling Rosno he would get the bonus in December. On cross-examination, Rosno testified that he was also told he had "earned" the bonus, but admitted he never received anything in writing stating he was going to receive a bonus for that year. Rosno also admitted that effective August 1995, he received a salary raise in an amount similar to his bonuses received in October 1993 and December 1994.

Rosno contends that the trial court erred in failing to award Rosno his promised $5,000 annual bonus. The relevant section of the employment agreement provides: "3. Salary and Bonuses: . . . Employer *may* pay Rosno a bonus at any time during the term of the Agreement. However, Rosno shall be paid a bonus of $5,000.00 after Rosno's first year of employment." (Emphasis supplied.)

According to the terms of the employment agreement, PBS was required to pay Rosno a bonus during his first year of employment only. PBS was not obligated to pay Rosno a bonus in any other year. While Rosno contends that Strasheim's brother orally promised him a bonus, the employment agreement requires that any changes to the employment agreement be made in writing. Rosno admitted that he did not receive anything in writing

from PBS confirming that he would receive a bonus in 1995. Accordingly, this assignment of error is without merit.

VI. CONCLUSION

We conclude that the covenant not to compete in the employment agreement is greater than is reasonably necessary to protect PBS and is unenforceable. We further conclude that Rosno is entitled to receive his vacation and sick leave pay earned but unused as of the date of his termination of employment on November 13, 1995, but is not entitled to his salary or vacation and sick leave pay that would have accrued during the 90-day notice period. Finally, we conclude that Rosno is not entitled to a bonus.

AFFIRMED.

TRI-PAR INVESTMENTS, L.L.C., APPELLANT, V.
COLETTE LYNN SOUSA, FORMERLY KNOWN AS
COLETTE LYNN WOODS, APPELLEE.

680 N.W.2d 190

Filed June 4, 2004. No. S-03-028.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **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. **Subrogation: Words and Phrases.** Subrogation is the substitution of one person in the place of another with reference to a lawful claim so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim.
5. **Subrogation.** The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity.
6. **Contracts: Insurance: Subrogation: Tort-feasors.** In the context of insurance, the right to subrogation is based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor.
7. **Insurance: Subrogation: Negligence.** An insurer cannot seek to subrogate against its own insured, even if the insured was negligent in causing the loss.

8. **Contracts: Insurance: Subrogation: Landlord and Tenant: Negligence.** Absent an express agreement to the contrary in a lease, a tenant and his or her landlord are implied coinsureds under the landlord's fire insurance policy, and the landlord's liability insurer is precluded from bringing a subrogation action against the negligent tenant.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas A. Grennan and Donald P. Dworak, of Gross & Welch, P.C., for appellant.

Betty L. Egan and Mark A. Weber, of Walentine, O'Toole, McQuillan & Gordon, for appellee.

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

GERRARD, J.

Tri-Par Investments, L.L.C. (Tri-Par), sued Colette Lynn Sousa, formerly known as Colette Lynn Woods, for negligence and breach of their lease agreement after a house Sousa rented from Tri-Par was damaged by fire. On appeal, we must determine whether the district court erred in concluding that Sousa and Tri-Par were coinsured under Tri-Par's insurance policy and that therefore, Tri-Par's insurer could not maintain a subrogation action against Sousa.

FACTUAL AND PROCEDURAL BACKGROUND

On April 17, 1996, a fire damaged the house Sousa was renting from Tri-Par. At the time of the fire, Tri-Par maintained a homeowner's policy of insurance on the house through its insurer, Auto-Owners Insurance (Auto-Owners). After Tri-Par made a claim for coverage, Auto-Owners paid Tri-Par for most of the damage done to the home. Shortly thereafter, Auto-Owners initiated a subrogation action in the name of Tri-Par against Sousa. Tri-Par sought $54,020 in relief for the fire damage and loss of rent based on two theories of recovery: (1) negligence and (2) breach of the lease agreement.

In its petition, Tri-Par alleged that Sousa's negligence caused the fire. Specifically, Tri-Par alleged that Sousa was negligent in failing to (1) properly and adequately supervise the minor children; (2) keep one of the minor children from playing with

or otherwise using matches or a lighter; and (3) keep matches, lighters, and other ignition sources in a secure place which would be inaccessible to the minor children. Tri-Par also alleged that Sousa breached the lease agreement by failing to (1) pay for or repair the damage done to the premises and (2) take care of the buildings and premises and keep them safe from danger of fire.

Both parties filed motions for summary judgment. On June 30, 2000, the district court determined that for subrogation purposes, Sousa and Tri-Par were coinsured under Tri-Par's homeowner's policy. Therefore, because an insurer has no subrogation rights against its own insured, the court granted Sousa's motion for summary judgment to the extent that Tri-Par's case was one of subrogation. To the extent Tri-Par asserted a claim for damages outside of its subrogated interests, the court overruled Sousa's motion for summary judgment. Tri-Par's motion for summary judgment was overruled.

Tri-Par appealed the order, and the Nebraska Court of Appeals dismissed for lack of jurisdiction because the district court's order did not adjudicate all the claims of all the parties and, therefore, was not a final, appealable order under Neb. Rev. Stat. § 25-705(6) (Supp. 1999) (now codified at Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002)). See *Tri-Par Investments v. Woods*, 9 Neb. App. liii (No. A-00-785, Sept. 1, 2000). Tri-Par then filed a motion asking the district court to enter an order of final judgment. On October 12, 2000, the district court entered an order, pursuant to § 25-705(6), granting Tri-Par's motion and incorporating its findings of June 30. Tri-Par then moved to appeal the court's order of June 30, 2000. On appeal, we determined that the district court's order of June 30 was not a final, appealable order and that the court's order of October 12 did not cure the defects of the first order because the record established the existence of a nonsubrogated interest in the case. *Tri-Par Investments v. Sousa*, 263 Neb. 209, 640 N.W.2d 371 (2002). Therefore, we dismissed Tri-Par's appeal for lack of jurisdiction. *Id.*

In order to make the district court's June 30, 2000, order a final, appealable order, Tri-Par went back to the district court and moved to withdraw the "non-subrogated interest and/or claims"

in the case. The court granted Tri-Par's motion and stated that because the entirety of the "non-subrogated interest and/or claims" in the case had been withdrawn and terminated, all of the claims, rights, and liabilities in the case had been fully and finally adjudicated. Thereafter, Tri-Par timely appealed.

We moved this case to our docket pursuant to our power to regulate the Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Tri-Par asserts, restated, that the district court erred in granting summary judgment to Sousa because (1) the court's decision is premised on the legal fiction that under a landlord-tenant relationship, the tenant is always constructively presumed to be an implied coinsured under the landlord's insurance policy, and (2) the facts preclude a finding that Sousa constitutes a coinsured under Tri-Par's insurance policy.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Misle v. HJA, Inc.*, 267 Neb. 375, 674 N.W.2d 257 (2004). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

Today, we are asked to weigh in on a dispute that has raged in subrogation jurisprudence for the last 30 years. Specifically, we are asked to decide whether, for subrogation purposes, the law presumes that a tenant is coinsured under his or her landlord's insurance policy absent an express provision in the parties' lease to the contrary. Because the right of subrogation cannot arise in

favor of an insurer against its own insured, see *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995), such a presumption would bar insurers from bringing a subrogation action against tenants who cause damage to their landlords' insured premises. In the instant case, the district court, relying on our opinions in *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984), and *Jindra, supra*, determined that such a presumption applied. Stated otherwise, the district court determined that because there was no express agreement to the contrary in the lease, Sousa was an implied coinsured under Tri-Par's insurance policy with Auto-Owners and that therefore, Tri-Par was prohibited from bringing a subrogation action on behalf of Auto-Owners against Sousa. We affirm.

[4-6] Before delving into the substance of the appeal, we begin by setting forth some of the guiding principles of subrogation law. Generally speaking, subrogation is the substitution of one person in the place of another with reference to a lawful claim so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim. *Jindra, supra*. The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity. *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977). In the context of insurance, the right to subrogation is based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor. *Allstate Ins. Co. v. LaRandeau*, 261 Neb. 242, 622 N.W.2d 646 (2001).

[7] Simply put, in the context of liability insurance, when a "liability insurer pays an insured's claim for damages caused by the . . . wrongdoing of a third party, the insurer is entitled to be subrogated to the rights of the insured against that third party." 22 Eric Mills Holmes, Holmes' Appleman on Insurance 2d § 141 at 417 (2003). An insurer, however, cannot seek to subrogate against its own insured, even if the insured was negligent in causing the loss. See, *Jindra, supra*; *Control Specialists v. State Farm Mut. Auto. Ins.*, 228 Neb. 642, 423 N.W.2d 775 (1988); *Reeder, supra*. Relying on this proposition, Sousa contends that she is an implied coinsured under Tri-Par's homeowner's policy and that

therefore, Auto-Owners cannot maintain a subrogation action against her.

Tri-Par, on the other hand, alleges that Sousa is a wrongdoer and should reimburse Auto-Owners for the payments Auto-Owners made to Tri-Par. Moreover, Tri-Par argues that the district court's decision is incorrect because it is premised on the legal fiction that under a landlord-tenant relationship, the tenant is presumed to be an implied coinsured under the landlord's insurance policy. Tri-Par contends that under Nebraska law, the availability of a subrogation claim is to be determined by examining the facts and circumstances of each case, and if there is no evidence that the landlord has agreed to maintain insurance for the benefit of the tenant, a court cannot presume that the tenant is an implied coinsured under the landlord's policy for the purpose of defeating subrogation.

As mentioned previously, the question whether the law presumes that a tenant is coinsured under his or her landlord's insurance policy for the purpose of subrogation has been heavily litigated and hotly debated. The debate began with *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975), where the Oklahoma Court of Appeals held that absent an agreement to the contrary, the law presumes that a tenant is coinsured under a landlord's fire insurance policy and that therefore, a landlord's insurer cannot maintain a subrogation action against a tenant for damage to the insured property that is caused by the tenant's negligence. *Id.* Generally speaking, the *Sutton* rule is the majority position and the modern trend in the law. See, e.g., *North River Ins. Co. v. Snyder*, 804 A.2d 399 (Me. 2002); *DiLullo v. Joseph*, 259 Conn. 847, 792 A.2d 819 (2002); *Peterson v. Silva*, 428 Mass. 751, 704 N.E.2d 1163 (1999); *Community Credit Union v. Homelvig*, 487 N.W.2d 602 (N.D. 1992); *Alaska Ins. Co. v. RCA Alaska Commun.*, 623 P.2d 1216 (Alaska 1981); *GNS Partnership v. Fullmer*, 873 P.2d 1157 (Utah App. 1994); *United Fire & Cas. Co. v. Bruggeman*, 505 N.W.2d 87 (Minn. App. 1993); *Cascade Trailer Court v. Beeson*, 50 Wash. App. 678, 749 P.2d 761 (1988); *New Hampshire Ins v Labombard*, 155 Mich. App. 369, 399 N.W.2d 527 (1986). See, generally, 16 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 224:6 (2000).

The court in *Sutton* espoused the following rationale for its rule:

> [S]ubrogation should not be available to the insurance carrier because the law considers the tenant as a co-insured of the landlord absent an express agreement between them to the contrary, comparable to the permissive-user feature of automobile insurance. This principle is derived from a recognition of a relational reality, namely, that both landlord and tenant have an insurable interest in the rented premises—the former owns the fee and the latter has a possessory interest. Here the landlords . . . purchased the fire insurance from Central Mutual Insurance Company to protect such interests in the property against loss from fire. This is not uncommon. And as a matter of sound business practice the premium paid had to be considered in establishing the rent rate on the rental unit. Such premium was chargeable against the rent as an overhead or operating expense. And of course it follows then that the tenant actually paid the premium as part of the monthly rental.
>
> The landlords of course could have held out for an agreement that the tenant would furnish fire insurance on the premises. But they did not. They elected to themselves purchase the coverage. To suggest the fire insurance does not extend to the insurable interest of an occupying tenant is to ignore the realities of urban apartment and single-family dwelling renting. Prospective tenants ordinarily rely upon the owner of the dwelling to provide fire protection for the realty (as distinguished from personal property) absent an express agreement otherwise. Certainly it would not likely occur to a reasonably prudent tenant that the premises were without fire insurance protection or if there was such protection it did not inure to his benefit and that he would need to take out another fire policy to protect himself from any loss during his occupancy. Perhaps this comes about because the companies themselves have accepted coverage of a tenant as a natural thing. Otherwise their insurance salesmen would have long ago made such need a matter of common knowledge by promoting the sale to tenants of a second fire insurance policy to cover the real estate.

> Basic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the insurable interests of all joint owners including the possessory interests of a tenant absent an express agreement by the latter to the contrary. The company affording such coverage should not be allowed to shift a fire loss to an occupying tenant even if the latter negligently caused it. . . . For to conclude otherwise is to shift the insurable risk assumed by the insurance company from it to the tenant—a party occupying a substantially different position from that of a fire-causing third party not in privity with the insured landlord.

(Citations omitted.) *Sutton v. Jondahl*, 532 P.2d 478, 482 (Okla. App. 1975).

Over the years, numerous courts have agreed with the rationale of *Sutton*. See, generally, *American Nat. Fire Ins. Co. v. Hughes*, 658 N.W.2d 330 (N.D. 2003) (primary rationale for concluding that landlords and tenants are coinsureds is their insurable interests in property and commercial realities under which lessors insure leased premises and pass on premium cost in rent); *Safeco Ins. Co. v. Capri*, 705 P.2d 659 (Nev. 1985) (noting insurance premium is likely passed along to tenant in form of higher rent); *Alaska Ins. Co. v. RCA Alaska Commun.*, 623 P.2d 1216 (Alaska 1981).

Moreover, other courts, while agreeing with the rule announced in *Sutton*, have expanded upon the rationale for the rule. For example, the Connecticut Supreme Court based its support of *Sutton* on its public policy of disfavoring economic waste. See *DiLullo v. Joseph*, 259 Conn. 847, 792 A.2d 819 (2002). The court stated that a rule which allocated to the tenant the responsibility of maintaining sufficient insurance to cover a claim for subrogation by the landlord's insurer would create a strong incentive for tenants to carry liability insurance for the value or replacement cost of the entire building, irrespective of the portion of the building they occupied. *Id.* Such insurance would duplicate that taken out by the landlord under the landlord's insurance policy. "Thus, although the two forms of insurance would be different, the economic interest insured would be the same," and economic waste would ensue. *Id.* at 854, 792 A.2d at 823. See, also, *North River*

Ins. Co. v. Snyder, 804 A.2d 399 (Me. 2002); *Peterson v. Silva*, 428 Mass. 751, 754, 704 N.E.2d 1163, 1166 (1999) ("[i]t surely is not in the public interest to require all the tenants to insure the building which they share, thus causing the building to be fully insured by each tenancy"); *United Fire & Cas. Co. v. Bruggeman*, 505 N.W.2d 87 (Minn. App. 1993).

In siding with *Sutton*, courts also point to the reasonable expectations of the tenant.

> We are persuaded that a tenant may reasonably expect that his or her rental payments will be used to cover the lessor's ordinary and necessary expenses, including fire insurance premiums. Tenants reasonably expect that, by effectively contributing to the premium payments, they will occupy a position akin to the insured and will be free from tort liability for negligently caused fire damage to the premises.

New Hampshire Ins v Labombard, 155 Mich. App. 369, 376-77, 399 N.W.2d 527, 531 (1986). See, also, *Bruggeman, supra*; *Cascade Trailer Court v. Beeson*, 50 Wash. App. 678, 749 P.2d 761 (1988). Lastly, courts have noted that insurers understand the risk associated with insuring rental property and have undoubtedly adjusted their rates to reflect the increased risk. See, *GNS Partnership v. Fullmer*, 873 P.2d 1157 (Utah App. 1994); *Bruggeman, supra*.

A number of courts, however, have rejected the *Sutton* rule, positing several reasons for doing so. For example, the Arkansas Supreme Court stated that *Sutton* is premised on a legal fiction.

> The fiction that by paying the rent, the lessee paid the insurance premium is not appropriate. There is no evidence that appellee paid any greater rent because of the insurance than he would have paid had appellant not taken insurance. If the tenant paid the insurance premium, he also paid the taxes on the property and the cost of construction or purchase of the house, not to mention cost of repairs and maintenance. Such a fiction ignores the fact that more often than not the market, i.e., supply and demand, is the controlling factor in fixing and negotiating rents.

Page v. Scott, 263 Ark. 684, 687-88, 567 S.W.2d 101, 103-04 (1978). See, also, *Neubauer v. Hostetter*, 485 N.W.2d 87 (Iowa

1992); *Zoppi v. Traurig*, 251 N.J. Super. 283, 598 A.2d 19 (1990). Similarly, the Iowa Supreme Court stated that *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975), disregards the fact that landlords and tenants have different interests in a dwelling and that these "separate estates [are] capable of being separately valued and separately insured." *Neubauer*, 485 N.W.2d at 90.

The *Sutton* rule has also been criticized for encroaching upon the contractual relationship between a landlord and its insurer. See *56 Associates ex rel. Paolino v. Frieband*, 89 F. Supp. 2d 189 (D.R.I. 2000). It has also been suggested that the common-law rule which requires that the burden of the loss be placed on the negligent party should weigh heavily against barring subrogation by the landlord's insurer. See *Regent Ins. Co. v. Economy Preferred Ins. Co.*, 749 F. Supp. 191 (C.D. Ill. 1990).

Of the courts that have rejected *Sutton*, a number hold to an opposite rule, i.e., that a landlord's insurer is allowed to bring a subrogation action against a tenant absent an express agreement in the lease to the contrary. See, e.g., *Regent Ins. Co., supra*; *Neubauer, supra*; *Britton v. Wooten*, 817 S.W.2d 443 (Ky. 1991); *Page, supra*; *Zoppi, supra*. A greater number, however, reject the aforementioned categorical rule and favor a case-by-case approach. These courts hold that a trier of fact must focus on the terms of the lease agreement itself to determine what the reasonable expectations of the parties were as to who should bear the risk of loss for damage to the leased premises caused by the tenant's negligence. See, generally, *56 Associates ex rel. Paolino, supra*; *Union Mut. Fire Ins. Co. v. Joerg*, 824 A.2d 586 (Vt. 2003); *Bannock Bldg. Co. v. Sahlberg*, 126 Idaho 545, 887 P.2d 1052 (1994); *Dix Mutual Ins. Co. v. LaFramboise*, 149 Ill. 2d 314, 597 N.E.2d 622, 173 Ill. Dec. 648 (1992); *Fire Ins. Exchange v. Hammond*, 83 Cal. App. 4th 313, 99 Cal. Rptr. 2d 596 (2000). For example, in *Sahlberg*, the Idaho Supreme Court asserted that the *Sutton* approach painted with too broad of a stroke and that the proper analysis should "look to the landlord's and tenant's intentions as shown by that particular lease agreement and the facts and surrounding circumstances to determine whether the risk of loss for damage by fire should fall on the landlord or the tenant." *Sahlberg*, 126 Idaho at 548, 887 P.2d at 1055.

In the instant case, Tri-Par asks us to adopt the case-by-case approach epitomized by *56 Associates ex rel. Paolino* and *Sahlberg*. Sousa, on the other hand, asks us to adopt the per se approach announced in *Sutton*. Because we believe *Sutton* and its progeny are in line with our prior cases and represent the better rule, we explicitly adopt that rule for Nebraska.

Although we have not had occasion to formally adopt the *Sutton* rule before today, we have implicitly done so in two of our past decisions discussing different, but highly related, factual circumstances. In *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984), the guest of an insured homeowner negligently caused fire damage to his host's home. After paying the insured homeowner for the damage, the insurer sought to subrogate against the guest. On appeal, we began by noting the rule that an insurer cannot recover against its own insured. *Id.* We then went on to compare the host-guest relationship to a landlord-tenant relationship, noting:

> "Absent an express provision in the lease establishing the tenant's liability for loss from negligently started fires, the trend has been to find that the insurance obtained was for the mutual benefit of both parties, and that the tenant 'stands in the shoes of the insured landlord for the limited purpose of defeating a subrogation claim.' . . ."

Id. at 128, 348 N.W.2d at 836, quoting *Alaska Ins. Co. v. RCA Alaska Commun.*, 623 P.2d 1216 (Alaska 1981). We then stated the rationale behind the modern trend:

> "[I]nsurance companies expect to pay their insureds for negligently caused fire, and they adjust their rates accordingly. In this context, an insurer should not be allowed to treat a tenant, who is in privity with the insured landlord, as a negligent third party when it could not collect against its own insured had the insured negligently caused the fire. In effect, a tenant stands in the shoes of the insured landlord for the limited purpose of defeating a subrogation claim."

Reeder, 217 Neb. at 129, 348 N.W.2d at 837, quoting *Rizzuto v. Morris*, 22 Wash. App. 951, 592 P.2d 688 (1979). Concluding that the reasoning underlying the denial of a subrogation claim between a landlord and a tenant was even more compelling when the relationship was between a host and a guest, we determined

that a guest who negligently caused damage to his host's home could not be sued by the owner's insurance carrier under a right of subrogation as a matter of law. *Reeder, supra.*

Expanding on *Reeder*, in *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995), we determined that joint tenants with a close family relationship were coinsureds under a policy of insurance held by one joint tenant and that therefore, the insurer could not seek to subrogate against the uninsured joint tenant who negligently caused extensive damage to the jointly held property. In reaching this conclusion, we noted that the "modern trend is that a lessor's insurer cannot maintain a subrogation action against a lessee in the absence of an express agreement or lease provision." *Id.* at 604, 529 N.W.2d at 527. Moreover, echoing the policy rationale espoused in *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975), we stated that landlords and tenants are coinsureds for subrogation purposes

> "because of the reasonable expectations they derive from their privity under the lease, their insurable interests in the property, and the commercial realities under which lessors insure leased premises and pass on the premium cost in rent and under which insurers make reimbursement for fires negligently caused by their insureds' negligence."

Jindra, 247 Neb. at 604, 529 N.W.2d at 527. Accord 6A John Alan Appleman & Jean Appleman, Insurance Law and Practice § 4055 (Supp. 2004).

In sum, although neither case turned on the relationship between a landlord and his or her tenant, both decisions were premised on our assumptions that (1) landlords and tenants are considered coinsureds for subrogation purposes and (2) a landlord's insurer cannot maintain a subrogation action against a tenant in the absence of an express provision in the lease agreement. Thus, principled adherence to *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984), and *Jindra, supra*, compels us to formally recognize that *Sutton* and its progeny represent the law of Nebraska, i.e., that landlords and tenants are implied coinsureds for subrogation purposes and that a landlord's insurer cannot maintain a subrogation action against a tenant in the absence of an express lease agreement to the contrary.

Moreover, even if we had reason to answer the issue anew, we would adopt the *Sutton* rule because it represents the better public policy. As an initial matter, a pure *Sutton* approach has the benefit of providing legal certainty. For example, the *Sutton* rule prevents landlords from engaging in gamesmanship when drafting leases by providing the necessary incentive for them, if they so desire, to place express subrogation provisions in their leases. If such a provision is placed in their lease, tenants will be on notice that they need to purchase liability insurance. If such a provision is not included in their lease, insurers will pass the increased risk along to landlords in the form of higher premiums, and landlords, in turn, will pass along the higher premiums to tenants in the form of increased rent. As the court in *Sutton* did 30 years ago, we acknowledge that this is almost certainly the current commercial reality.

[8] In addition, we continue to believe that absent an express agreement alerting them otherwise, the *Sutton* rule comports with the reasonable expectations of tenants. Moreover, the *Sutton* rule accounts for modern commercial realities by preventing the economic waste that will undoubtedly occur if each tenant in a multiunit dwelling or multiunit rental complex is required to insure the entire building against his or her own negligence. In sum, *Sutton* and its progeny represent the better reasoned rule. Therefore, we hold that absent an express agreement to the contrary in a lease, a tenant and his or her landlord are implied coinsureds under the landlord's fire insurance policy, and the landlord's liability insurer is precluded from bringing a subrogation action against the negligent tenant.

In the instant case, although the lease required Sousa to (1) repair all damages done to the premises or pay for the same, (2) keep the building free from danger of fire, and (3) return the property in as good of condition as it was received, there is no express provision in the lease that provides for the right of subrogation on behalf of Tri-Par's insurer. Therefore, for subrogation purposes, Sousa and Tri-Par are implied coinsureds and Tri-Par cannot maintain this subrogation action on behalf of Auto-Owners against Sousa.

CONCLUSION

For the foregoing reasons, Tri-Par is precluded, as a matter of law, from bringing a subrogation action on behalf of Auto-Owners against Sousa. The district court's order granting summary judgment in favor of Sousa and against Tri-Par was correct and is hereby affirmed.

AFFIRMED.

LARRY R. DEMERATH, APPELLANT, V. KNIGHTS OF COLUMBUS, A FOREIGN INSURANCE COMPANY, APPELLEE.

680 N.W.2d 200

Filed June 4, 2004. No. S-03-377.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **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.
4. **Contracts: Insurance: Fraud.** Whether an insurance company has a duty to investigate the propriety of an attorney in fact's change in beneficiary designation under an insurance policy depends on whether the insurance company had knowledge of facts reasonably suggesting the change was improper.
5. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Larry R. Demerath, of Demerath Law Offices, pro se.

Andrew M. Loudon, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

McCormack, J.

NATURE OF CASE

This is an appeal from a declaratory judgment action in which Larry R. Demerath claimed that the Knights of Columbus (the Knights) had a duty to investigate a change of beneficiary form that was executed by his father's appointed attorney in fact. The district court for Douglas County, Nebraska, granted summary judgment in favor of the Knights, and Demerath appeals.

BACKGROUND

The facts relevant to this appeal are not in dispute. Demerath's parents, Raymond J. Demerath (Raymond) and Ruby A. Demerath (Ruby), had five children: Judith Rech, Demerath, Patricia Cerney, Phyllis Weber, and Lois Tiemann. Raymond purchased two insurance policies from the Knights, in 1941 and again in 1990. The 1941 policy designated Ruby as primary beneficiary and the couple's then living five children as secondary beneficiaries. The 1990 policy named only Ruby as beneficiary with no named contingent beneficiaries.

In 1993, Raymond executed a durable power of attorney, naming one of his daughters, Weber, as his attorney in fact. On August 24, 1999, acting in her capacity as Raymond's attorney in fact, Weber executed a change of beneficiary form provided by the Knights for both the 1941 and 1990 policies. The beneficiary designation forms purported to designate the Raymond J. Demerath Revocable Trust (Trust) as sole beneficiary under both policies. On that same day, a copy of Raymond's executed durable power of attorney was provided to the Knights' agent, Jeff Beller. Beller provided a copy of the durable power of attorney to the certificate service department of the Knights on September 1. On September 2, the Knights accepted and recorded the change of beneficiary for both policies. A copy of the Trust was not submitted to the Knights.

Raymond died in July 2000. Upon Raymond's death, the Trust was to be used for the health, maintenance, and support of Ruby during her lifetime and, upon her death, for the benefit of his four daughters. Demerath was not a named beneficiary under the Trust. The Knights paid the proceeds of the 1990 policy, in the amount of $26,798.57, and the 1941 policy, in the amount of

$1,171.44, to the Trust pursuant to the beneficiary designation. Ruby died in February 2001. Ruby's will was admitted to probate and named all five children, including Demerath, as beneficiaries.

Demerath subsequently filed a declaratory judgment action. The trial court, in its order granting the Knights' motion for summary judgment, described the issue, quoting the petition, as stating that the Knights " 'in some way neglected its obligations to Raymond . . . in allowing a third party to change beneficiaries on two life insurance policies, with only a Power of Attorney — and no direct actual authority from [Raymond] himself.' "

The parties filed cross-motions for summary judgment. The trial court denied Demerath's motion and granted the Knights' motion, dismissing the petition. The trial court found that the Knights "had no separate duty to investigate the change of beneficiary that lead [sic] to the payment at issue in this case. The Knights . . . have, beyond factual dispute, acted in compliance with their contractual undertaking to Raymond . . . ."

Demerath filed a motion for new trial and for rehearing, which the trial court overruled. The court found that Demerath failed to cite any authority for the proposition that an insurer has some duty beyond its own contract with an insured to investigate into the insured's relationships and to determine that a distribution under the policy would be in all respects appropriate. Demerath timely filed this 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).

ASSIGNMENTS OF ERROR

Demerath assigns that the trial court erred in (1) holding that use of a power of attorney to benefit oneself under a life insurance beneficiary is proper, (2) holding that an insurance company has no duty to pay death benefits to the insured's legal appointed beneficiaries, and (3) holding that an insurance company has no duty to determine proper beneficiaries.

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. *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004); *First Colony Life Ins. Co. v. Gerdes*, 267 Neb. 632, 676 N.W.2d 58 (2004).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *First Colony Life Ins. Co. v. Gerdes, supra*; *Misle v. HJA, Inc.*, 267 Neb. 375, 674 N.W.2d 257 (2004).

[3] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004).

ANALYSIS

This case presents the following single issue for our determination: Whether the Knights had a contractual or fiduciary duty to investigate whether the change of beneficiary form presented by the attorney in fact under a general power of attorney was the actual intention of the insured, Raymond.

Demerath's first assignment of error mischaracterizes the trial court's holding in that the trial court did not hold that use of a power of attorney to benefit oneself under a life insurance beneficiary is proper. We agree with the trial court, as set forth in its order overruling Demerath's motion for new trial, that such an argument is more properly directed in a suit against the attorney in fact and has no direct relevance in a suit against the insurance company. See *Mischke v. Mischke*, 247 Neb. 752, 530 N.W.2d 235 (1995) (holding, in action by personal representative of decedent's estate against decedent's brothers, brother exceeded authority under durable power of attorney by transferring assets to himself and two other brothers without consideration while decedent was in coma). Accordingly, we will not separately address this assignment of error.

Demerath does not dispute that Raymond had the right to change the beneficiary under either policy. The executed beneficiary designation forms in the record reflect that Raymond did

indeed have authority under both policies to change the beneficiary designation. We conclude that Raymond reserved the right under both policies to change beneficiaries.

We must next determine whether the Knights had a duty to investigate the propriety of that change in beneficiary.

> Where an insurer, acting in good faith without any actual knowledge of the insured's mental incompetency, has recognized an apparently duly executed change of beneficiary and has paid the proceeds of the insurance to the substituted beneficiary, it is not liable to the original beneficiary when sued by him or her even though it is established that the insured was, in fact, incompetent and lacked the capacity to make the change of beneficiary. That is, the insurer is not under any duty to investigate the mental competency of the insured to change the beneficiary unless it knows of circumstances reasonably suggesting the probability of his or her mental incompetency.
>
> Similarly, an insurer is not required to investigate to determine whether a change of beneficiary had been procured by undue influence in the absence of knowledge of facts which would indicate that the change might have been so procured.

4 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 60:77 at 60-141 to 60-142 (1997).

In *McNabb v. Kentucky Central Life Ins. Co.*, 631 S.W.2d 253 (Tex. App. 1982), the mother of a deceased insured brought an action for damages against the insurance company. She alleged that the proceeds of several life insurance policies insuring her daughter's life were wrongfully paid to a third party as the result of a forged change of beneficiary form signed by the insured's father. The policies originally named the mother and the insured's estate as beneficiary. The change of beneficiary forms were dated 6 days before an automobile accident resulting in the insured's death and were received by the insurance company 2 days after the accident. The mother contended that the change of beneficiary was not valid because the forms were acted upon after the insured's death. The court concluded that the insurance company had no knowledge of any irregularity in the change of beneficiary forms and had no proof that the forms were signed after the

insured's death. Thus, the court concluded, the insurance company was under no duty to determine whether the change of beneficiary was procured or induced by improper means where it had no reason to believe or know that such was the case.

In *Bosworth v. Wolfe*, 146 Wash. 615, 264 P. 413 (1928), the Washington Supreme Court upheld the trial court's finding that a change of beneficiary form had been fraudulently executed. In so holding, the court held that the insurance company did not have a duty to inquire into the mental incompetency of the insured or to investigate whether undue influence had been exerted upon him to procure the order to change the beneficiary.

[4] Thus, whether an insurance company has a duty to investigate the propriety of an attorney in fact's change in beneficiary designation under an insurance policy depends on whether the insurance company had knowledge of facts reasonably suggesting the change was improper. The record discloses no such knowledge.

We conclude that the Knights did not, in this case, have any contractual or fiduciary duty to make inquiry as to the propriety of the change in beneficiary forms submitted to it and signed and executed by the attorney in fact.

[5] Demerath also contends in his brief that certain portions of deposition testimony given by the attorney in fact relating to conversations she had had with Raymond constitute inadmissible hearsay. Demerath fails, however, to assign this argument as error, and therefore, we do not address it. See *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003) (errors argued but not assigned will not be considered on appeal).

CONCLUSION

For the foregoing reasons, we affirm the decision of the trial court.

AFFIRMED.

JOHN SCHAFERSMAN AND EILEEN SCHAFERSMAN, HUSBAND AND WIFE, APPELLANTS, V. AGLAND COOP, A NEBRASKA COOPERATIVE CORPORATION, APPELLEE.

681 N.W.2d 47

Filed June 10, 2004. No. S-02-1267.

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 refrains 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. **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.
4. **Trial: Rules of Evidence: Expert Witnesses.** Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), requires that trial courts act as gatekeepers to ensure the evidentiary relevance and reliability of an expert's opinion. 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.
5. ____: ____: ____. In performing its gatekeeping duty, it is not enough for the trial court to determine that an expert's methodology is valid in the abstract. The trial court must also determine if the witness applied the methodology in a reliable manner. See Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995).
6. ____: ____: ____. The objective of the trial court's gatekeeping responsibility is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. See Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995).
7. **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.
8. **Summary Judgment: Proof.** Because the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted.
9. ____: ____. Once the party moving for summary judgment produces enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted, the burden of producing contrary evidence shifts to the party opposing the motion.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Affirmed.

James F. Cann and David A. Domina, of Domina Law, P.C., L.L.O., and John M. Thor for appellants.

Dan H. Ketcham and Jason R. Yungtum, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

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

CONNOLLY, J.

The appellants, John Schafersman and Eileen Schafersman, allege that contaminated oats delivered to them by the appellee, Agland Coop (Agland), caused their dairy cows to become ill. To prove this allegation, the Schafersmans relied upon expert testimony. In *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001) (*Schafersman I*), we reversed a jury award for the Schafersmans, holding that the expert opinion testimony of their expert, Dr. Wallace Wass, failed to meet the *Frye* general acceptance test. But in *Schafersman I*, we also concluded that we would no longer employ the *Frye* test for determining the admissibility of expert opinion testimony. Instead, we adopted the standards that the U.S. Supreme Court 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 must decide whether the trial court erred in (1) determining that the opinion testimony of the Schafersmans' experts failed to meet the *Daubert* standards and (2) entering summary judgment for Agland. We affirm.

I. FACTUAL BACKGROUND

The Schafersmans operate a commercial dairy farm. In June 1994, they ordered 40 bushels of unadulterated commercial grade oats from Agland, a cooperative that sells grain and feed. Agland delivered 3,260 pounds to the Schafersmans on June 22. It is undisputed that the oats delivered to the Schafersmans on June 22 were contaminated with "Envirolean 2.5L Swine Concentrate" (Envirolean), a premix concentrate for hogs

containing high-protein minerals, vitamins, and other micronutrients. Upon delivery, the contaminated oats were dumped into the Schafersmans' grinder-mixer so it could be mixed with other ingredients for the Schafersmans' dairy herd. This mix was then given to the cows.

When the mix was delivered, the Schafersmans owned 75 cows. Fifty-four of these cows were lactating. The 21 cows that were not lactating were located in a separate "dry lot." The Schafersmans claim that the contaminated oats were given to only the 54 lactating cows.

According to the Schafersmans, their cows went "off their feed" within days after the delivery. In other words, the cows were refusing their normal feed intake and were not milking efficiently. The Schafersmans also claim that several cows developed diarrhea within a few days of eating the contaminated oats.

Roughly 2 weeks after Agland had made the delivery, the Schafersmans stopped giving the cows the contaminated oats. However, according to John Schafersman, by July 1994, 23 cows that had consumed the contaminated oats had dried up, i.e., stopped lactating.

At the end of July 1994, the Schafersmans noticed that some cows were getting "yellow under the belly" and in the eyes. John Schafersman called Dr. James Grassmeyer, a local veterinarian. Grassmeyer conducted basic physical examinations on two or three cows and determined that at least one cow showed signs of jaundice. He did not, however, perform a liver biopsy on any cows. Grassmeyer suggested that the Schafersmans have the contaminated oats tested. However, at the original trial, he also testified that there were several possible causes for the cows' symptoms and that he had not attempted to ascertain the actual cause.

According to the Schafersmans, all the cows that had eaten the contaminated oats dried up within 6 months, none returned to normal milk production, and 10 died within 18 months of the time the contaminated oats were delivered. Others had difficulty breeding, and the following year, there was a high rate of aborted calves among those cows that had eaten the contaminated oats. By the end of 1995, all the cows that had eaten the contaminated oats had either died or been culled from the herd.

According to the Schafersmans, the 21 cows that had not eaten the contaminated oats remained healthy.

1. FIRST TRIAL AND *SCHAFERSMAN I*

The Schafersmans filed a petition in which they alleged that Agland was negligent in delivering the contaminated oats. They sought damages for lost milk production, cows lost to death or slaughter, increased labor costs, and veterinary costs.

To establish that the contaminated oats had caused their cows to become ill, the Schafersmans relied on Wass' testimony, who at the time of the first trial was a professor in the department of diagnostic and production animal medicine at Iowa State University. Wass' testimony focused on the minerals that were present in the contaminated oats. For a dairy cow, a healthy diet includes the presence of several minerals, but too much of one mineral can be toxic. Several minerals were present in the contaminated oats above recommended levels. However, these levels were not above what dairy cows can tolerate. According to Wass, the aggregation of these minerals at above-normal quantities proved toxic to the cows and caused their symptoms. Wass labeled his theory "multiple mineral toxicity."

The trial court overruled Agland's objections to Wass' testimony, and the jury returned a $120,000 verdict for the Schafersmans. In an unpublished opinion, the Nebraska Court of Appeals affirmed. See *Schafersman v. Agland Coop*, No. A-98-623, 2000 WL 704984 (Neb. App. May 30, 2000) (not designated for permanent publication). We then granted Agland's petition for further review. We reversed, and remanded for a new trial, concluding that Wass' expert opinion testimony was not admissible. In so ruling, we applied the *Frye* test, which asks whether the scientific theory employed by the expert has "'gained general acceptance in the particular field in which it belongs.'" *Schafersman I*, 262 Neb. at 222, 631 N.W.2d at 870 (quoting *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). We determined that Wass' multiple mineral toxicity theory had not gained general acceptance within the field in which it belongs. We also concluded that the record did not provide any other basis to support Wass' opinion. Specifically, we noted Wass admitted that he had not performed a differential diagnosis, which we

described as "a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." *Schafersman I*, 262 Neb. at 223, 631 N.W.2d at 871.

But our conclusion that the court had erred in admitting Wass' expert opinion testimony did not end our analysis in *Schafersman I*. We went on to hold that the *Frye* test would no longer provide the means for determining the admissibility of expert opinion testimony in Nebraska. In its place, we adopted the test set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and its progeny. We held:

> [I]n 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 I, 262 Neb. at 232, 631 N.W.2d at 876-77. We went on to state that "although Wass' testimony did not meet the requirements of the *Frye* test at the first trial, this does not necessarily preclude the Schafersmans from offering such testimony at a second trial." 262 Neb. at 232-33, 631 N.W.2d at 877.

2. Proceedings Following Remand

On remand, the Schafersmans once again relied on Wass' expert opinion testimony to prove that the contaminated oats had caused their cows to become ill. In addition, they retained two other experts, Dr. Raymond Gene White and Professor Vernon Oraskovich, who sought to testify that Wass employed a reliable methodology in reaching his conclusion. Because the primary issue on appeal is whether on remand the court abused its discretion in excluding the expert opinion testimony of Wass, White, and Oraskovich, we set out in detail their respective opinions, as well as the opinions of Agland's experts.

(a) Wass

Wass continues to claim that the cows developed multiple mineral toxicity from the contaminated oats. In Wass' post-remand deposition, he testified that he was unaware of any studies or peer-reviewed articles supporting his theory. But he also stated that it was unlikely that dairy cows had previously been fed the same combination of minerals at the same levels received by the Schafersmans' cows either in a controlled experimental setting or at another dairy operation. He also suggested that the clinical situation presented at the Schafersmans' operation was similar to a scientific experiment, because the dry herd, which did not receive the contaminated oats, acted like a control group.

In addition, in his postremand deposition, Wass seems to have made a subtle change to his multiple mineral toxicity theory. In *Schafersman I*, we noted that Wass had testified that no single mineral was present in the contaminated oats at a level scientifically accepted to be toxic, although several minerals were present at above-normal levels. We further explained that by using the term "multiple mineral toxicity," Wass had meant that the combined effect of those minerals that were present in the contaminated oats at above-normal levels had made the cows ill. See *Schafersman I*. Wass now claims that some minerals were present in the contaminated oats at levels high enough that they alone could have caused the symptoms. Specifically, he claims that the contaminated oats contained enough copper to cause some symptoms that occurred in the Schafersmans' herd, including jaundice and death.

At the time of the original trial, the National Research Council had set the maximum tolerable level of copper for dairy cows at 100 parts per million (ppm). But Wass testified that a colleague at Iowa State University told him about a case where dairy cows had developed copper toxicity after receiving copper at a level of 40 ppm. Here, testing showed that copper was present at 58 ppm in the contaminated oats. Wass further testified that it is well accepted that dairy cows are more susceptible to copper toxicity if the ratio of copper to molybdenum in their diet is greater than 10:1. The ratio in the contaminated oats was 22:1.

Wass conceded, however, that the contaminated oats were not the only ingredient in the cows' diet. When the oats were delivered, they were mixed with corn and a mineral premix for dairy cows. In addition, the cows were also fed alfalfa and supplied with mineral blocks that they could lick. As we noted in *Schafersman I*, although Wass had the contaminated oats tested to determine their mineral makeup, he did not attempt to estimate the mineral makeup of the cows' complete diet.

In addition to the changes Wass made in his multiple mineral toxicity theory, he also took issue with our holding in *Schafersman I* that his clinical analysis had been inadequate because he had not ruled out other potential causes for the symptoms exhibited by the Schafersmans' cows. Wass conceded that there were other possible causes for the cows' symptoms and that he had not conducted testing to rule out those other causes. He testified, however, that some causes could be dismissed without testing because they rarely, if ever, occur in Nebraska. In addition, he repeatedly suggested that the clinical picture, i.e., the almost immediate onset of symptoms after the cows had eaten the contaminated oats and the lack of symptoms in the cows that did not eat the contaminated oats, made extensive testing for other causes unnecessary.

(b) White

White currently is an animal production consultant. He holds a doctorate of veterinary medicine from Oklahoma State University and a master's degree in animal nutrition from the University of Nebraska. Until his retirement in 1998, he was a professor at the University of Nebraska, where he served as the director of research compliance services.

White did not become involved until after *Schafersman I*. Thus, he did not have the opportunity to physically examine the cows that ate the contaminated oats. He reviewed most of the trial record and spoke with Wass and John Schafersman. He also reviewed material addressing toxicology.

White opines that the methodology employed by Wass was reliable and consistent with that which is ordinarily employed by clinical veterinarians. He agrees with Wass that the cumulative effect of the minerals in the contaminated oats could have

caused the cows' symptoms, and he believes that Wass conducted a reliable clinical analysis.

(c) Oraskovich

Oraskovich has a master's degree in education with an emphasis in dairy management and nutrition from the University of Minnesota. He is employed as an extension educator at the University of Minnesota, where he is responsible for the development of educational programs and working one-on-one with individual dairy producers and the agribusiness community. He is not a veterinarian.

Like White, Oraskovich did not become involved in the litigation until after *Schafersman I* and thus never had the opportunity to personally examine or conduct tests on the cows that ate the contaminated oats. In forming his opinion, he reviewed literature addressing mineral toxicity and the trial testimony.

Based on his professional experience, Oraskovich believes Wass employed reliable techniques in determining that the contaminated oats had caused the cows to become ill. Oraskovich agreed with Wass that the aggregation of minerals in the oats at above-normal levels could have caused the cows to become ill, although he was hesitant to label the theory "multiple mineral toxicity." He also agreed with Wass' revised theory that the amount of copper in the oats was sufficient to cause some of the cows' symptoms. To support this contention, he points to a chapter in a textbook on minerals, which cites recent research showing that copper toxicity can result when cows receive copper in their diet at a level of 40 ppm.

(d) Agland's Experts

To counter the testimony of Wass, White, and Oraskovich, Agland relied on the expert testimony of three veterinarians, with one veterinarian specializing in epidemiology and one veterinarian specializing in toxicology. Each generally opined that (1) the Schafersmans' experts had not used reliable methodologies, (2) "multiple mineral toxicity" is not generally accepted and has not been subject to peer-reviewed scientific research, (3) the amount of copper in the contaminated oats was not capable of causing the cows' symptoms, and (4) Wass had failed to perform a reliable clinical analysis.

(e) Trial Court's Decision

After discovery, Agland moved for a hearing under Neb. Evid. R. 104, Neb. Rev. Stat. § 27-104 (Reissue 1995), i.e., a *Daubert* hearing, requesting that the court determine whether the expert opinion testimony of Wass, White, and Oraskovich would be admissible at the second trial. After receiving evidence at the *Daubert* hearing, the court concluded that the expert opinion testimony of Wass, White, and Oraskovich was not admissible. Concerning the "multiple mineral toxicity" theory, the court ruled (1) it had not been peer reviewed, (2) it had not been tested, (3) it had no known or potential error rate, (4) it had not been generally accepted within the scientific community, and (5) no standard exists for determining what levels of any given mineral could result in a toxic effect. In addition, the court ruled that none of the Schafersmans' experts had performed a reliable differential diagnosis and that they had failed to employ sound epidemiological principles.

Agland then moved for summary judgment. In the motion, it contended that because the court had ruled that the Schafersmans' experts could not testify, there was no genuine issue of material fact concerning causation. The court granted the motion, and the Schafersmans appealed.

II. ASSIGNMENTS OF ERROR

The Schafersmans assign, restated and consolidated, that the court erred in (1) ruling that the expert opinion testimony of their experts was inadmissible under the *Schafersman I/Daubert* standard and (2) granting summary judgment to Agland.

III. STANDARD OF REVIEW

[1] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004); *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003).

[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains 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. *Carlson v. Okerstrom, supra.*

[3] 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. *Francis v. City of Columbus*, 267 Neb. 553, 676 N.W.2d 346 (2004).

IV. ANALYSIS

1. Admissibility of Expert Opinion Testimony

(a) *Schafersman I/Daubert* Framework

[4] Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), governs the admissibility of expert opinion testimony. It provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Section 702 requires that trial courts act as gatekeepers to ensure the evidentiary relevance and reliability of an expert's opinion. *Carlson v. Okerstrom, supra.* 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. *Carlson v. Okerstrom, supra*; *Schafersman I.*

In *Schafersman I*, we noted several factors that might bear on a judge's gatekeeping determination: whether a theory or technique can be (and has been) tested; whether, regarding 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." *Id.* at 233, 631 N.W.2d at 877.

[5] Since *Schafersman I*, we have ruled that in performing its gatekeeping duty, it is not enough for the trial court to determine that an expert's methodology is valid in the abstract. The trial

court must also determine if the witness applied the methodology in a reliable manner. *Carlson v. Okerstrom, supra.*

[6] However, " 'the trial court's role as gatekeeper . . . is not intended to serve as a replacement for the adversary system.' " *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 250 (5th Cir. 2002) (quoting Fed. R. Evid. 702, advisory committee's note). Rather, the objective of the trial court's gatekeeping responsibility is to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). See, also, *Rosen v. Ciby-Geigy Corp.*, 78 F.3d 316, 318-19 (7th Cir. 1996) (noting that object of *Daubert* standard "was to make sure that when scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work. . . . If they do, their evidence (provided of course that it is relevant to some issue in the case) is admissible even if the particular methods they have used in arriving at their opinion are not yet accepted as canonical in their branch of the scientific community. If they do not, their evidence is inadmissible no matter how imposing their credentials").

(b) Application of *Schafersman I/Daubert* Framework

In *Schafersman I*, we stated that Wass' opinion that the contaminated oats caused the cows to become ill was "dependent upon the underlying theory of multiple mineral toxicity." 262 Neb. at 222, 631 N.W.2d at 871. Following remand, the court ruled that (1) the multiple mineral toxicity theory had not been peer reviewed, (2) it had not been tested, (3) it had no known or potential error rate, (4) it had not been generally accepted within the scientific community, and (5) no standard exists for determining what levels of any given mineral could result in a toxic effect. However, as we noted above, Wass altered his multiple mineral toxicity theory following remand. He now contends that the amount of copper in the contaminated oats could have caused the cows' symptoms. It is not clear from the trial court's order whether it detected this change in Wass' theory.

But it is unnecessary for us to consider whether Wass' revised theory of multiple mineral toxicity was reliable under

Schafersman I/Daubert. The lack of independent hard scientific support for multiple mineral toxicity was not the only reason the court gave for excluding the testimony of the Schafersmans' experts. It also ruled that they could not testify because they had failed to perform a reliable clinical analysis, specifically noting that none of the experts had conducted a differential diagnosis.

In *Schafersman I*, we gave the following critical description of Wass' clinical analysis:

> Wass testified that in preparing his opinion, he physically went to the Schafersman farm, but only examined the Schafersmans' records relating to the cows. Wass admitted that he did not perform a clinical examination of any of the cows and did not treat the cows. Wass did not perform any tests on the cows to rule out other causes of the jaundice that had been observed in the cows by the Schafersmans' veterinarian, nor did he test for copper toxicity, which Wass opined was a contributing factor to the illness afflicting the cows. Wass performed no tests to rule out other potential causes for the alleged drop in milk production. Wass acknowledged that he should have tested for copper toxicity and performed other tests on the cows. Wass further testified that while he tested a sample of the mixture delivered to the Schafersmans by Agland, he did not test the composition of the total ration actually fed to the cows after it was combined by the Schafersmans with corn and other nutrients.

262 Neb. at 220, 631 N.W.2d at 869. Later in our opinion, we pointed out that Wass admittedly had failed to perform a differential diagnosis, which we described as "a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." *Id.* at 223, 631 N.W.2d at 871. See, also, *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004) (discussing at length when differential diagnosis provides reliable basis for expert opinion testimony).

Nothing has changed on remand. Neither Wass, nor White, nor Oraskovich took any substantive steps to shore up the weaknesses we identified in Wass' clinical analysis. We do not hold that an expert must perform every step we identified in *Schafersman I* for

his or her clinical analysis to be reliable. But, given that the Schafersmans' experts did not perform any of those steps, the trial court did not abuse its discretion in refusing to admit their expert opinion testimony.

2. Summary Judgment

[7-9] Next, the Schafersmans argue that the court erred in granting summary judgment for Agland. 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. *Francis v. City of Columbus*, 267 Neb. 553, 676 N.W.2d 346 (2004). Because the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted. *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002). Once the movant has made this showing, the burden of producing contrary evidence shifts to the party opposing the motion. *Id.*

Agland supported its motion for summary judgment with, among other items, affidavits from its experts, each of whom testified that there was no scientific basis to claim that a causative link existed between the contaminated oats and the cows' illnesses. This was sufficient for Agland to meet its burden of production. The only contrary evidence the Schafersmans had was the expert testimony of Wass, White, and Oraskovich. But, as we have already determined, this evidence failed to meet the *Schafersman I/Daubert* standard. Thus, the Schafersmans could not rebut Agland's prima facie showing and the court correctly entered summary judgment for Agland.

V. CONCLUSION

The court acted within its discretion in ruling that the opinions of the Schafersmans' experts were inadmissible, and it did not err in entering summary judgment for Agland.

Affirmed.

STATE OF NEBRASKA, APPELLEE, V. ELMORE HUDSON, JR., APPELLANT.

680 N.W.2d 603

Filed June 10, 2004. No. S-03-056.

1. **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.
2. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
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. **Motions for New Trial.** In order for a new trial to be granted, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby.
5. **Trial: Motions for Mistrial: Waiver: Appeal and Error.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
6. **Convictions: Appeal and Error.** On appellate review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
7. **Criminal Law: Death: Proximate Cause: Words and Phrases.** Proximate cause of death is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the death, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death.
8. **Criminal Law: Proximate Cause: Words and Phrases.** An efficient intervening cause is a new and independent cause, itself a proximate cause of a death, which breaks the causal connection between the original illegal act and the death.
9. **Rules of Evidence: Expert Witnesses: Hearsay.** Under Neb. Evid. R. 703, an expert may rely on hearsay facts or data reasonably relied upon by experts in that field.
10. **Expert Witnesses: Physicians and Surgeons: Records.** A medical expert may express opinion testimony in medical matters based, in part, on reports of others which are not in evidence but upon which the expert customarily relies in the practice of his or her profession.
11. **Expert Witnesses.** An expert must possess facts which enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

A. Michael Bianchi, of Bianchi & Vander Schaaf, L.L.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

After trial to a jury, Elmore Hudson, Jr., was convicted of first degree murder, attempted second degree murder, and two counts of use of a deadly weapon to commit a felony. Hudson was sentenced to life imprisonment for the first degree murder conviction, 30 years' imprisonment for the attempted second degree murder conviction, and 20 years' imprisonment for each of the two use of a deadly weapon to commit a felony convictions, the sentences to be served consecutively. Hudson appeals, claiming errors in the trial court's communication with the jury after deliberations had begun, the State's failure to prove proximate cause, and the admission of expert testimony regarding certain matters related to the deceased victim's treatment and prognosis.

II. BACKGROUND

On January 29, 2001, Hudson and Derreck Jones broke into the apartment of Victor Rodriguez and his girl friend, Margarite Salgado, located in Omaha, Nebraska, with the intent to steal money and drugs. Jones testified that upon kicking down the door to the apartment, Hudson began repeatedly striking Rodriguez in the back of the head with a wooden softball bat he had brought with him. After punching Salgado in the face several times, Jones began searching the apartment for money and marijuana while Hudson began hitting Salgado with the bat. When Hudson and Jones left the apartment, Rodriguez and Salgado were apparently unconscious. Testimony adduced at trial indicates that on January 31, Salgado apparently regained consciousness and was able to go

for help. Both Salgado and Rodriguez were taken by ambulance to St. Joseph Hospital. Rodriguez was transported to the hospital as a "Code 3," which meant he had life-threatening injuries and was determined to be near death.

Because Hudson argues that his assault upon Rodriguez did not cause Rodriguez' death, we will set out in detail the medical treatment rendered to Rodriguez. Upon admittance to St. Joseph Hospital, Rodriguez was diagnosed as having sustained a severe traumatic brain injury and was in a coma. Rodriguez sustained a large laceration to the left frontal part of his scalp, exposing the bone; a laceration just to the right top of his scalp; and a large entry to the back of his head. Rodriguez also sustained multiple fractures to the back section of his skull. Upon admission to St. Joseph Hospital, the record indicates Rodriguez had a 30-percent chance of death and was at risk of developing pneumonia, infection, abnormal bone formation, hydrocephalus (a buildup of pressure in the brain), and seizures. Moreover, due to the extent of Rodriguez' brain injury, Rodriguez was also at risk for impaired swallowing. A swallowing evaluation performed at St. Joseph Hospital showed that Rodriguez was in danger of having whatever he swallowed end up in his lungs, commonly referred to as "gastric aspiration." As a result, a feeding tube was placed through Rodriguez' abdominal wall to assist him with eating.

Dr. Jose Poblador, a licensed rehabilitation physician and director of brain injury rehabilitation at the Madonna Rehabilitation Hospital (Madonna Center) in Lincoln, Nebraska, testified on behalf of the State. Poblador's testimony revealed that he attended Ohio University, College of Osteopathic Medicine, in Athens, Ohio, and has specialized training in treating traumatic brain injuries. Upon Rodriguez' admittance into the Madonna Center on March 27, 2001, Poblador described Rodriguez as restless, incoherent, not able to follow or respond to simple commands, speaking only infrequently, not capable of symmetrical eye movement, unable to walk without substantial assistance, and pulling at his feeding tube even after the Madonna Center staff placed both of Rodriguez' hands in mittens. Rodriguez' condition while at the Madonna Center required that he receive constant, 24-hour-per-day, one-on-one care by nursing staff to prevent him from crawling out of bed or pulling on his feeding tube.

As a result of these apparent difficulties, Poblador ordered that nurses check Rodriguez' vital signs, blood pressure, and temperature at least every 8 hours. Poblador also followed up on orders from Rodriguez' gastroenterologist at St. Joseph Hospital that Rodriguez receive a new feeding tube. Poblador testified that replacement of the old feeding tube with a new one in a different location became necessary when the Madonna Center personnel began experiencing difficulty feeding Rodriguez and giving him fluids and medication through the original tube. The gastroenterologist discovered that the feeding tube was pulled from its hole through the abdominal wall. On April 12, 2001, the old feeding tube was pulled and a new tube placed in a different location. At that time, the gastroenterologist reinitiated the tube feeding at its previous rate of 95 cc per hour and water at 250 cc four times per day. At that time, Rodriguez was also placed on medication to improve the movement of residuals of the tube feeding from Rodriguez' stomach into the small intestine.

After the feeding tube was replaced, Madonna Center medical staff regularly checked the residuals of the tube feeding in Rodriguez' stomach at designated times. Within a few days after the tube replacement, the Madonna Center nurses reported that Rodriguez was not tolerating the tube feeding. As a result, the Madonna Center physician assigned to Rodriguez at the time decreased the feeding rate to 50 cc, and then to 30 cc on April 14, 2001. Poblador testified that Rodriguez' demonstrated intolerance to tube feeding is a common complication of a traumatic brain injury. On April 17, the gastroenterologist gave an order to change the tube feeding from a continuous delivery to a bullous delivery, which, for Rodriguez, meant 250 cc delivered into the tube five times daily. Poblador testified that the primary reason for changing from continuous to bullous tube feeding is typically to allow the patient more mobility. However, Poblador testified that in Rodriguez' case,

> the more important reason for him [to change to bullous tube feeding] is that he is agitated, restless and has shown previously a tendency to pull tubes, catheters. So, this having been the second tube already, [the gastroenterologist] could have been trying to provide more protection to the patient so that he doesn't pull the tube again.

On that same date, the gastroenterologist ordered that he be notified if Rodriguez' residuals exceeded 150 cc and that the residuals plus tube feeding should equal 250 cc with each bullous feeding.

On April 19, 2001, shortly after 3 p.m., medical records indicate that Rodriguez vomited. At approximately 6 p.m. that same day, Rodriguez' medical records indicate that his residuals measured at 190 cc and that his bullous feeding was withheld. At 9:45 p.m., Rodriguez' residuals were approximately 200 cc and the Madonna Center nursing staff again withheld Rodriguez' bullous feeding. At midnight, Rodriguez' residuals measured at 240 cc. Shortly thereafter, Rodriguez vomited again and became unconscious. The Madonna Center personnel immediately began administering emergency assistance to Rodriguez, and he was subsequently taken to BryanLGH Medical Center, where he died. Poblador agreed that the Madonna Center nurses' records did not reflect whether the gastroenterologist was contacted at the time Rodriguez' residuals moved above 150 cc; Poblador testified, however, that Rodriguez' residuals plus bullous feeding levels never exceeded 250 cc.

Poblador further testified, over objection, that Rodriguez' severe traumatic brain injury put him at high risk for gastric aspiration. Poblador concluded that the cause of Rodriguez' death was gastric aspiration, secondary to severe traumatic brain injury.

Dr. Robert E. Bowen, a pathologist who conducted an autopsy of Rodriguez, also testified on behalf of the State. Bowen testified that Rodriguez' head injuries were consistent with being hit by a bat. Bowen also testified that other than the injuries to his head and a mild case of emphysema, Rodriguez was a fairly healthy individual. With respect to the cause of Rodriguez' death, Bowen's autopsy report states that "[t]he immediate cause of death of this individual is attributed to gastric aspiration with extensive bronchopneumonia. The proximate cause of death is attributed to blunt trauma to the head." At trial, Bowen confirmed the autopsy report, testifying to a reasonable degree of medical certainty that

> the immediate cause of death . . . was gastric aspiration. That is, food was removed — it was aspirated from his stomach into his lungs which triggered him to die. And this

> is a result of head injury, of blunt head injury, severe head injury, which made it so he wasn't able to swallow and protect his airway.

At the close of the State's case and again at the close of Hudson's case, Hudson moved to dismiss the charges against him, contending the State had failed to prove a prima facie case. Specifically, Hudson contended that the State failed to prove Hudson's assault was the proximate cause of Rodriguez' death. The trial court overruled both motions.

The jury convicted Hudson on all counts, and the trial court entered its order on the jury's verdict. Hudson subsequently filed a motion for new trial, alleging irregularities in the proceedings of the court and witnesses, that the verdict was not sustained by sufficient evidence and was contrary to law, and that several errors of law occurred at trial to which Hudson objected. In the motion for new trial, Hudson also raised all other motions and objections previously raised before the court. The trial court denied Hudson's motion for new trial, and Hudson appeals to this court.

III. ASSIGNMENTS OF ERROR

Hudson assigns, restated, that the trial court committed reversible error when it (1) denied Hudson's motion for new trial despite the court's improper directive to the jury after it retired to deliberate regarding the length of time required for jury deliberations; (2) denied Hudson's motion to dismiss at the end of the case for the reason that the State failed to prove, as a matter of law, that Hudson proximately caused the death of Rodriguez; and (3) allowed Poblador, Rodriguez' attending physician, to speculate regarding certain matters concerning Rodriguez' treatment and prognosis. Specifically, Hudson advances three separate contentions with respect to his third assignment of error. Hudson first contends that Poblador is a doctor of osteopathy, not a doctor of medicine or a surgeon, and therefore could only speculate regarding how Rodriguez' skull reformation procedure was performed. Second, Hudson contends that Poblador's testimony regarding Rodriguez' poor prognosis for recovery and ability to live on his own was complete conjecture. Third, Hudson contends Poblador was not qualified

to testify that Rodriguez was at a greater risk for gastric aspiration due to the severe traumatic brain injury he sustained and that Poblador failed to testify to the same to a reasonable degree of medical or osteopathic certainty.

IV. STANDARD OF REVIEW

[1] 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. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002).

[2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003); *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

[3] 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. *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 267 Neb. 703, 677 N.W.2d 122 (2004).

V. ANALYSIS

1. Judicial Misconduct

[4] Hudson first contends that the trial court should have granted his motion for new trial due to alleged irregularity occurring during jury deliberations. Neb. Rev. Stat. § 29-2101 (Cum. Supp. 2002) provides:

> A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following grounds affecting materially his or her substantial rights: (1) Irregularity in the proceedings of the court, of the prosecuting attorney, or of the witnesses for the state or in any order of the court or abuse of discretion by which the defendant was prevented from having a fair trial . . . .

Moreover, in order for a new trial to be granted, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby. *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991).

Hudson contends that the trial court violated Neb. Rev. Stat. §§ 25-1115 and 25-1116 (Reissue 1995) when it communicated with the jury, albeit through its bailiff, after the jury retired to deliberate.

Section 25-1115 provides:

> No oral explanation of any instruction authorized by the preceding sections shall, in any case, be allowed, and any instruction or charge, or any portion of a charge or instructions, given to the jury by the court and not reduced to writing, as aforesaid, or a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections, shall be error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein.

Section 25-1116 provides:

> After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

Hudson contends that after 1 day of deliberations, one juror inquired of the court's bailiff regarding how long the jury would have to deliberate. The record on appeal indicates that prior to the jury rendering its verdict, counsel for Hudson inquired of the court regarding this communication as follows:

> [Hudson's counsel]: And the only other thing was, apparently, someone in passing suggested to your bailiff or inquired as to how long they had to deliberate or how long they were supposed to deliberate, and at some point the bailiff contacted the Court and went back and told them basically you deliberate as long as the case lasted; is that my understanding?

THE COURT: Well, what happened is the first questions that were posed by the jury included a question about what happens if the jury is hung, which I told you my comment was, I can't comment on that. When that question was delivered to my bailiff, they wondered how long if they were — they would have to deliberate if they couldn't reach a verdict, and I just told her that a rule of thumb is generally at least the length of time of the trial, but that's not necessarily the hard and fast rule. So that's what that is about.

[Hudson's counsel]: And I don't think that question was in writing, and that's the only reason I wanted to — that's all I wanted to make a record of. That's it.

THE COURT: No, it wasn't. So that did occur.

[5] At no time before the verdict was rendered did Hudson move for a mistrial. When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). Accordingly, this assignment of error is without merit.

2. Proximate Cause

[6] Hudson next contends that the State failed to prove that severe head trauma proximately caused Rodriguez' death. On appellate review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002). 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. *Id.* Moreover, in determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are

within the jury's province for disposition. *Id.*; *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

[7,8] In *State v. Harris*, 194 Neb. 74, 80, 230 N.W.2d 203, 207 (1975), we enunciated the following general rule:

> "The act of accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause resulted naturally from the act of accused, as where the direct cause was a disease or infection resulting from the injury inflicted by accused. . . . It is not a defense to one whose act has contributed to the death that improper treatment on the part of physicians, nurses, or the victim also contributed thereto; but one who has inflicted an injury is not responsible for homicide where death results solely from erroneous treatment by another."

See, also, *State v. Meints*, 212 Neb. 410, 322 N.W.2d 809 (1982) (reaffirming this principle). Proximate cause of death is " 'that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the death, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death.' " *State v. Lytle*, 194 Neb. 353, 358, 231 N.W.2d 681, 685 (1975). An efficient intervening cause is a new and independent cause, itself a proximate cause of a death, which breaks the causal connection between the original illegal act and the death. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

Hudson contends that because Rodriguez' health was steadily improving, the Madonna Center medical staff, and not the brain injury, was the proximate cause of Rodriguez' death. Even if an improving condition were a dispositive factor, which it is not, the record does not support Hudson's contention that Rodriguez' condition had more than marginally improved, if at all. Poblador testified that while Rodriguez was speaking more intelligibly and seemed a little more alert toward the latter part of his stay at the Madonna Center, his condition in mid-April 2001 generally was not very different from what it was upon admittance to the Madonna Center on March 27. Hudson's expert, Dr. Gerald Langdon, a doctor specializing in internal medicine, testified that

> [d]uring the approximate three weeks [Rodriguez] was [at the Madonna Center], the staff made an excellent attempt at trying to begin some rehabilitation, without great success, but he was able to walk some, never had any meaningful ability to communicate and had a great deal of difficulty cooperating. And also didn't seem to recognize people around him and such. Although, there were rare instances when he seemed to make some sense.

Hudson further contends that the evidence clearly shows that had the Madonna Center staff followed the gastroenterologist's orders and properly notified him when Rodriguez' residuals reached 150 cc, Rodriguez would not have died. Hudson maintains that Rodriguez' level of improvement combined with Langdon's testimony that people who have feeding tubes can live for extended periods of time, breaks the causal chain. Hudson provides no citations to the record in support of his contention. Indeed, our review of the record points to a contrary conclusion.

None of the experts were expressly asked, and none testified, regarding the issue of whether Rodriguez would still be alive but for the alleged failure to contact the gastroenterologist when Rodriguez' residuals exceeded 150 cc. To the contrary, witness testimony indicates that Rodriguez was transported to St. Joseph Hospital as a "Code 3" with life-threatening injuries and was near death. Upon admittance to the hospital, Rodriguez had a 30-percent chance of death and was at risk of pneumonia, seizures, and impaired swallowing as a result of the head injury. A swallowing evaluation performed at the hospital confirmed impairment and that Rodriguez was at risk for gastric aspiration. Poblador's and Langdon's testimony confirmed that Rodriguez' condition put him at high risk for gastric aspiration.

Poblador concluded that the cause of Rodriguez' death was gastric aspiration, secondary to severe traumatic brain injury. While Hudson objected to Poblador's testimony on the ground that it was complete conjecture, as discussed later in this opinion, we find this objection to be unfounded. In addition, Bowen's autopsy report states that "[t]he proximate cause of death is attributed to blunt trauma to the head." At trial, Bowen confirmed the autopsy report, testifying to a reasonable degree of medical certainty that

> the immediate cause of death . . . was gastric aspiration. That is, food was removed — it was aspirated from his stomach into his lungs which triggered him to die. And this is a result of head injury, of blunt head injury, severe head injury, which made it so he wasn't able to swallow and protect his airway.

The only testimony in the record that in any way relates to Hudson's contention that the Madonna Center medical personnel were negligent comes from Hudson's expert, Langdon. Langdon testified on direct examination that the blunt head trauma is not what caused Rodriguez to die. Langdon explained that Rodriguez sustained the head injuries approximately 70 days prior to his death but died within a period of 10 minutes and that he died "of an acute — I don't want to really say failure of nursing care or anything like that, because I'm not going to cast stones at this facility. It's a very difficult job to care for a patient like this, but the fact is that he did have excessive feeding." However, Langdon further testified on direct examination that it was his opinion that Rodriguez' head injury was a secondary cause of death. Langdon testified as follows:

> Q. Do you have an opinion, Dr. Langdon, to a reasonable degree of medical certainty as to why or how Victor Rodriguez died in this case?
>
> A. Well —
>
> Q. Just yes or no.
>
> A. Yes, I do.
>
> Q. Can you tell me what that opinion is?
>
> A. The easiest way would be for me to describe how I would sign his death certificate. And, incidentally, I don't think we've yet seen a death certificate, if I may say that.
>
> Q. Okay.
>
> A. I would sign his death certificate in this manner: No. 1 is acute unexpected cardiopulmonary arrest, secondary to acute gastric aspiration, secondary to gastric retention of feeding material. And then we add after those acute episodes the longer things, the more persistent things and those would be persistent invalidism, secondary to blunt head trauma. In other words, it's self-evident that something caused him to be in this condition.

On cross-examination, Langdon again admitted a causal relationship between Rodriguez' death and the blunt head trauma. Langdon testified as follows:

> Q. If you would have signed this death certificate, you would have included secondary to blunt trauma to the head, correct?
>
> A. That would be the remote reason why he was even there, of course.
>
> Q. Wouldn't be having a [feeding] tube if it hadn't been for the blunt trauma to the head?
>
> A. I think that everyone could understand that.
>
> Q. He wouldn't have aspirated had he not had a head injury, correct?
>
> A. That's a different question, completely. He wouldn't have been there if he had not had the injury. The injury was not necessarily the reason for the aspiration. Those are two separate events.
>
> Q. Okay. The reason for the [feeding] tube is the head injury?
>
> A. No, the reason for the [feeding] tube is nutrition.
>
> Q. Because he can't do it on his own?
>
> A. Fine.
>
> Q. Correct?
>
> THE COURT: Yes or no?
>
> THE WITNESS: Yes.
>
> Q. . . . So you're not here telling the ladies and gentlemen of this jury that his cause of death had nothing to do with the blunt trauma to his head, are you?
>
> A. Not at all.

Hudson further contends that because Bowen testified that the necessity of feeding tubes is not exclusive to patients with blunt head trauma, that fact alone requires a finding that death resulting from complications associated with feeding tubes constitutes a supervening cause. Hudson appears to advance this conclusion notwithstanding the existence of a causal relationship between the event initially necessitating the feeding tube and the subsequent death. Our research reveals several factually similar cases that reach a contrary conclusion.

For example, in *State v. Baker*, 87 Or. App. 285, 742 P.2d 633 (1987), following a motorcycle accident, the victim was in a comatose state and had a tracheostomy tube in her throat for breathing. Two months after the accident, the victim was transferred from the hospital to a nursing home. Eight days after moving to the nursing home, medical personnel removed the victim's tracheostomy tube, and the next day she died. The court determined that "one who criminally inflicts an injury upon another is responsible for that other's death, notwithstanding later negligent medical treatment, unless the medical treatment was so grossly erroneous as to have been the sole cause of death." *Id.* at 289, 742 P.2d at 635-36. The court stated that when viewed most favorably to the defendant, the evidence showed that removal of the tube, negligently or otherwise, did not cause the victim's inability to breathe, the consequences of the head injury did. *Id.* As such, the court found the defendant criminally responsible for the victim's death. See, also, *Brackett v. Peters*, 11 F.3d 78 (7th Cir. 1993); *Davis v. State*, 520 N.W.2d 319 (Iowa App. 1994).

Based on our review of the record, we conclude that a reasonable jury could have concluded beyond a reasonable doubt that severe head injury inflicted by Hudson was a proximate cause of Rodriguez' death. Accordingly, Hudson's second assignment of error is without merit.

3. Testimony of Poblador

For his third assignment of error, Hudson contends that Poblador was permitted, over objection, to speculate regarding Rodriguez' skull repair surgery, the likelihood of gastric aspiration for an individual in Rodriguez' situation, and the likelihood that Rodriguez would eventually be able to live again on his own.

(a) Rodriguez' Surgery

Hudson first contends that the trial court erroneously overruled Hudson's foundation objection to Poblador's testimony describing how Rodriguez' skull reformation procedure was performed while Rodriguez was still at St. Joseph Hospital. Hudson contends that Poblador never qualified himself as a surgeon and that the record establishes that Poblador is only a doctor of osteopathy and not necessarily a doctor of medicine. Thus, Hudson contends,

Poblador was not familiar with skull reformation surgery and was to some degree "guessing" when he testified regarding the surgery performed at St. Joseph Hospital to repair Rodriguez' skull. Brief for appellant at 26.

[9,10] Under Neb. Evid. R. 703, an expert may rely on hearsay facts or data reasonably relied upon by experts in that field. *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002); *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001). See § 27-703. A medical expert may express opinion testimony in medical matters based, in part, on reports of others which are not in evidence but upon which the expert customarily relies in the practice of his or her profession. See, *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994); *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749 (1985).

In the instant case, according to Poblador's testimony, he was licensed as a doctor in 1997 and his specialty is in the area of treating brain injuries. He attended the osteopathic school at Ohio University, College of Osteopathic Medicine. Osteopathy is "[a] system of complete medical practice based on the maintenance of proper relationships among the various parts of the body. Osteopathic physicians, licensed in all 50 states, employ manipulative therapy, drugs, surgery, x-ray, and all other accepted therapeutic methods in the treatment of disease and injury." Black's Law Dictionary 1101 (6th ed. 1990). Poblador further testified that he performed his residency in rehabilitation medicine at the hospital of the University of Pennsylvania in Philadelphia, Pennsylvania, and that from 1996 to 1997, he participated in a 1-year brain injury fellowship at Baylor University in Houston, Texas. When asked to describe the brain injury fellowship, Poblador stated:

> In rehabilitation medicine, of course, it's sort of a general field, so we take care of different varieties of patients, including traumatic brain injuries. So I took an additional training just to take care of traumatic brain injured patients. That includes essentially patients who have had car accidents, falls, anything that has trauma to the head.

Poblador has been the director of brain injury rehabilitation and the mild traumatic brain injury clinic at the Madonna Center for 2 years. Before coming to the Madonna Center, Poblador was

the medical director of brain injury rehabilitation at Spalding Hospital in Aurora, Colorado, for 5 years.

Poblador testified that it is his normal procedure to review medical records from previous hospitals so as to gain a better understanding of a patient's case and history to provide the best possible care. Poblador further testified that prior to treating Rodriguez, he reviewed all of the documentation from St. Joseph Hospital. Moreover, on cross-examination, Poblador testified that in preparation for his testimony at trial, he reviewed all of the records generated by the Madonna Center relative to Rodriguez as well as a combination of records from St. Joseph Hospital. These included doctors' reports from their evaluations, procedure notes, *including surgeries*, speech therapy evaluations, progress notes, daily physician notes, CAT scan reports, and laboratory test reports.

The testimony in which Poblador describes the skull repair surgery was clearly taken from his review of St. Joseph Hospital's medical records. Poblador's review of Rodriguez' surgical records and any conclusions he drew from those records are activities that are consistent with his practice in the field of brain injury rehabilitation.

Based on our review of the record, Poblador properly qualified himself as a medical expert in the field of traumatic brain injuries. Moreover, we determine that Poblador reasonably relied upon the reports of medical professionals, including surgical reports of the kind at issue in this case. Poblador's testimony regarding the skull reformation procedure was based upon his review of the medical records from St. Joseph Hospital. As such, we find that the trial court did not abuse its discretion in admitting Poblador's testimony regarding the skull reformation procedure.

(b) Testimony Regarding Likelihood for Gastric Aspiration

Hudson next contends that the trial court erroneously overruled Hudson's foundation and form objections to Poblador's testimony that it was his opinion that Rodriguez was at greater risk for gastric aspiration due to the severe traumatic brain injury he sustained. Hudson contends Poblador was not qualified to give this testimony and did not do so to a reasonable degree of medical or osteopathic certainty.

The testimony at trial indicates that gastric aspiration is a common condition associated with traumatic brain injury. Moreover, Hudson's own expert, Langdon, conceded on cross-examination that without the severe traumatic head injury, Rodriguez would not have aspirated. Bowen testified, over objection, that has not been assigned as error in this appeal, that the gastric aspiration experienced by Rodriguez was a complication of the traumatic brain injury. Moreover, Poblador testified, without objection, that according to St. Joseph Hospital's medical records, upon admittance to the hospital, a swallowing evaluation was performed that confirmed Rodriguez was at risk for gastric aspiration. As an expert in brain injury rehabilitation, Poblador was familiar with and qualified to testify regarding Rodriguez' risk for gastric aspiration. Accordingly, we determine that it was not an abuse of discretion for the trial court to admit this testimony.

(c) Poblador's Testimony Regarding Rodriguez' Prognosis

Hudson's final contention is that the trial court erred in allowing Poblador to testify, over objection, that Rodriguez had a poor prognosis for a good recovery. Specifically, Hudson contends:

> While, admittedly, Dr. P[o]blador may be familiar with how other patients have responded after having suffered from blunt trauma injury — after all, he is the Director of the Madonna Rehabilitation Hospital — it is complete conjecture as to when, if, and how long Mr. Rodriguez would take in order to attain a certain level of recovery.

Brief for appellant at 27.

[11] An expert must possess facts which enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). Based on Poblador's qualifications enumerated above and the testimony underlying his prognosis for Rodriguez' recovery, we conclude that Poblador was qualified to and possessed sufficient facts to enable him to offer an opinion as to Rodriguez' prognosis for recovery. As such, this assignment of error is without merit.

VI. CONCLUSION

Because Hudson did not move for a mistrial based upon the alleged improper communication, he cannot now complain of an

unfavorable verdict. When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). Regarding his second assignment of error, we conclude that the evidence was sufficient to support Hudson's conviction. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the blunt head injury inflicted by Hudson proximately caused Rodriguez' death. Finally, with respect to Hudson's third assignment of error, we conclude that there was sufficient foundation for Poblador to testify about his review of the medical report regarding the skull reformation procedure. We further conclude that Poblador was qualified to testify regarding Rodriguez' prognosis and risk for gastric aspiration. For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

CORNHUSKER CASUALTY COMPANY, APPELLANT, V.
FARMERS MUTUAL INSURANCE COMPANY
OF NEBRASKA, APPELLEE.

680 N.W.2d 595

Filed June 10, 2004. No. S-03-336.

1. **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.
2. **Insurance: Contracts.** An insurance policy is a contract between the insurance company and the insured. As such, the insurance company has the right to limit its liability by including those limitations in the policy definitions. If those definitions are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced.
3. **Insurance: Contracts: Claims.** Although a liability insurer is legally obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded with directions.

Thomas J. Culhane and Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellant.

Thomas A. Grennan, Alison L. McGinn, and Thomas E. Morrow, Jr., of Gross & Welch, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Cornhusker Casualty Company (Cornhusker) filed a petition in the district court for Douglas County against Farmers Mutual Insurance Company of Nebraska (Farmers). Pursuant to a garage policy issued to the estate of Leo J. Bongers (the Estate) by Cornhusker and a farm policy issued to the Estate by Farmers, Cornhusker and Farmers had each paid half of a judgment which had been entered against the Estate. Cornhusker claimed it was not liable under its policy, and it therefore sought reimbursement from Farmers for the half of the judgment Cornhusker had paid as well as for all the moneys Cornhusker had expended in defending the Estate. Farmers filed a counterclaim asserting that Cornhusker's coverage was primary and that therefore Cornhusker was liable for the entire judgment. Farmers sought reimbursement for the half of the judgment that it had paid.

The parties submitted the case to the district court on stipulated evidence. The court ruled against Cornhusker on its claim and dismissed Cornhusker's action. The court ruled in favor of Farmers on its counterclaim and entered a judgment against Cornhusker equal to the portion of the judgment against the Estate that Farmers had paid. Cornhusker appeals. We reverse, and remand to the district court with directions to enter judgment in Cornhusker's favor on its claim and to dismiss Farmers' counterclaim.

STATEMENT OF FACTS

The Estate was insured under a garage policy issued by Cornhusker and under a farm policy issued by Farmers. The Estate and other defendants were sued by Joseph A. Haag after

Haag was injured in an accident while attending an auction on farm property owned by the Estate. The trial court in Haag's action entered judgment on a jury verdict in the amount of $600,000 in favor of Haag and against the Estate and the other defendants. The judgment was affirmed by this court in *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999). The facts of Haag's action are set forth in greater detail in *Haag v. Bongers, supra*, and will be repeated here only to the extent necessary to resolve the issues in this appeal.

In the present case, Cornhusker and Farmers submitted into evidence stipulated facts including the following paragraphs regarding the underlying facts of Haag's action:

> 3. On or about January 30, 1993, an auction was conducted upon the premises owned by the Estate of Leo Bongers in David City, Butler County, Nebraska. The auction was held by Alfred M. Bongers and Delores D. Kuhl in their capacity as personal representatives of the Estate of Leo J. Bongers. The estate employed Dolan & Bauer-Moravec to conduct the auction for which admission was charged. The auction was for the purpose of selling off, among other things, approximately 120 automobiles owned by the Bongers' [sic] Estate.
>
> 4. The vehicles which were to be auctioned were driven or towed, if necessary, into a Quonset building on the property by volunteers or employees of Dolan & Bauer-Moravec. An alley way made of bales of hay were [sic] set up through the middle of the auction barn through which the vehicles were driven or towed. At one point during the auction, the auctioneers reminded the bidders and spectators to stay behind the hay bales because some of the bidders and spectators were not behind the hay bales. It is unknown whether Joseph A. Haag, was behind or in front of the hay bales at the time of the accident. There were no other barricades, ropes or fences which separated the bidders and spectators from the area where the vehicles were being auctioned. The auctioneers nationally advertised the auction and estimated that approximately 700 people would attend. However, as many as 1250 people actually attended the auction. It is unknown how many bidders and

spectators were actually in the Quonset at the time of the accident in question.

5. During the course of the auction, a 1950 Studebaker Truck was brought up to the Quonset building to be sold. The truck was towed into the Quonset building by a 1951 M International Farmall tractor with a rope that was attached to a ball hitch which was attached to the tow bar of the tractor. The threaded shaft of the ball hitch was inserted through in the tow bar and was tightened with a nut. Following the sale of the truck, the tractor attempted to tow the truck out of the building. As the tow rope tightened, the ball hitch came loose from the tow bar of the tractor. Joseph A. Haag was struck in the head by the ball hitch and suffered injuries.

6. The ball hitch and tow ropes were purchased by the auctioneers hired by the Bongers' [sic] Estate to conduct the auction. The ball hitch and tow rope were attached to the tractor and cars by volunteers that were assisting with the auction.

Haag sued the Estate and other defendants, including the auctioneers and the manufacturer of the ball hitch. The Estate tendered the defense of the lawsuit to both Cornhusker and Farmers. Farmers admitted its policy provided coverage for the claim and accepted coverage without reservation. However, Farmers declined to defend the Estate, claiming that the Cornhusker policy also provided coverage and was primary to the excess coverage provided under the Farmers policy.

Cornhusker undertook the defense of Haag's claim against the Estate but sent a letter with the title "Reservation of Rights" to the Estate. In the letter, Cornhusker stated:

> It would appear at this point that the vehicles being used in the towing operation which caused the injury are over 30 years old and would be excluded off of our policy. Any bodily injury resulting from the ownership, maintenance, or use of vehicles over 30 years old would not be covered.

Haag's lawsuit went to trial and was submitted to a jury on September 15, 1997. The jury was instructed, inter alia, that Haag claimed that the Estate was liable under the doctrine of respondeat superior and vicarious liability for the negligence of individuals who (1) failed to use the ball hitch in the manner for

which it was intended; (2) placed the shank or screw of the ball hitch in a drawbar hole which was too large, thus causing the hitch to tilt and place unreasonable stresses on the integrity of the hitch; (3) placed the hitch in a drawbar which was too thick for the hitch, thus preventing the lock washer and nut of the hitch to be fully engaged; (4) failed to fully engage the nut with the screw of the hitch assembly; and (5) attached a synthetic towrope to the hitch which created an unreasonable risk of harm to Haag and the occupants of the building because it stored energy and acted like a slingshot when the hitch failed. The jury was also instructed that Haag claimed that the Estate was independently negligent for (1) failing to correct the manner in which ball hitches were being used to tow vehicles into the crowded sale barn when it knew, or in the exercise of reasonable care should have known, that the manner in which ball hitches were being used was unreasonably dangerous and created an unreasonable risk of harm to Haag and other occupants of the sale barn; (2) failing to limit the number of people in the sale barn so that the bidders could be kept at a safe distance from the towing process; and (3) failing to warn Haag and the other business visitors in the sale barn that vehicles were being towed in an unreasonably dangerous manner, when it knew or should have known that vehicles were being towed in an unreasonably dangerous manner.

On September 16, 1997, the jury returned a general verdict in favor of Haag and against all the defendants, including the Estate, and assessed damages in the amount of $600,000. The verdict was accepted, and the trial court entered judgment against all defendants for $600,000 plus costs. The judgment was affirmed by this court in *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999).

In letters dated April 15, 1999, Cornhusker informed the personal representatives of the Estate that it was denying coverage for the Haag judgment because Cornhusker asserted that the accident "occurred as a result of a tractor over 30 years old towing another antique vehicle that was similarly over 30 years old." Cornhusker stated that coverage was excluded under an endorsement which read as follows:

> This insurance does not apply to Bodily Injury or Property Damage resulting from the ownership, maintenance, or use

> of tow trucks, vehicles over 30 years old, tank trucks, tank trailers and haulaways whether connected or not connected to non-owned or covered "autos" you own. Physical Damage Coverage does not apply to vehicles over 30 years old.

Cornhusker further asserted in the letter that Farmers had agreed that its policy covered the loss and that therefore "the estate's portion of the judgment should be paid by Farmers Mutual of Nebraska." Despite the denial of coverage, Cornhusker was obligated to pay the judgment to Haag under the terms of a supersedeas bond. Cornhusker and Farmers each paid $166,741.71 to Haag to satisfy the Estate's share of the judgment. Other defendants paid the rest of the judgment to Haag.

On September 3, 1999, Cornhusker filed a petition against Farmers seeking a judgment in the amount of $166,741.71 for the portion of the judgment Cornhusker paid to Haag and in the amount of $98,245.65 for costs Cornhusker incurred in defending the Estate against Haag's claims. Cornhusker alleged that the policy it issued to the Estate did not provide coverage for the claims asserted by Haag because Haag's injuries resulted from the Estate's ownership, maintenance, or use of two trucks or vehicles more than 30 years old. Cornhusker further alleged that the policy Farmers issued to the Estate did provide coverage and that therefore Farmers was liable for all of the Estate's share of the judgment as well as the entire costs of defending the Estate.

Farmers answered and in effect alleged that Cornhusker's policy provided coverage for Haag's claims against the Estate. Farmers further alleged that its coverage was excess to that of Cornhusker and that Cornhusker's coverage was primary. Farmers therefore filed a counterclaim seeking reimbursement of the amount it had paid on the judgment against the Estate.

The matter proceeded to a bench trial on April 16, 2001, and was tried on stipulated facts, the evidence from the *Haag v. Bongers* trial, and other evidence, including Cornhusker's correspondence with the Estate. On November 13, the district court entered an order dismissing Cornhusker's petition. The court found that "the cause of the accident was the faulty ball hitch." The court also stated that the use of the tractor and the ownership of the Studebaker truck were "only an incident of the accident," and the court therefore found that the exclusion in the Cornhusker policy

did not apply. The court also found that the sale of cars at the auction was part of "garage operations" as provided in the policy, thereby invoking coverage under the policy. The court entered judgment in favor of Farmers and dismissed Cornhusker's petition.

Cornhusker attempted to appeal the November 13, 2001, order. However, this court dismissed the appeal for lack of a final order because the district court had failed to rule on Farmers' counterclaim. *Cornhusker Casualty Co. v. Farmers Mutual Ins. Co.*, 263 Neb. xxii (No. S-01-1288 (Apr. 17, 2002)). The district court on March 17, 2003, entered an order granting judgment against Cornhusker in the amount it had paid plus costs on Farmers' counterclaim. Cornhusker appeals.

ASSIGNMENTS OF ERROR

Cornhusker asserts that the district court erred in (1) finding that the exclusion endorsement did not exclude coverage for Haag's claims against the Estate and that the endorsement did not apply to "garage operations"; (2) finding that Cornhusker's policy was primary and that Farmers' policy provided excess coverage; (3) finding that the cause of the accident was the faulty ball hitch and that the use of the tractor and the Studebaker truck, which were both over 30 years old, was only incidental to the accident; (4) failing to find that Farmers was liable for the judgment and defense costs and failing to enter judgment against Farmers on Cornhusker's claim; and (5) failing to enter judgment in Cornhusker's favor on Farmers' counterclaim and failing to dismiss Farmers' counterclaim.

STANDARD OF REVIEW

[1] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

ANALYSIS

Applicability of Exclusion.

We first consider Cornhusker's argument that the district court erred in determining that the exclusion in the Cornhusker policy for damages resulting from the ownership, maintenance, or use of

vehicles over 30 years old did not exclude coverage for Haag's claims against the Estate. Our resolution of this argument controls the outcome of this appeal. Contrary to the district court's order, we conclude as a matter of law that the exclusion applied to Haag's claims. Accordingly, we determine that the district court erred in holding in Farmers' favor on both Cornhusker's claim and on Farmers' counterclaim.

On appeal, Farmers contends that the exclusion at issue applied only to certain types of coverage under the Cornhusker policy and that it did not apply to the garage operations coverage. We reject this contention. The exclusion at issue was contained in an endorsement to the policy and expressly stated that it modified the insurance provided under the garage coverage form. The heading on the exclusion alerted the insured to its scope by stating in a banner across the top of the page: "THIS ENDORSEMENT CHANGES THE POLICY." The endorsement was located on a separate page following the descriptions of all the various types of coverage provided under the policy. There is no language in the exclusion which would indicate that it might apply to only certain types of coverage. We further note that there is policy language within the descriptions of specific types of coverage which provides for certain types of exclusions which are unique to those specific coverages. The placement of the exclusion at issue in the policy and the language of the exclusion indicate that the exclusion applied to the coverage provided under the entire garage policy.

[2] In interpreting limitations and exclusions in an insurance policy, this court has stated:

> An insurance policy is a contract between the insurance company and the insured. As such, the insurance company has the right to limit its liability by including those limitations in the policy definitions. If those definitions are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced.

Safeco Ins. Co. of America v. Husker Aviation, Inc., 211 Neb. 21, 27, 317 N.W.2d 745, 749 (1982). In *Safeco Ins. Co. of America*, we recognized that an insurance contract will be construed against the insurer when the policy is indefinite or ambiguous because the insurer drafted the contract; however, we also recognized that

"[w]e are not permitted to create an ambiguity simply to afford coverage where a clear reading of the policy would otherwise deny coverage." 211 Neb. at 26, 317 N.W.2d at 749.

The Cornhusker policy in this case excludes coverage for damages "resulting from the ownership, maintenance, or use of[, inter alia,] vehicles over 30 years old." This exclusion is not indefinite or ambiguous. We find the exclusion to be applicable to Haag's claims.

Haag's injuries were caused when a faulty ball hitch came loose while the hitch was being used to tow a vehicle which was owned by the Estate and was over 30 years old. The court specifically found that "the cause of the accident was the faulty ball hitch." In its order, the district court also noted that "the injuries sustained by Haag occurred as the tractor towing the Studebaker with the rope caused the ball hitch to come loose." The district court concluded that the exclusion did not apply and entered orders in favor of Farmers. Given the facts and the Cornhusker policy language, the district court's orders are in error.

In this case, the district court's finding that the faulty ball hitch caused the accident cannot be separated from the additional finding that the accident occurred while the ball hitch was being used to tow the 1950 Studebaker truck, a vehicle over 30 years old which was owned by the Estate. Even though the faulty ball hitch was the specific cause, the fact remains that the damages resulted from the towing of the 1950 Studebaker truck. A faulty ball hitch without an application is unlikely to cause harm. In this case, the towing was an incident of the Estate's ownership of the vehicle, and therefore, any liability the Estate had for the damages to Haag "resulted from" the Estate's ownership of a vehicle over 30 years old. Although it is possible that the faulty ball hitch could have been used to tow a vehicle that was not over 30 years old, in this particular accident, the Estate's liability resulted from its ownership of a vehicle that was in fact over 30 years old. In its policy, Cornhusker specifically excluded coverage for any damages resulting from the Estate's ownership of vehicles over 30 years old, and therefore the particular injuries to Haag in this case were within a set of risks that the policy excluded from coverage, and the district court's decision to the contrary was error. We note that because we conclude

that the exclusion applied, we need not consider whether Haag's claim would have been covered under the garage policy absent the exclusion.

Farmers argues that the present case should be analyzed pursuant to the "concurrent cause doctrine" used in other jurisdictions. This court has not specifically adopted the concurrent cause doctrine in this type of case. In cases where insurance policies cover losses caused by one risk while excluding losses caused by another risk, courts in other jurisdictions have alternatively used a "concurrent cause rule" or an "efficient proximate cause rule" to resolve coverage issues. See 7 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d §§ 101:55 to 101:57 at 101-148 to 101-153 (1997). The concurrent cause rule provides that "coverage should be allowed whenever two or more causes do appreciably contribute to the loss, and at least one of the causes is an included risk under the policy," while the efficient proximate cause rule allows recovery for a loss "caused by a combination of a covered and an excluded risk only if the covered risk was the efficient proximate cause of the loss, meaning that the covered risk set the other causes in motion which, in an unbroken sequence, produced the result for which recovery is sought." *Id.*, § 101:57 at 101-152 to 101-153.

We note that when applying both the concurrent cause rule and the efficient proximate cause rule, it is essential to recognize that "[t]he initial task . . . is determining whether there really are two causes, or merely one cause being given different labels." *Id.*, § 101:55 at 101-149. Although the concurrent cause rule or the efficient proximate cause rule may be applicable "where two or more distinct actions, events or forces combined to create the damage," such analysis has no application when "the evidence shows the loss was in fact occasioned by only a single cause, albeit one susceptible to various characterizations." *Chadwick v. Fire Ins. Exchange*, 17 Cal. App. 4th 1112, 1117, 21 Cal. Rptr. 2d 871, 874 (1993). The court in *Chadwick* stated, "An insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss." *Id.* See, also, *Austin Mut. Ins. Co. v. Klande*, 563 N.W.2d 282 (Minn. App. 1997) (for concurrent cause rule to apply, there must be divisible concurrent causes and question

is whether causes could have operated independently of one another to bring about loss).

Given the district court's finding of fact that the cause of Haag's injuries was the faulty ball hitch and in light of the fact that the use of the ball hitch was an inseparable part of the accident that resulted from the towing of the Estate's 1950 Studebaker truck, we determine that Haag's injuries occurred as the result of an accident that was one distinct action, event, or force rather than as a result of separate concurrent causes which could have operated independently of one another to bring about the loss. Because neither rule would apply, we need not consider in this case whether either the concurrent cause rule or the efficient proximate cause rule should be adopted in this state.

We conclude that the exclusion in the Cornhusker policy relating to the ownership of vehicles over 30 years old applied to Haag's claim against the Estate and that therefore Cornhusker was not liable under its garage policy. The district court erred in concluding that the exclusion did not apply and in entering judgment against Cornhusker on both its claim and on Farmers' counterclaim. Because Cornhusker was not liable under its policy, judgment should have been entered against Farmers in the amount of the $166,741.71 payment Cornhusker made toward Haag's judgment, and Farmers' counterclaim should have been dismissed.

Defense Costs.

In addition to the portion of the Haag judgment it paid, Cornhusker also sought recovery from Farmers for costs Cornhusker had incurred in defending the Estate against Haag's claim. The district court denied Cornhusker's claim for defense costs, and Cornhusker appeals this ruling.

[3] Although a liability insurer is legally obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy. *City of Scottsbluff v. Employers Mut. Ins. Co.*, 265 Neb. 707, 658 N.W.2d 704 (2003). Because we concluded above that Haag's claim was outside the coverage of the Cornhusker garage policy, we further conclude that Cornhusker did not have a duty to defend the suit filed by Haag. Farmers conceded it was liable to the Estate under its policy, and therefore

Farmers had a duty to defend the Estate, and Farmers is liable to Cornhusker for the costs Cornhusker incurred defending against Haag's claim. Cornhusker and Farmers stipulated in this case that Cornhusker spent $98,245.65 in defense of Haag's claims against the Estate, and Farmers is therefore liable to Cornhusker for that amount.

CONCLUSION

We conclude that the exclusion for damages resulting from the ownership, maintenance, or use of vehicles over 30 years old applied to Haag's claims against the Estate and that therefore Cornhusker was not liable for coverage. Because Cornhusker was not liable for coverage of Haag's claim, Cornhusker consequently had no duty to defend the Estate. The district court therefore erred in finding in Farmers' favor on both Cornhusker's claim and on Farmers' counterclaim. We reverse the judgment of the district court, and we remand the cause to the district court with directions to enter judgment in Cornhusker's favor and against Farmers in the amount of $166,741.71 for the portion of the judgment Cornhusker paid to Haag and in the additional amount of $98,245.65 for costs Cornhusker incurred in defending the Estate against Haag's claims. We also direct the district court to dismiss Farmers' counterclaim.

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., and STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RICK A. PERRY, APPELLANT.

681 N.W.2d 729

Filed June 18, 2004. No. S-03-174.

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: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, 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. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

3. ____: ____: ____: ____. In order to obtain a new direct appeal as postconviction relief, the defendant must show, by a preponderance of the evidence, that the defendant was denied his or her right to appeal due to the negligence or incompetence of counsel, and through no fault of his or her own.
4. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.
5. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
6. **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.
7. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Gregory C. Damman for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

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

WRIGHT, J.

I. NATURE OF CASE

In 1994, Rick A. Perry was convicted of two counts of sexual assault of a child and one count of first degree sexual assault on a child. Perry appeals from the district court's denial of his motion for postconviction relief.

II. SCOPE 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. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

III. FACTS

In an amended information filed October 18, 1993, Perry was charged with two counts of sexual assault of a child and one count of first degree sexual assault on a child. On February 17, 1994, a Thayer County District Court jury found Perry guilty on all three counts.

On April 5, 1994, Perry was sentenced to a term of imprisonment of from 1 year to 366 days on count I, sexual assault of a child, and given credit for 148 days served. On count II, first degree sexual assault on a child, Perry was sentenced to 40 to 42 years' imprisonment. On count III, sexual assault of a child, Perry was sentenced to a term of imprisonment of from 1 year to 366 days. The sentences were to be served consecutively.

Following sentencing, Perry's counsel began the process for filing an appeal. In a letter to Perry dated April 27, 1994, counsel requested that Perry sign an enclosed poverty affidavit, have the affidavit notarized, and return it to counsel as quickly as possible. In a letter dated April 29, 1994, Perry was reminded to return the poverty affidavit. Perry signed the poverty affidavit and had it notarized on May 3, but it was not received by counsel until May 6. The Nebraska Court of Appeals subsequently dismissed Perry's appeal for lack of jurisdiction because the poverty affidavit was not timely filed. See *State v. Perry*, 3 Neb. App. xxiii (No. A-94-457, Aug. 8, 1994).

On August 17, 1994, Perry filed a motion for review of his sentence. On July 1, 1996, the trial court, upon its own motion, denied Perry's motion but ordered the clerk of the district court to issue an amended commitment with regard to Perry's conviction for first degree sexual assault on a child. Perry's sentence was amended to from 40 to 42 years' imprisonment to 200 months' to 42 years' imprisonment. There is no record that Perry appealed from this order to amend the commitment.

On August 24, 2001, Perry filed an amended motion for postconviction relief, seeking to have his convictions and sentences vacated. In this motion, Perry alleged that the amendment of his sentence on July 1, 1996, violated his due process right to be present and be given an opportunity for allocution. Perry also made the following claims regarding ineffective assistance of counsel: Counsel did not minimally prepare for trial, did not

subpoena witnesses he knew would be helpful to Perry's case, did not cross-examine witnesses called by the State, did not correct errors in the presentence investigation, failed to properly file a direct appeal, failed to elicit testimony from witnesses that would have disclosed they were biased toward Perry, failed to elicit testimony that would have disclosed that witnesses were under the influence of alcohol during events about which they testified, failed to investigate facts surrounding the issuance of a search warrant for Perry's business and residence, failed to file a motion to suppress evidence seized as a result of the unlawfully issued search warrant, and failed to present evidence in support of a motion to sever the counts. Perry further alleged that the trial court erred in telling the jury that the jurors were "'free to tell [their] spouses and maybe [their] friends what ha[d] gone on'" during the 2 days of trial.

During an evidentiary hearing on Perry's motion for postconviction relief, the district court received exhibits and evidence in the form of testimony from four witnesses and took judicial notice of certain documents. In a journal entry filed on February 4, 2003, the district court found generally for the State and against Perry. The court specifically found that Perry's trial counsel was not negligent and that Perry was responsible for not providing the poverty affidavit needed to perfect his direct appeal. The court overruled Perry's motion for postconviction relief, and Perry timely appealed from this order.

IV. ASSIGNMENTS OF ERROR

Perry assigns the following restated errors regarding the order of the district court: (1) the court's overruling of his claims for ineffective assistance of counsel, (2) the court's overruling of his claim that the jury was improperly instructed during a break in the trial, and (3) the court's overruling of his claim that his constitutional rights were violated when he was "re-sentenced" without the opportunity to be present or to make allocution.

V. ANALYSIS

1. Ineffective Assistance of Counsel

Perry argues that he was denied effective assistance of counsel in three respects: counsel's failure to perfect the direct

appeal, counsel's failure to attempt to sever the counts at trial, and counsel's failure to file a motion to suppress certain evidence prior to trial.

(a) Failure to Perfect Appeal

[2] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, 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. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.*

At the evidentiary hearing, conflicting evidence was presented with regard to whether counsel or Perry was to blame for the failure to file a poverty affidavit by the May 5, 1994, deadline for perfecting Perry's direct appeal. The result of this failure was that Perry's appeal was dismissed by the Court of Appeals. See *State v. Perry*, 3 Neb. App. xxiii (No. A-94-457, Aug. 8, 1994).

The district court found that Perry's counsel was not negligent on or about April 28 through May 6, 1994, and that Perry was responsible for not providing the poverty affidavit needed to perfect his direct appeal.

[3] 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. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004). In order to obtain a new direct appeal as postconviction relief, the defendant must show, by a preponderance of the evidence, that the defendant was denied his or her right to appeal due to the negligence or incompetence of counsel, and through no fault of his or her own. *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002); *State v. Hess, supra*. Thus, it was Perry's burden to show that he was denied his right to appeal due to the negligence or incompetence of counsel and through no fault of Perry's own.

We conclude that the district court was not clearly erroneous in finding that counsel was not negligent and that Perry was responsible for not providing the poverty affidavit required to perfect his appeal. Perry has failed to prove that his counsel's performance

was deficient, and his claim of ineffective assistance of counsel in failing to perfect his direct appeal is without merit.

(b) Failure to Attempt to Sever Counts

[4] We first note Perry's admission that he had no constitutional right to separate trials on the offenses charged in the information. See *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997). A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion. *Id.*

The question for our determination is whether Perry's counsel was ineffective when he failed to obtain separate trials as to the charges against Perry. Perry contends that if counsel had called witnesses and presented documentary evidence, he would have established that Perry was prejudiced by joining the three counts alleged in the information in a single trial. Perry also contends that because the dates of the offenses were different and the activities involved in the offenses were significantly different, he was prejudiced by the joinder of all three counts. He implies that trial counsel was ineffective by failing to present any evidence to support the motion to sever. We find this assignment of error to be without merit.

At the evidentiary hearing on his postconviction motion, Perry offered a number of exhibits, including the deposition of his trial counsel, the bill of exceptions from his trial, and the trial court's file concerning the trial. At this hearing, Perry was given an opportunity to present the evidence that he claims his trial counsel should have presented. However, the evidence offered at this hearing failed to establish that Perry's counsel was deficient in his handling of the severance issue, and this assignment of error is without merit.

(c) Failure to File Motion to Suppress

Perry claims that trial counsel was ineffective because he failed to file a motion to suppress evidence obtained as a result of the wrongful issuance of a search warrant. He asserts that the information contained in the search warrant was stale, that persons who reported the alleged criminal activity lacked credibility, and that the reasons for this lack of credibility were not presented to

the magistrate. Perry claims that he was prejudiced by this evidence because it led the jury to believe he was a " 'bad person.' " See brief for appellant at 17.

During the hearing on the motion for postconviction relief, Perry failed to produce evidence to establish that the search warrant was improperly issued. The evidence presented was mostly documentary in nature. This evidence did not establish that the search warrant should not have been issued because it was based on false information or testimony that lacked credibility. Without evidence that the search warrant was defective, Perry's claim that trial counsel should have moved to suppress the evidence obtained from the warrant has no merit.

Perry failed to sustain his burden of showing that counsel was ineffective for not moving to suppress the evidence that resulted from the search warrant. Accordingly, the district court did not err in its conclusion that Perry was not entitled to postconviction relief based upon this claim of ineffective assistance of counsel.

2. Amendment of Sentence

Perry claims that the district court erred in not granting him postconviction relief because he was "re-sentenced" without being offered an opportunity for allocution or to present evidence to the court. Perry was sentenced by the trial court on April 5, 1994. On August 17, after the Court of Appeals had dismissed his direct appeal, Perry filed a motion for review of his sentence. Perry argued in the motion that his sentence for first degree sexual assault on a child was unconstitutional because it was based on a sentencing guideline that became effective on September 9, 1993. Since the crimes Perry was convicted of occurred before that date and the new law required a more lengthy minimum sentence, Perry sought the benefit of being sentenced under the earlier law.

On July 1, 1996, the trial court denied Perry's motion but ordered the clerk of the court to issue an amended commitment. Perry's sentence for first degree sexual assault on a child was amended from 40 to 42 years' imprisonment to 200 months' to 42 years' imprisonment. The sentences Perry received for his convictions on two counts of sexual assault of a child were not affected by the trial court's order.

On appeal, Perry argues that the district court erred in failing to grant him postconviction relief based on the trial court's alleged error in issuing its July 1, 1996, order. We do not reach the merits of Perry's argument regarding the amendment of his sentence because this is an issue that could have been raised via a direct appeal.

[5] The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003). In the case at bar, judgment was rendered with the entry of sentence on April 5, 1994. Accordingly, the trial court's July 1, 1996, order was a final, appealable order, since it affected a substantial right made on summary application in an action after judgment was rendered. Perry did not file a direct appeal from this order.

[6] This assignment of error concerns an issue that could have been raised on direct appeal, and Perry is not entitled to postconviction relief on this issue. 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); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

3. Statement to Jury

Perry claims that he should have received postconviction relief because the trial court erred when it told the jury: "[You are] 'free to tell your spouses and maybe your friends what has gone on these two days.' " Perry asserts that this statement was presumptively prejudicial in that the jurors were exposed to information about his case beyond the evidence presented and that, therefore, his due process rights, as guaranteed by the U.S. and Nebraska Constitutions, were violated.

We conclude that this argument is without merit because it concerns an issue that could have been raised on direct appeal. Since Perry was responsible for the failure to properly perfect a direct

appeal, he is procedurally barred from raising this issue by a motion for postconviction relief. A motion for postconviction relief cannot be used to secure the review of an issue which could have been litigated on direct appeal. See, *State v. Curtright, supra*; *State v. Hess, supra*.

4. Errors Assigned but Not Argued

[7] We decline to consider the remainder of Perry's claims of ineffective assistance of counsel because although the claims were assigned as error, they were not argued in his brief. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

VI. CONCLUSION

For the reasons set forth herein, the order of the district court denying Perry's motion for postconviction relief is affirmed.

AFFIRMED.

Roger Eugene Parker, appellee, v. Beverly Maxine Parker, now known as Beverly Maxine Washington, appellant, and Lisa Parker, intervenor-appellee.

681 N.W.2d 735

Filed June 25, 2004. No. S-02-739.

1. **Conveyances: Fraud: Equity: Appeal and Error.** An appeal of a district court's determination that a transfer of an asset was not in violation of the Uniform Fraudulent Transfer Act, Neb. Rev. Stat. § 36-701 et seq. (Reissue 1998), is equitable in nature.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate court will consider 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. **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. **Conveyances: Fraud: Words and Phrases.** The generally recognized badges of fraud are the lack of consideration for the conveyance, the transfer of the debtor's entire estate, the relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or hurried transaction, insolvency or indebtedness of the

transferor, departure from the usual method of business, the retention by the debtor of possession of the property, and the reservation of benefit to the transferor.

5. **Debtors and Creditors: Conveyances: Fraud: Proof.** In an action seeking to set aside a fraudulent transfer, the burden of proof is on a creditor to prove, by clear and convincing evidence, that fraud existed in a questioned transaction.
6. **Evidence: Proof: Words and Phrases.** 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 a fact to be proved.
7. **Parol Evidence: Contracts.** The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement.
8. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.
9. **Judgments: Liens: Property.** A lien of judgment does not attach to the mere legal title where the equitable and beneficial interest is in another.
10. **Trial: Evidence: Appeal and Error.** An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.

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

David L. Herzog, of Herzog & Herzog, P.C., for appellant.

Frank X. Haverkamp, of Penke & Haverkamp, for appellee Lisa Parker.

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

GERRARD, J.

NATURE OF CASE

In February 1977, Roger Eugene Parker and Beverly Maxine Parker, now known as Beverly Maxine Washington, were divorced. Pursuant to the divorce decree, Roger was ordered to pay $100 a month in child support. After 3 years, Roger stopped making child support payments to Beverly. In October 1977, Roger married Lisa Parker. In 1985, Roger and Lisa were divorced. In 1992, despite their divorce, Roger cosigned a loan with Lisa in order to enable her to build a house. Both Roger and Lisa appear on the warranty deed for the property as joint tenants. On January 28, 2000, Beverly filed a motion for judgment on unpaid child support and accrued interest against Roger. On February 2, per Lisa's request, Roger conveyed his interest in their jointly owned property to Lisa by quitclaim

deed. On February 7, Beverly filed the instant action seeking to set aside this conveyance as a fraudulent transfer designed to impair her interests as a creditor of Roger. The main question on appeal is whether Roger's conveyance to Lisa was a fraudulent transfer that should be set aside.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to 1977, Roger and Beverly were married. The parties lived in Minnesota, and their marriage produced three children. Roger and Beverly were divorced in Minnesota on February 3, 1977. Pursuant to the divorce decree, Roger was ordered to pay $100 a month in child support. On September 16, in an effort to enforce his visitation rights, Roger filed a petition for registration of a foreign judgment in the district court for Douglas County, Nebraska.

On October 8, 1977, Roger married Lisa. On February 20, 1980, Roger and Lisa's sole child was born. On September 30, 1985, Roger and Lisa were divorced in Minnesota. Neither child support nor alimony was awarded in the divorce decree. Despite their divorce, both Roger and Lisa believed that it was important to raise their child in a two-parent household. Therefore, they agreed to continue to live together until their child reached adulthood. Although they lived in the same house in their roles as father and mother, Roger and Lisa did not live as husband and wife. For example, they stayed in separate bedrooms, maintained separate bank accounts, and filed separate income tax returns.

In 1992, Lisa decided to build a house. Lisa applied for a loan to cover its costs, but was told by a mortgage broker that her income was too low to qualify for the loan. Lisa turned to Roger for help, and although he had not been involved in the decision to build the home, Roger agreed to cosign the loan. Thereafter, the loan was approved, Lisa made the downpayment, and Roger and Lisa closed on the property on June 8, 1992.

Both Roger's and Lisa's names appear on the warranty deed for the property as joint tenants with rights of survivorship. In addition, the warranty deed, deed of trust, and disclosure statement all refer to Roger and Lisa as husband and wife. Roger and Lisa, however, contend that throughout the process of purchasing the property, they never claimed to be married, and that no one

inquired about their marital status. Moreover, both Roger and Lisa testified that after they moved into their new home, their separate living arrangements continued.

Although Roger had cosigned the loan and the parties took title jointly, both Roger and Lisa considered the property to be Lisa's personal possession. To this end, Lisa made all of the mortgage payments and paid for needed repairs, improvements, and furnishings. Roger did, however, pay for utilities and do some household chores, including yardwork.

On October 16, 1999, Roger and Lisa's child moved out. Approximately 2 weeks later, per the parties' alleged agreement, Roger also moved out of the home.

On January 28, 2000, Beverly filed a motion for judgment on unpaid child support and accrued interest against Roger. At the time of her motion, Beverly estimated that Roger owed $15,700 in child support and an additional $22,240 in accrued interest. Shortly thereafter, Lisa asked Roger to sign a quitclaim deed to the property. At the time she made this request, Lisa was aware that Beverly was attempting to collect child support from Roger; however, Lisa testified that she did not know Beverly was seeking payment from the equity in the property. In any event, Roger agreed to Lisa's request, and on February 2, 2000, Roger signed a quitclaim deed granting his interest in the property to Lisa. Roger testified he did so because he believed that he had no interest in the property and he wanted to make sure it stayed with its rightful owner. Roger testified that he was not paid anything when he signed the quitclaim deed.

On February 7, 2000, Beverly filed a motion seeking to vacate and set aside the conveyance from Roger to Lisa. Essentially, Beverly alleged that the conveyance was an act to defraud her, a creditor of Roger, in violation of the Uniform Fraudulent Transfer Act (UFTA), Neb. Rev. Stat. § 36-701 et seq. (Reissue 1998). Fearing the impairment of her property, Lisa filed a motion to intervene on February 11. Lisa also requested that the child support lien that was attached to her property be released. On February 17, Lisa's motion to intervene was granted; however, the court did not rule on Lisa's request to have the child support lien on her property released.

On March 2, 2000, Beverly's motion for judgment on unpaid child support and accrued interest was granted, and a judgment was entered against Roger in the amount of $27,420.99. Thereafter, additional hearings were held in regard to Beverly's motion to vacate and set aside the quitclaim deed.

On June 7, 2000, the district court entered an order overruling Beverly's motion to set aside the conveyance. Essentially, the court concluded that there was not clear and convincing evidence that the execution of the quitclaim deed was fraudulent within the meaning of the UFTA. In addition, the court determined that Roger's interest in the property was mere legal title and that a judgment lien does not attach to mere legal title where the equitable and beneficial interests lie elsewhere. Therefore, because it found all the equitable and beneficial interests in the property were with Lisa, the court concluded that Beverly did not establish that the quitclaim deed should be set aside simply because Roger and Lisa purchased the property as joint tenants and a number of the loan documents listed them as husband and wife. Finally, the court determined that even if Roger's interest in the property was more than mere legal title, no lien against him existed at the time he executed the quitclaim deed to Lisa because he had yet to be served with the summons of the action seeking unpaid child support.

On June 9, 2000, Beverly filed a motion for new trial, alleging that the court committed 25 errors of fact and law. On June 16, the court overruled Beverly's motion, and on June 26, Beverly filed her notice of appeal. On appeal, the Court of Appeals determined that no final order had been entered because the district court's order failed to grant or deny the relief Lisa requested in her petition to intervene, i.e., to release the child support lien on her property. Accordingly, the Court of Appeals dismissed the appeal for lack of jurisdiction. *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

On remand, Beverly filed a motion requesting leave to amend her motion to vacate and set aside the conveyance. Beverly sought to allege that Roger and Lisa formed an association for the purpose of holding the property and took certain fraudulent actions to defeat Beverly's claim. After the court granted Beverly's motion to amend, Lisa filed an answer denying the

new allegations. Thereafter, a limited amount of additional evidence was adduced.

On May 6, 2002, the district court entered an order overruling Beverly's motion to set aside the conveyance. In its order, the court repeated its findings from the June 9, 2000, order. In addition, the court determined that because Beverly failed to establish fraud, her new association-based claim, which was premised on the allegedly fraudulent transfer, must fail. The court also stated its belief that the equities in the case simply did not support the relief Beverly was requesting because she had recently obtained a judgment against Roger for $27,420.99 and Roger's wages were being garnished in connection with that decision. Last, the court ordered that the child support lien on Lisa's property be released.

Thereafter, Beverly filed a motion for new trial, alleging that the court committed 28 errors of law and fact. Beverly's motion for new trial was overruled, and Beverly filed a timely notice of appeal.

ASSIGNMENTS OF ERROR

On appeal, Beverly assigns, restated, that the district court erred in (1) failing to find that Roger fraudulently transferred his interest in the property to Lisa, (2) failing to set aside Roger's transfer of his interest in the property to Lisa, (3) failing to find that a lien existed on the property prior to the execution of the quitclaim deed, (4) failing to grant her motion for a new trial, (5) sustaining objections to evidence that she presented, (6) failing to find that Roger and Lisa engaged in an association with which Roger had a legal and equitable interest in the property, and (7) allowing Roger and Lisa to testify as to their agreement concerning the ownership and rights in the property.

STANDARD OF REVIEW

[1,2] An appeal of a district court's determination that a transfer of an asset was not in violation of the UFTA is equitable in nature. *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999). In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate court

will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*; *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999).

[3] 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. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

ANALYSIS

UFTA

On appeal, Beverly contends that the district court erred in determining that Roger's conveyance to Lisa was not fraudulent under § 36-705, which provides, in relevant part:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor[.]

Under the UFTA, "transfer" means "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." § 36-702(12). A "creditor" is "a person who has a claim," and a "debtor" is "a person who is liable on a claim." § 36-702(4) and (6). A "claim" is defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." § 36-702(3).

Pursuant to these definitions, it is obvious that Roger "transferred" property to Lisa when he signed the quitclaim deed. Likewise, it is clear that at the time of the transfer, Beverly had a "claim" against Roger for unpaid child support, and that therefore, Beverly was a "creditor" of Roger and, conversely, Roger was a "debtor" of Beverly. Neither party disputes these conclusions. Instead, the focus of this dispute is on Roger's intent at the

time of the conveyance, and the dispositive issue is whether Roger intended to defraud Beverly when he signed the quitclaim deed to Lisa.

In determining actual intent under the UFTA, § 36-705(b) instructs courts to consider whether:

> (1) the transfer or obligation was to an insider;
>
> (2) the debtor retained possession or control of the property transferred after the transfer;
>
> (3) the transfer or obligation was disclosed or concealed;
>
> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (5) the transfer was of substantially all the debtor's assets;
>
> (6) the debtor absconded;
>
> (7) the debtor removed or concealed assets;
>
> (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

[4] Although long, the aforementioned list of factors is not exclusive; § 36-705(b) states that when determining actual intent, consideration may be given to additional factors. Noting this, we have remained mindful of those factors the common law considers to be indicia of fraud.

> " ' "The generally recognized badges of fraud are the lack of consideration for the conveyance, the transfer of the debtor's entire estate, relationship between transferor and the transferee, the pendency or threat of litigation, secrecy or hurried transaction, insolvency or indebtedness of the transferor, departure from the usual method of business, the retention by the debtor of possession of the property, and the reservation of benefit to the transferor. . . ." ' "

Eli's, Inc. v. Lemen, 256 Neb. 515, 533, 591 N.W.2d 543, 555 (1999), quoting *Schall v. Anderson's Implement*, 240 Neb. 658,

484 N.W.2d 86 (1992). See, also, *Brown v. Borland*, 230 Neb. 391, 432 N.W.2d 13 (1988).

[5,6] In an action seeking to set aside a fraudulent transfer, the burden of proof is on a creditor to prove, by clear and convincing evidence, that fraud existed in a questioned transaction. *Eli's, Inc., supra*; *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999). 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 a fact to be proved. *Fales v. Norine*, 263 Neb. 932, 644 N.W.2d 513 (2002).

Here, Beverly contends that she presented clear and convincing evidence that Roger's conveyance to Lisa was fraudulent. Specifically, Beverly argues that Roger's intent to defraud her was demonstrated by the following facts: (1) Before the transfer was made, Roger had been sued to collect unpaid child support; (2) Roger received nothing of value for the transfer; (3) outside of Roger's interest in the house, there were very limited assets from which Beverly could seek to enforce the judgment; and (4) the transfer was to an insider, Lisa.

As an initial matter, we agree that the evidence establishes that Roger was sued prior to signing the quitclaim deed. Likewise, it is clear that Roger received nothing of value in exchange for signing the quitclaim deed. We conclude that this fact, however, is of limited importance because both Roger and Lisa testified that Roger never made any financial contributions toward the property and did not believe he owned the property. Therefore, it would have been odd for Roger to have received more than a nominal payment for relinquishing his interest in property that he never contributed any assets toward and did not believe he owned.

Next, to some extent, we agree that the record establishes Roger was without other property from which Beverly could seek to enforce the judgment. For example, Roger testified that in addition to owning no other real property, he had not invested in stocks, bonds, or broker accounts. This badge of fraud is mitigated, however, by the fact that Roger was employed and, therefore, his wages could easily be garnished to satisfy the judgment.

Furthermore, we do not agree that Roger transferred his property to an "insider." Under the UFTA, an "insider" is "a relative of the debtor." § 36-702(7)(i)(A). Therefore, in order for Lisa to

be considered an insider, she must have been Roger's relative at the time of the transfer. Although the UFTA does not state who qualifies as a "relative," it is commonly understood that a relative is a person connected with another by blood or affinity. See, e.g., Black's Law Dictionary 1291 (7th ed. 1999) (relative is "[a] person connected with another by blood or affinity; a kinsman"); Webster's Third New International Dictionary, Unabridged 1916 (3d ed. 1993) (relative is "a person connected with another by blood or affinity").

Consequently, because Roger and Lisa are not connected by blood and were not married at the time Roger signed the quitclaim deed, Lisa was not Roger's relative at the time of the transfer. *Cf.*, *Ex Parte Wactor v. Wactor*, 245 Miss. 132, 146 So. 2d 540 (1962); *Robertson v. Aetna Cas. & Sur. Ins. Co.*, 629 So. 2d 445 (La. App. 1993) (ex-wife is not her ex-husband's relative under homeowner's insurance policy because she is not related by blood or marriage). Therefore, Roger did not transfer property to an insider, and this badge of fraud does not exist.

Moreover, as the district court found, a number of additional badges of fraud are noticeably absent from this case. For example, there was no evidence that (1) Roger was insolvent, (2) Roger transferred substantially all of his assets, or (3) Roger retained possession or control of the property after the transfer. Simply put, the evidence adduced at trial did not establish many of the statutory and common-law badges of fraud. Instead, the evidence indicates that Beverly's suit merely provided the impetus for Roger and Lisa to formalize their prior understanding concerning the true ownership of the property.

In sum, based on our de novo review of the record, we conclude that Beverly did not establish by clear and convincing evidence that Roger's conveyance to Lisa was fraudulent.

Parol Evidence

[7] On appeal, Beverly contends that any testimony by Roger or Lisa concerning their contention that Roger neither had, nor was intended to have, an actual ownership interest in the property should have been barred by the parol evidence rule. The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts

the terms of a written agreement. *In re Trust Created by Cease*, 267 Neb. 753, 677 N.W.2d 495 (2004).

[8] As an initial matter, we note that Beverly did not make a single parol evidence objection during Roger's testimony. Therefore, with regard to Roger's testimony, Beverly waived her right to assert prejudicial error on appeal. See *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). Additionally, during Lisa's testimony, Beverly made only two parol evidence objections. Therefore, Beverly waived her right to contest the overwhelming majority of Lisa's testimony, including numerous statements concerning her contention that Roger did not, nor was he intended to, have an actual interest in the property. See *id.*

As to the objections Beverly did make, we conclude that the district court did not err in overruling them. Beverly first objected when Lisa's attorney asked Lisa if she signed the loan documents as an individual. The district court sustained Beverly's objection. The court did allow, however, limited inquiry concerning whether the loan documents contained certain notations that indicated that Roger and Lisa were signing the documents as husband and wife. It was in this regard that Beverly made a continuing parol evidence objection to Lisa's subsequent testimony that the signature lines in a number of the loan documents were not near notations that signified that Roger and Lisa were signing the documents as husband and wife. Beverly's other parol evidence objection was in regard to Lisa's testimony that her tax returns showed that she was the head of her household.

We note that in both instances, Lisa testified only to what the documents actually said. Consequently, Lisa's testimony did not alter, vary, or contradict the terms of the loan documents. Therefore, Lisa's testimony did not violate the parol evidence rule, and the district court did not err in overruling Beverly's objections on that basis.

MERE LEGAL TITLE

Next, Beverly argues that the district court erred in failing to find that a lien on the property existed prior to the time the quitclaim deed was executed. According to Beverly, under Neb. Rev. Stat. § 25-1504 (Reissue 1995), a judgment lien attaches to the land of a debtor the day the judgment is rendered. Therefore,

because Roger was in arrears on his child support obligation, Beverly contends that a judgment lien attached to Roger's interest in the property on June 12, 1992, the date the deed of trust was recorded in Douglas County.

[9] As the district court noted, however, a lien of judgment does not attach to the mere legal title where the equitable and beneficial interest is in another. *Action Realty Co., Inc. v. Miller*, 191 Neb. 381, 215 N.W.2d 629 (1974); *Knaak v. Brown*, 115 Neb. 260, 212 N.W. 431 (1927). In such a situation, equity allows a court to break free from the normal chains of legal title and disregard a lienholder's claim to the interest of a debtor who holds mere legal title.

In the instant case, based on our de novo review, we conclude that the record is replete with evidence which establishes that Roger's interest in the property was that of mere legal title and that all the equitable and beneficial interests in the property resided with Lisa. For example, both Roger and Lisa testified that it was Lisa who wished to construct the house and that it was only after Lisa was refused financing that she turned to Roger. Although Roger cosigned the loan, both parties agreed that Lisa made the downpayment for the property, as well as all of the subsequent mortgage payments. Lisa also paid for the needed repairs and improvements to the home, in addition to paying for the furnishings for the home. Furthermore, Lisa testified that she was the sole decisionmaker when it came to the property and believed she could have sold it without Roger's approval. Likewise, Roger testified that he did not believe that he owned the property.

Although Beverly makes much of the fact that the warranty deed and a few of the loan documents contain references to Roger and Lisa as husband and wife, both Roger and Lisa testified that (1) they never conveyed this information to their financing agent, (2) their financing agent never asked about their marital status, and (3) they signed the documents in a hurried manner without closely reading them. Furthermore, both Roger and Lisa testified that after their divorce, they continued to live together only because they believed it was in their child's best interests. By leaving Lisa's home shortly after his child's departure (and before the initiation of Beverly's suit), Roger demonstrated that he did not consider the property to be his own.

In sum, the evidence revealed that Roger's interest in the property was that of mere legal title and that all the equitable and beneficial interests in the property resided with Lisa. Therefore, the district court correctly concluded that Beverly's judgment lien did not attach to Roger's limited interest in the property.

ROGER AND LISA AS ASSOCIATION

Beverly also contends that the district court erred in failing to determine that Roger and Lisa formed an association for the purpose of holding property under Neb. Rev. Stat. § 25-313 (Reissue 1995) and then used that association to perpetrate a fraud upon her. The district court determined that because Beverly failed to establish that Roger's conveyance to Lisa was fraudulent under the UFTA, her association claim was without merit. We agree. As noted above, based on our de novo review of the record, Beverly failed to establish that Roger's conveyance to Lisa was fraudulent. Consequently, her association-based theory of recovery, which is premised on the allegedly fraudulent conveyance, must also fail.

TESTIMONY OF LAWYER

On remand from the Court of Appeals, Beverly called a local lawyer to testify about the significance that the police would attach to Roger and Lisa's living situation. Lisa objected on the ground that the police, and not a lawyer, should be called to testify as to what the police will do in a given situation. The objection was sustained, and Beverly made an offer of proof.

Essentially, the lawyer would have testified that when seeking to obtain a search warrant, the police will often submit utility and land title records to the judicial officer as evidence that the person has a legal interest in the property discussed in the records. Therefore, according to the lawyer, because Roger's name was on the warranty deed and Roger paid utilities for the home, the police would have concluded that Roger had a legal interest in the property.

[10] On appeal, Beverly contends that the district court erred in sustaining Lisa's objection to the lawyer's testimony. Without passing on the correctness of the district court's ruling, we conclude that Beverly was not prejudiced by the exclusion of this evidence because substantially similar evidence was admitted

without objection. See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002) (improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection).

The record illustrates that prior to Lisa's objection and Beverly's offer of proof, the lawyer was allowed to testify, without objection, that (1) in anticipation of getting a search warrant to search a home, the police look to see who has a legal interest in the property; (2) the police examine land records and utility records to determine who has a legal interest in the property; and (3) land records and utility records are often included in the affidavit upon which the application for a search warrant is based. In addition, evidence had already been presented that (1) Roger's name was on the warranty deed to the property and (2) Roger paid the utilities for the home in which he and Lisa lived.

Therefore, prior to Lisa's objection, the court had already been presented with evidence from which it could determine that if the police sought to search the house where Roger lived, they would conclude, based on title and utility records, that Roger had a legal interest in the home. Consequently, no prejudice has befallen Beverly because the lawyer, if he had been allowed to testify further, would have simply emphasized and restated what was already before the court.

CONCLUSION

For each of the foregoing reasons, Beverly's assignments of error are without merit. The judgment of the district court is affirmed.

AFFIRMED.

IN RE CONSERVATORSHIP OF H. COOPER HANSON III, DECEASED. MARGARET HANSON, CONSERVATOR, APPELLANT, V. AMY LOHRBERG PECK ET AL., APPELLEES.

682 N.W.2d 207

Filed June 25, 2004. No. S-02-1241.

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.** 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. ____: ____. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Guardians and Conservators: Rules of the Supreme Court: Words and Phrases.** The word "compensation" in the context of letters of conservatorship and Neb. Ct. R. of Cty. Cts. 43 (rev. 2000) includes any form of payment or remuneration made to the conservator from assets of the protected person.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the County Court for Washington County, C. MATTHEW SAMUELSON, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Gregory P. Drew for appellant.

Denise E. Frost, of Johnson & Mock, for appellees Amy Lohrberg Peck, John Lohrberg, and Jonathan Hanson.

James B. Respeliers, of Respeliers & Harmon, P.C., for appellee Great Western Bank.

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

STEPHAN, J.

This court has promulgated a general rule applicable to all county courts which requires letters of conservatorship to include the following language: " 'You shall not pay yourself or your attorney compensation from the assets or income of your ward . . . without first obtaining an order therefor . . . .' " Neb. Ct. R. of Cty. Cts. 43 (rev. 2000). Language to this effect was included in letters of conservatorship issued to Margaret Hanson when she was appointed conservator for the estate of her husband, H. Cooper Hanson III (Cooper), in April 2000.

From the date of her appointment until Cooper's death on January 19, 2001, Margaret transferred funds from Cooper's accounts to her personal account pursuant to an oral agreement with Cooper which antedated her appointment as conservator. These transfers were made without court approval. Objections

were filed by the guardians for Cooper's minor child and individually by Cooper's adult child (appellees). The personal representative of Cooper's estate also filed an objection. In response, the Washington County Court held that these payments were made in violation of the restriction imposed by the letters of conservatorship and ordered Margaret to pay $24,800 to the personal representative of Cooper's estate as reimbursement for the unauthorized payments to herself. Margaret appealed, and the Nebraska Court of Appeals reversed, based upon its determination that the challenged payments did not constitute "compensation" and did not violate the prudent person standard. *In re Conservatorship of Hanson*, 12 Neb. App. 202, 670 N.W.2d 460 (2003). We granted the appellees' petition for further review.

FACTS

Cooper and Margaret were married in 1995. It was the second marriage for both. Cooper's two children from his previous marriage, both minors at the time, were living with his former spouse. Margaret's daughter lived with her and Cooper in a house owned by Margaret.

In the fall of 1995, Cooper began having health problems which led to a diagnosis of amyotrophic lateral sclerosis, also known as ALS or Lou Gehrig's disease, in July 1996. In August of that year, Margaret's daughter left for college. In November, Cooper's former spouse died unexpectedly and his two minor children came to live with him and Margaret. Cooper's health worsened, and by March 2000, he was confined to his home.

Margaret was appointed temporary conservator of Cooper's estate on April 19, 2000, and conservator on June 22. The conservatorship was created in order to facilitate the receipt of Social Security benefits for which Cooper had become eligible. The letters of conservatorship issued to Margaret provided: "You shall not pay yourself or your attorney compensation from the assets or income of the Protected Person . . ." without prior order of the court.

Prior to their marriage, Margaret and Cooper entered into an oral agreement whereby Cooper would give Margaret money each month as reimbursement for the added expense of his living in her house. From the time of this agreement until January 2000,

Cooper transferred $1,950 per month to Margaret. After that date, the amount increased to approximately $2,500. As conservator of Cooper's estate, Margaret continued to have these funds transferred directly into her personal account each month. She did not seek or obtain court approval for the transfers.

After Cooper's death, Margaret petitioned for approval of her final accounting, termination of the conservatorship, and discharge as conservator. Objections were filed to the proposed accounting by the personal representative and the appellees. At the hearing on the objections, Margaret initially testified that the monthly payments she made to herself were reimbursement for the added expense of Cooper's living in the house. On cross-examination, however, Margaret testified that during the conservatorship, she and Cooper agreed that in addition to making the mortgage and utility payments, he would continue to pay her a monthly allowance to make up for her lost income. Margaret testified that the transfers were not payment for the care she gave Cooper.

ASSIGNMENTS OF ERROR

The appellees assign, restated and consolidated, that the Court of Appeals erred in (1) reversing the judgment of the county court ordering Margaret to reimburse the conservatorship $24,800, (2) applying an unduly narrow definition of the word "compensation," and (3) misapplying the standard of review applicable to appeals in probate matters by reweighing the evidence instead of deferring to the factual findings of the probate court.

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). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). When reviewing questions of law,

an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004).

ANALYSIS

The issue presented in this appeal is whether the payments which Margaret made to herself from Cooper's funds while serving as conservator constituted "compensation" as that term is used in the letters of conservatorship. The Court of Appeals adopted a narrow definition of this term, holding that "it is not just any payment, but money for a specific purpose—compensation, meaning in this case payment for services rendered as conservator or attorney—that was prohibited." *In re Conservatorship of Hanson*, 12 Neb. App. 202, 206, 670 N.W.2d 460, 463-64 (2003). The court concluded that the payments in question "were not for services Margaret rendered as conservator, but were merely a continuation of an agreement between husband and wife which Margaret continued effectuating until Cooper's death." *Id.* at 206, 670 N.W.2d at 464.

Informal financial arrangements between married persons are generally not subjected to judicial scrutiny. However, when a court appoints one spouse to serve as the conservator of the estate of the other, a new legal relationship is formed in which the conservator assumes obligations for which he or she is accountable to the court as well as to the protected spouse. In such protective proceedings, the appointment of a conservator is based upon a judicial determination that it is necessary to protect the property of one who is unable to manage his or her property and affairs effectively for various reasons, including "physical illness or disability," and that such person

> has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by him or her and that protection is necessary or desirable to obtain or provide funds.

Neb. Rev. Stat. § 30-2630(2) (Reissue 1995). When an individual is in need of physical or financial protection, the law must in many instances think and act for him or her. *In re Guardianship*

& Conservatorship of Donley, 262 Neb. 282, 631 N.W.2d 839 (2001). Statutory protective proceedings, such as conservatorships, are the means by which that task is accomplished.

The appointment of a conservator vests "title as trustee to all property of the protected person" in the conservator. Neb. Rev. Stat. § 30-2649 (Reissue 1995). "In the exercise of his or her powers, a conservator is to act as a fiduciary . . . ." Neb. Rev. Stat. § 30-2646 (Cum. Supp. 2002). Every conservator "must account to the court for his [or her] administration of the trust" upon resignation or removal. Neb. Rev. Stat. § 30-2648 (Reissue 1995).

Because a conservator holds property in trust, any transaction on behalf of the protected person which inures to the financial benefit of the conservator is especially subject to judicial oversight. Generally, such transactions are regarded with distrust by the courts.

> Since the relation is so intimate, the dependence so complete, and the influence so great, any transaction between the two parties or by the [conservator] alone through which the [conservator] obtains a benefit, entered into while the relation exists, is, in the highest sense, suspicious and presumptively fraudulent.

39 Am. Jur. 2d *Guardian and Ward* § 254 at 181 (1999).

[4] Thus, a transfer of funds or other assets from one spouse to another has a legal significance transcending the marital relationship when it is carried out by the transferee as the conservator for the estate of the transferor. In light of these considerations, we conclude that the Court of Appeals adopted an unduly narrow definition of the word "compensation" in the context of letters of conservatorship and county court rule 43 by restricting it to "payment for services rendered as conservator." See *In re Conservatorship of Hanson*, 12 Neb. App. at 206, 670 N.W.2d at 464. Given the risk of harm attendant to self-dealing by a fiduciary, we conclude that compensation in this context should include any form of payment or remuneration made to the conservator from assets of the protected person. This broader definition may well include many transactions which are perfectly legitimate and consistent with the conservator's fiduciary obligation; however, subjecting all such transactions to the filter of prior judicial approval affords a measure of protection against

those which are not. So construed, rule 43 embodies the concept that self-dealing by a conservator may be permissible, but only after a judicial finding that there is an adequate reason for the transaction. See *In re Guardianship of Jordan*, 616 N.W.2d 553 (Iowa 2000).

We therefore examine the record to determine whether the judgment of the county court conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. In her petition for approval of her final account, Margaret alleged that "[b]y agreement between Petitioner and the ward, entered into approximately January 1, 1999, Petitioner was to be compensated an amount for the care of the ward . . . ." At the hearing, however, Margaret testified that the transfers which she made to herself pursuant to this agreement were not in payment for care she gave to Cooper, but, rather, "[t]o make up for my lost income." Regardless of which of these statements we rely upon, by Margaret's own admission, the payments were a form of compensation.

Margaret argues that the monetary transfers to her personal bank account were not compensation but were "family financial management in the family's accustomed manner." Brief for appellant at 11. She further contends that "[t]he record is clear that all pooled funds were spent on persons legally dependent on the protected person or members of the protected person's household who are unable to support themselves and who were in need of support." Brief for appellant at 12. Based on our determination, however, that in this context compensation includes any form of payment, the purpose of the transfers is irrelevant.

We conclude that the county court's findings are supported by competent evidence, and are neither arbitrary, capricious, nor unreasonable. *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). We note, as did the county court, that the events which are the subject of this action occurred during a period of tremendous stress and anxiety occasioned by Cooper's illness and that there is no indication in the record that Margaret acted out of any sinister motive. However, the record does clearly establish that in contravention of her letters of conservatorship, Margaret paid compensation to herself from the assets of the protected person without prior approval of the

court. This limitation upon the powers of the conservator was required under a rule promulgated by this court which we are obligated to enforce uniformly. Accordingly, we conclude that the county court did not err in requiring Margaret to pay the personal representative of Cooper's estate $24,800.

CONCLUSION

On further review, we conclude that the Court of Appeals erred in reversing the judgment of the county court. We therefore reverse the judgment of the Court of Appeals and remand the cause to that court with directions to affirm the judgment of the Washington County Court.

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., not participating.

BIG RIVER CONSTRUCTION COMPANY, APPELLEE, V. L & H PROPERTIES, INC., APPELLANT.

681 N.W.2d 751

Filed June 25, 2004. No. S-02-1361.

1. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable.
4. ____: ____: ____. When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just.
5. **Summary Judgment.** The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to judgment as a matter of law.
6. **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.
7. ____. When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.

8. ____. A contract must be construed as a whole, and if possible, effect must be given to every part thereof.
9. **Parol Evidence: Contracts.** Unless a contract is ambiguous, parol evidence cannot be used to vary its terms. In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
10. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded.
11. **Appeal and Error.** Error without prejudice provides no ground for appellate relief.
12. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
13. **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.

Appeal from the District Court for Otoe County: RONALD E. REAGAN, Judge. Affirmed.

Timothy W. Nelsen, of Fankhauser, Nelsen & Werts, P.C., for appellant.

John J. Horan, of Brandt, Horan, Hallstrom, Sedlacek & Stilmock, for appellee.

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

MCCORMACK, J.

I. INTRODUCTION

Big River Construction Company (Big River) brought an action to recover for the value of improvements made to property it had leased from L & H Properties, Inc. (L & H), which filed a cross-petition alleging that Big River had committed waste to the property. The district court found in favor of Big River and dismissed L & H's cross-petition. L & H appeals.

II. BACKGROUND

Big River entered into a lease agreement to lease property located in Nebraska City, Nebraska, from L & H. The lease term ran from August 1, 1991, to July 31, 2001, with rent of $1,200 due annually on August 1.

The relevant provision of the lease is as follows:

> LESSOR'S RIGHT TO TERMINATE LEASE AND IMPROVEMENTS PURCHASE.
>
> If the [president of Big River] dies or becomes disabled during the term of this lease, or any extension thereof, the Lessee may assign this lease or sublet the property subject to the approval of the assignee or sublessee, by the Lessor. If the Lessor does not approve the assignee or sublessee designated by the Lessee, this lease shall be deemed terminated and the Lessor shall pay to the Lessee compensation for the improvements made upon the premises. The amount of compensation to be paid for the improvements shall be determined by an appraisal made of the property. From that appraisal shall be deducted the value of the ground and the depreciation of the improvements claimed by the Lessee in its accounting procedure and reported on its federal income tax return for each year. Any prepaid rent shall be repaid or credited to the Lessee upon the lease termination. It is understood that the Lessee intends to depreciate the cost of the shop building over a period of thirty years. Upon the termination of the lease term, the Lessor shall pay Lessee for the improvement at a cost determined by the formula set forth above.

The record indicates that initially, the parties were agreeable to renewing the lease at the end of the 10-year lease term. Ultimately, however, Big River decided to vacate the premises and did so on August 11, 2001. Cleon Popelka, president of Big River, testified that he notified Howard Bebout, president of L & H, that Big River had vacated the premises.

During the term of the lease, and pursuant to its authority under the lease, Big River erected a shop building on the leased property. Subsequent to Big River's vacating the property, Big River filed a petition alleging that L & H breached the lease agreement by failing to pay Big River for the value of that improvement. In its answer, L & H denied that it owed Big River for the improvement and filed a cross-petition alleging that Big River had committed waste to the property.

L & H moved for summary judgment. The district court denied that motion. Following a bench trial, the court found in favor of Big River, and explained its reasoning from the bench:

> [T]he attorney that drafts the lease is — if there is ambiguity, it's construed against his client. As it turns out, the law firm probably represented both sides at this time, and so it wouldn't be proper to construe any ambiguities against the — either side.
>
> Having said that — and I've looked back over that lease a number of times since the summary judgment, and I am not really certain that there is an ambiguity. . . .
>
> But Paragraph 9 can make a lot of sense if, instead of having one simple paragraph, you got two paragraphs with the last sentence being a second paragraph. And unless you read it that way, the lease doesn't make any sense at all.
>
> . . . .
>
> . . . [M]y conclusion is that it's clear enough for my purposes that the lease provided that there was going to be payment for the improvements if there was, under the first scenario, the death or disability of Mr. Popelka.
>
> Under the second scenario, there was going to be payment on termination of the lease term. And the termination of the lease term in the second scenario, it still goes back to a formula that's set forth in the — under the first scenario.

The district court then proceeded to value the improvements at $30,000. After deducting $6,169.82 for depreciation, the court awarded Big River $23,831.18 plus court costs. L & H appeals.

III. ASSIGNMENTS OF ERROR

L & H assigns, rephrased and renumbered, that the district court erred in (1) denying L & H's motion for summary judgment; (2) determining that the lease contract was ambiguous; (3) admitting parol evidence, including the testimony of both Popelka and the attorneys involved in the initial drafting and execution of the lease agreement, without first determining that the lease contract was ambiguous; (4) admitting the testimony of the attorneys involved in the initial drafting and execution of the lease agreement when such testimony was subject to the attorney-client privilege; (5) awarding Big River damages without sufficient proof; (6) accepting the opinion of Big River's appraiser with regard to the value of improvement without deducting the value of the ground and the depreciation of the improvement; and (7) denying L & H's motion for new trial.

IV. STANDARD OF REVIEW

[1,2] The meaning of a contract and whether a contract is ambiguous are questions of law. *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (2003). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

V. ANALYSIS

1. Motion for Summary Judgment

In its first assignment of error, L & H argues that the district court erred in not granting its motion for summary judgment.

[3,4] We have repeatedly stated that a denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable. *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004). The only exception we have fashioned to this general rule is that when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004).

[5] Absent the above-stated exception, the denial of a motion for summary judgment is neither appealable nor reviewable; thus we need not consider the district court's denial of L & H's motion for summary judgment. The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to judgment as a matter of law. *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003).

L & H's first assignment of error is without merit.

2. Ambiguity of Contract

In its second assignment of error, L & H argues that the district court erred in determining that the lease contract was ambiguous.

L & H argues that the lease is unambiguous in providing that under the facts presented, Big River was not entitled to payment for improvements made to the leased property.

The district court, in its oral findings, stated that it was "not really certain that there [was] an ambiguity [in the lease]." However, L & H argues that the "district court clearly re-drew the Lease with Option," when it concluded that the last sentence of paragraph 9 of the lease should be read as its own separate paragraph. Brief for appellant at 14. As a result, L & H argues the district court must have concluded that the lease was ambiguous.

[6] The meaning of a contract, and whether a contract is ambiguous, are questions of law. *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (2003). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.* 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. *Id.*

[7,8] When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Trimble v. Wescom*, 267 Neb. 224, 673 N.W.2d 864 (2004). A contract must be construed as a whole, and, if possible, effect must be given to every part thereof. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

Given the above-stated propositions of law, this court must independently review the lease agreement and make our own determination as to whether the agreement was ambiguous. The court did not, as alleged in the second assignment of error, find that the lease was ambiguous.

A plain and ordinary reading of paragraph 9 reveals that payment for improvements arises under two different sets of circumstances. In the first instance, Big River was entitled to payment for the improvements made to the leased property under the formula contained in paragraph 9 if (1) Popelka died or became disabled and (2) Big River leased or sublet the property to another party without L & H's approval of the assignee or sublessee. In the second instance, Big River was entitled to payment

for the improvements "[u]pon the termination of the lease term," as determined by the formula in paragraph 9.

Lending support to the conclusion reached by the district court that paragraph 9 provides for payment under two different sets of circumstances is the fact that L & H's reading makes several other lease provisions redundant and useless. L & H argues that Big River is entitled to payment for the improvements only in the event of Popelka's death or disability and L & H's subsequent disapproval of Big River's assignee or sublessee. L & H's interpretation renders the last sentence of paragraph 9 a mere restatement of the second sentence of the paragraph. If, however, the district court was correct in interpreting the last sentence as requiring L & H to pay for improvements upon "the termination of the lease term," that reading would give meaning and effect to the last sentence of paragraph 9.

L & H's interpretation also renders paragraph 13 of the lease unnecessary. Paragraph 13 provides that if Big River defaults, the "Lessee shall not be entitled to payment for the improvements placed upon said property." If the second sentence of paragraph 9 outlines the only circumstance under which Big River was entitled to payment for reimbursement, then additionally restricting Big River's right to payment for improvements as is done in paragraph 13 would not be necessary. If, however, the last sentence of paragraph 9 were read to mean that any termination of the lease provided for payment by L & H to Big River, paragraph 13 would simply qualify Big River's right to payment when Big River was in default of the agreement.

Upon our own independent review of this lease, we determine that it is unambiguous. We determine that the district court did not err in concluding that Big River was entitled to payment for improvements made to the leased property pursuant to paragraph 9 of the lease agreement. L & H's second assignment of error is without merit.

3. Admission of Parol Evidence

In its third assignment of error, L & H argues that the district court erred in admitting portions of Popelka's testimony, as well as portions of the testimony of the attorneys involved in the initial drafting and execution of the lease agreement as to their

interpretation of paragraph 9 of the lease. L & H argues that this testimony was inadmissible parol evidence.

[9] Unless a contract is ambiguous, parol evidence cannot be used to vary its terms. In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000).

We have determined that the lease contract was unambiguous. As a result, parol evidence was inadmissible and the district court erred in admitting the portions of Popelka's testimony, as well as the portions of the testimony of the attorneys involved in the initial drafting and execution of the lease agreement. These witnesses each opined as to their interpretation of paragraph 9 of the lease contract.

[10,11] As a general rule, however, to constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003). We determine that the admission of the parol evidence did not unfairly prejudice L & H since we determined, without reference to any of the disputed parol evidence, that the last sentence of paragraph 9 unambiguously provided for payment to Big River for improvements made to the property upon the termination of the lease. Error without prejudice provides no ground for appellate relief. *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d 168 (2003). We also note that in the district court's findings, it did not rely on this parol evidence.

L & H's third assignment of error is without merit.

4. Attorney-Client Privilege

In its fourth assignment of error, L & H argues that the district court erred in admitting testimony of the attorneys involved in the initial drafting and execution of the lease agreement because such testimony was subject to the attorney-client privilege.

Assuming without deciding that the testimony at issue was privileged and that it was error for the district court to allow such testimony, we nevertheless conclude that the admission of this parol evidence was not prejudicial to L & H. Such testimony

was unnecessary in our determination that the lease contract was unambiguous. See *Agri Affiliates, Inc. v. Bones, supra.*

L & H's fourth assignment of error is without merit.

5. Damages

In its fifth and sixth assignments of error, L & H argues that the district court erred in awarding damages despite the lack of sufficient proof and in accepting Big River's appraisal as the value of the property. The district court awarded Big River damages in the amount of $23,831.18.

[12] The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002). On appeal, the fact finder's determination of damages is given great deference. *Id.*

(a) Date of Appraisal

In its fifth assignment of error, L & H argues that the $30,000 value testified to by Big River's appraiser, George Tesar, Jr., was not sufficient proof of the value of the building because the appraisal reflected the value on March 7, 2002, not July 31, 2001.

At trial, L & H objected to Tesar's appraisal on the basis of foundation and relevance. The district court overruled the foundation objection and overruled the relevancy objection "at the present time on relevancy, subject to a motion to strike if there is no relationship back to the appropriate date." Tesar then testified to his $30,000 appraisal of the leased property on March 7, 2002. In its oral findings, the district court stated:

> There is testimony in, and there is testimony in that the value of the improvements as of March 7th of 2002 w[as] $30,000.
>
> I received that testimony and indicated at the time that objections on foundation and relevancy were overruled subject to a motion to strike. There was never a motion to strike made. So I do have in front of me testimony that the value of the leasehold improvements — and that obviously means improvements after the deduction of the ground. The value of the ground was $30,000 as of March 7th.

> I think it's within my prerogative as a finder of fact to assume that they were at least that much as of July 31st of 2001. There was no testimony or evidence at all that there was any waste or — committed on the property that required any kind of substantial payment by . . . Bebout.

Although the district court did not expressly refer to Neb. Rev. Stat. § 27-104(2) (Reissue 1995), it appears its ruling with regard to Tesar's appraisal testimony was based on this statute. That statute provides "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." This court in *Reavis v. Slominski*, 250 Neb. 711, 724-25, 551 N.W.2d 528, 540 (1996), noted that

> "[t]he everyday method of handling the situation when the adversary objects to the relevancy or the competency of the offered fact is to permit it to come in conditionally, upon the assurance, express or implied, of the offering counsel that [he] will 'connect up' the tendered evidence by proving, in the later progress of his case, the missing facts. . . ."
>
> . . . The burden is on the objecting party to object if the offering counsel fails to connect up, and this is generally done with a motion to strike.

Following L & H's objection to Tesar's testimony, it was proper for the district court to overrule the objection and allow Big River to "connect up" the period of time between March 7, 2002, and the July 31, 2001, expiration of the lease. If L & H believed that Big River's counsel did not adequately show the relationship of the appraisal back to the expiration of the lease term, it should have made a motion to strike Tesar's testimony on that point. No such motion to strike was made. As a result, Tesar's appraisal was properly before the district court, and the district court did not err in relying on the appraisal in determining the value of Big River's improvement.

We determine that L & H's fifth assignment of error is without merit.

(b) Tesar's Testimony

In its sixth assignment of error, L & H argues that the district court also erred in accepting Tesar's appraisal because his

testimony indicated that he had not deducted from his appraisal the value of the ground or the depreciation taken by Big River on its federal tax return.

Paragraph 9 of the lease agreement provides the formula by which the value of improvements made to the leased property should be calculated. It provides in relevant part:

> The amount of compensation to be paid for the improvements shall be determined by an appraisal made of the property. From that appraisal shall be deducted the value of the ground and the depreciation of the improvements claimed by the Lessee in its accounting procedure and reported on its federal income tax return for each year.

To support its contention that Tesar did not deduct either the value of the land or depreciation in conducting his appraisal, L & H directs us to a portion of L & H's cross-examination of Tesar:

> [L & H's counsel:] [D]id you, when you did the appraisal of the property, deduct the value of the ground and depreciation of improvements claimed by the lessee in its accounting procedure and reported on its federal income tax return for each year?
>
> [Tesar:] Did I depreciate?
>
> Q. When you did this appraisal, did you deduct the value of the ground and the depreciation of the improvements claimed by the lessee in its accounting procedure and reported on its federal income tax return for each year?
>
> A. No.

L & H overlooks another portion of Tesar's testimony. On direct examination, Tesar testified:

> [Big River's counsel:] All right. When you did your appraisal, did you arrive at a figure, then, with respect to the improvements?
>
> [Tesar:] Yes.
>
> Q. The value? And at the time you did it, was — did you separate out the real estate that it was situated on? Is your appraisal based strictly on the value of the improvements, the building that you appraised?
>
> . . . .
>
> A. Yes.

Q. Okay. And you do have an opinion with respect to the fair market value of that property, do you —

A. Yes, I do.

Q. — on March 7, 2002? And what is your opinion of the fair market value of that property on that date?

. . . .

A. $30,000.

Tesar's testimony on direct examination indicates that the value of the ground was deducted from the appraisal he conducted. Tesar's testimony on cross-examination shows that he did not deduct depreciation, but does not contradict his testimony on direct examination that the value of the ground was deducted. On cross-examination, Tesar was asked whether he deducted both the value of the ground and depreciation from his appraisal. In testifying, Tesar clarified L & H's question, stating "[d]id I depreciate?" before answering "[n]o." Given the phrasing of L & H's question to Tesar on cross-examination, as well as Tesar's attempt at clarification, Tesar's cross-examination testimony is consistent with his direct testimony, and it was proper for the district court to rely on Tesar's appraisal to establish the value of the improvement.

In addition, Big River established the depreciation of the improvement through Popelka's testimony: "[Big River's counsel:] . . . Is it true also that your CPA's had depreciated that on your income tax return and had taken $5,520.80 in depreciation? [Popelka:] I believe that's right. Q. Up to that period of time? A. I believe that's right." L & H also offered an asset depreciation form from Big River's tax return listing depreciation on the building at $6,169.82.

The lease provided, "From [the] appraisal shall be deducted the value of the ground and the depreciation of the improvements . . . ." Tesar's testimony was sufficient to establish that his appraisal was the value of the building alone. The terms of the lease did not preclude establishing depreciation separately from the appraisal of the improvement. Big River offered evidence of an appraisal which excluded the value of the land. Big River and L & H both offered evidence of the depreciation Big River had taken on the improvement. We conclude that the valuation formula of the lease

agreement was followed and that the district court did not err in the damages it awarded to Big River.

L & H's sixth assignment of error is without merit.

6. Motion for New Trial

In its seventh and final assignment of error, L & H argues that the district court erred in failing to grant its motion for a new trial.

[13] 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. *Perry Lumber Co. v. Durable Servs.*, 266 Neb. 517, 667 N.W.2d 194 (2003). The district court found that the lease agreement was unambiguous and that Big River was entitled to a judgment in the amount of $23,831.18. Upon our review of the record and the applicable law, we conclude that the district court did not abuse its discretion in not granting L & H's motion for a new trial.

L & H's seventh assignment of error is without merit.

VI. CONCLUSION

The decision of the district court is affirmed.

Affirmed.

State of Nebraska, appellee, v.
Darrin J. McHenry, appellant.
682 N.W.2d 212

Filed June 25, 2004. No. S-03-217.

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. **Postconviction.** An evidentiary hearing is not required when the motion alleges only conclusions of fact or law.

4. **Postconviction: Judges: Recusal.** There is no rule of law which automatically disqualifies a judge who has presided at trial from subsequently considering a postconviction action.
5. **Judges: Recusal: Waiver.** A defendant who is aware of a reason for recusal waives the issue of whether the judge should have recused himself or herself when the defendant fails to request the judge's recusal.
6. **Speedy Trial: Indictments and Informations: Complaints.** If an amendment to the complaint or information does not change the nature of the charge, time continues to run against the State for purposes of the speedy trial act.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by the same lawyers, generally speaking, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.
8. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden 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. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
9. **Effectiveness of Counsel: Proof.** In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
10. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
11. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
12. **Effectiveness of Counsel.** Defense counsel is not ineffective for failing to raise an argument that has no merit.
13. **Trial: Proof: Appeal and Error.** Trial courts are to refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury. However, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.
14. **Effectiveness of Counsel: Jury Instructions.** Defense counsel is not ineffective for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading.
15. **Postconviction: Effectiveness of Counsel: Jury Instructions.** A postconviction court is not required to hold an evidentiary hearing on a claim that an attorney was ineffective for failing to propose an alternative instruction when the instruction given was a standard instruction which had consistently been found adequate and constitutional by this court.
16. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information,

unless the 6 months are extended by any period to be excluded in computing the time for trial.

17. **Speedy Trial: Attorney and Client.** Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 1995) excludes delays resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel.
18. **Speedy Trial.** The plain language of Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 1995) anticipates a request for a continuance made solely by counsel.
19. **Speedy Trial: Waiver.** Under Neb. Rev. Stat. § 29-1207 (Reissue 1995), a defendant has the right to waive a speedy trial and consent to a continuance as long as he or she was properly advised either by counsel or the court of his or her rights to a speedy trial.
20. **Speedy Trial: Effectiveness of Counsel: Motions to Dismiss.** When a delay in trial is attributable to a defense motion for a continuance filed within the statutory period, defense counsel is not ineffective for failing to file a motion to dismiss.
21. **Attorney and Client.** Except for such basic decisions as whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant is bound by the tactical or strategic decisions made by his or her counsel.
22. **Speedy Trial: Waiver.** The statutory right to a speedy trial is not a personal right that can be waived only by a defendant.
23. **Speedy Trial: Waiver: Attorney and Client.** Defense counsel's request for a continuance in order to prepare for trial waives a defendant's statutory right to a speedy trial despite the defendant's objections to the continuance.
24. **Speedy Trial: Effectiveness of Counsel.** Where defense counsel's continuance is granted before the expiration of the statutory speedy trial time, the period of continuance is properly excludable under Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 1995) and defense counsel is not ineffective by failing to assert a defendant's right to a speedy trial or by failing to file a motion for discharge.
25. **Postconviction: Justiciable Issues: Right to Counsel.** A district court does not abuse its discretion by failing to appoint counsel when the assigned errors in a postconviction petition contain no justiciable issue of law or fact.

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

Darrin J. McHenry, pro se.

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

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

MILLER-LERMAN, J.

I. INTRODUCTION

Darrin J. McHenry appeals from an order of the district court for Lincoln County denying his motion for postconviction relief

without an evidentiary hearing. We conclude that McHenry's claims on appeal are without merit. Accordingly, we affirm.

II. BACKGROUND

McHenry's initial conviction was reversed on appeal, and the cause was remanded for a new trial. *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995) (*McHenry I*). The facts underlying the current case are summarized in our opinion affirming McHenry's convictions from his second trial, found at *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996) (*McHenry II*). They are repeated here only as necessary to our disposition of McHenry's postconviction claims.

An information was filed against McHenry on January 22, 1993, charging him with aiding and abetting first degree murder and aiding and abetting attempted robbery for his involvement in the death of Richard Sterkel. Sterkel was found dead in North Platte, Nebraska, and an autopsy revealed that the cause of death was manual strangulation, compression of the neck, and multiple blunt injuries to the head, neck, and chest. On August 4, an amended information was filed, adding charges of first degree sexual assault and aiding and abetting first degree sexual assault.

McHenry was living with three other men at a transient encampment near the place where Sterkel's body was found. The men had invited Sterkel to drink with them, and he stayed for a few days. Both of McHenry's codefendants testified that on July 28, 1992, the day of Sterkel's death, McHenry initiated an assault on Sterkel after the men had been drinking. McHenry and two others began beating Sterkel and forced him to show them where he had hidden his wallet in the woods. Sterkel was brutally beaten and strangled. His body was found 2 days later.

Following a jury trial, McHenry was acquitted of aiding and abetting first degree sexual assault but convicted of the remaining counts. See *McHenry I*. Because of the trial court's jury instruction on reasonable doubt, McHenry's convictions were reversed on direct appeal. *Id.*

McHenry was tried again, convicted of aiding and abetting first degree murder and aiding and abetting attempted robbery, and acquitted of sexual assault. See *McHenry II*. On his second direct appeal, McHenry's conviction for aiding and abetting

attempted robbery was reversed as violating the Double Jeopardy Clause's prohibition against multiple punishments for the same offense, because the Legislature had not affirmatively indicated an intent to punish defendants independently for felony murder and for the underlying felony. McHenry is currently serving a sentence of life imprisonment for aiding and abetting first degree murder. He was represented by the same two attorneys in both trials and in both appeals.

On February 12, 2003, McHenry filed a motion for postconviction relief. The district court determined that there was no denial of any constitutional right which would warrant granting the motion. The motion was denied without an evidentiary hearing. The court also overruled McHenry's motion for appointment of counsel. McHenry appeals.

III. ASSIGNMENTS OF ERROR

McHenry assigns, reordered and restated, that the district court judge erred in failing to recuse himself sua sponte from considering McHenry's postconviction motion because some of the postconviction allegations involved the judge's purported misconduct. McHenry further assigns that the district court erred in (1) failing to find that the prosecutor had engaged in misconduct by conspiring with McHenry's defense counsel to deny McHenry his right to a speedy trial; (2) failing to find that his trial counsel had provided ineffective assistance by (a) failing to investigate a substantial defense, (b) failing to object to the court's prejudicial remarks made during voir dire of his second trial, (c) failing to object to vague jury instructions; (d) failing to assert his right to a speedy trial or seek a discharge once that right had been violated; and (e) conspiring with the prosecutor for the purpose of denying him his right to a speedy trial; and (3) failing to grant him an evidentiary hearing and to appoint postconviction counsel.

IV. STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Ray*, 266 Neb. 659, 668 N.W.2d 52 (2003).

V. ANALYSIS

[2,3] 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. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

1. Failure to Recuse

[4,5] McHenry initially claims that the district court judge erred in failing to recuse himself sua sponte from ruling on McHenry's postconviction motion because some of McHenry's allegations involved the judge's purported misconduct. However, "[t]here is no rule of law which automatically disqualifies a judge who has presided at trial from subsequently considering a postconviction action." *State v. Joubert*, 235 Neb. 230, 235, 455 N.W.2d 117, 122 (1990). We have reviewed McHenry's claims of judicial misconduct, and we see no indication that the purported "misconduct" was of the type that would have required the judge to recuse himself. Moreover, McHenry waived this issue by failing to request the judge's recusal when McHenry was aware of the court's actions of which he complains. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998) (refusing to consider on direct appeal whether trial judge should have recused himself when defendant was aware of judge's conduct and did not request recusal). This claim is without merit.

2. Prosecutorial Misconduct

McHenry alleged that the prosecutor engaged in prejudicial misconduct by filing an amended information in an effort to "cover up" the fact that the time for trial under the speedy trial statute had expired for the charges in the original information. The district court found this claim to be frivolous. The State charged McHenry with aiding and abetting first degree murder and aiding and abetting attempted robbery in the original information filed in January 1993. The amended information filed in

August added charges of first degree sexual assault and aiding and abetting first degree sexual assault. With respect to the charges in the amended information, McHenry was acquitted of aiding and abetting first degree sexual assault in his first trial, *McHenry I*, and acquitted of sexual assault in his second trial, *McHenry II*.

[6] The record shows that by the time McHenry was arraigned on the amended information on August 12, 1993, his trial on the original information had already been rescheduled for September 14. The trial in fact began on September 14. Further, the State's filing of an amended information would not have tolled the speedy trial time limit on the same charges included in the original information. See *State v. French*, 262 Neb. 664, 670, 633 N.W.2d 908, 914 (2001) (stating that "[i]f the amendment to the complaint or information does not change the nature of the charge, then obviously the time continues to run against the State for purposes of the speedy trial act"). McHenry was acquitted of both charges contained in the amended information, and, to the extent that the amended information contained the same charges as the original information, it did not "cover up" or impact the trial deadline on those original charges. We agree with the district court that this claim is without merit.

3. Ineffective Assistance of Counsel

[7] When a defendant was represented both at trial and on direct appeal by the same lawyers, generally speaking, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief. See *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002).

[8] In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden 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. The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002).

[9-11] In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient

performance, the result of the proceeding would have been different. *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003). In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *Id.*

(a) Failure to Investigate

McHenry alleged that his trial counsel provided ineffective assistance by failing to investigate whether Sterkel could have died of alcohol poisoning. He alleged that counsel for a codefendant had given McHenry's trial counsel a letter from a private pathologist prior to McHenry's trial that cast doubt on the State's expert testimony regarding the cause of Sterkel's death. McHenry attached a copy of the pathologist's letter dated July 19, 1993, as an exhibit to his postconviction motion. The defense of alcohol poisoning, which McHenry now suggests, was not raised at either trial. The State's expert testified that the cause of death was strangulation, compression of the neck, and multiple blunt injuries to the head, neck, and chest.

McHenry alleged that testimony at trial showed that Sterkel had ingested large amounts of alcohol, that Sterkel had a known history of alcohol problems, and that a whiskey bottle was found under Sterkel's body. McHenry claims that these facts, coupled with the pathologist's letter, would have put a reasonable attorney on notice to investigate further the possibility of alcohol as the cause of Sterkel's death. He claims that a possible scenario of Sterkel's death is that after he was beaten, Sterkel then drank enough to cause his death.

The State's expert testified at both of McHenry's trials that he did not believe alcohol was a contributing factor to Sterkel's death and that Sterkel had extensive injuries sufficient to have caused his death. He recognized that the alcohol level in Sterkel's blood was high but explained that an elevated alcohol level is not unusual in post mortem examinations because alcohol forms in the body as it decomposes. He further opined that because of Sterkel's history of chronic alcoholism, he would have been able to tolerate high levels of blood alcohol.

In the private pathologist's letter attached to McHenry's motion, the pathologist opined that strangulation was a sufficient cause of death. He believed that the blunt force injuries alone would be insufficient to cause death in ordinary circumstances. However, he did indicate that blunt force injuries when combined with a high blood alcohol content, such as the autopsy revealed, could have resulted in death, although the death would have been more prolonged. He believed it was possible but not probable that Sterkel had died of a combination of strangulation and a beating. He did not endorse the scenario McHenry posits in his postconviction motion.

[12] The court found that the combination of causes contributing to Sterkel's death was irrelevant where McHenry's defense at trial was that he did not participate in the beating. Following the second trial, McHenry was again convicted of aiding and abetting first degree murder and did not claim in either of his direct appeals that the evidence was insufficient to convict him. The pathologist's letter does not suggest that Sterkel died of alcohol poisoning or that he would not have died as a result of the intentional injuries he sustained. McHenry has failed to allege the existence of any exculpatory fact which could have been discovered by his trial counsel. See *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). Defense counsel is not ineffective for failing to raise an argument that has no merit. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

(b) Failure to Object to Court's Comments

McHenry alleged that his trial counsel was ineffective for failing to object to the court's comments made to the jury during voir dire of his second trial concerning the O.J. Simpson trial, which was then ongoing. McHenry claims that such comments were prejudicial. He alleged that the Simpson trial had become a media circus by June 1995 and that the national consensus was to convict Simpson.

The record shows that the court admonished the jury to ignore the Simpson trial and stated that criticisms of the jury system resulting from that trial were overblown. The court reminded the jurors that "[y]ou're simply here to decide the issue of guilt or innocence based on the evidence adduced by the State of Nebraska." In his postconviction motion, McHenry

construes these comments as "a call to the jury to convict." He alleged that the last sentence was an attempt by the court to have the jury ignore evidence adduced by the defense.

[13] Trial courts are to refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury. *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). However, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant. *Id.*

The court's statements were made before the trial commenced, and it did not comment on the evidence presented. The court's statement that the jurors were to decide the issue of guilt or innocence based on evidence adduced by the State acknowledged that the State had the burden of proof, which burden was fully explained to the jurors at the same time that this statement was made. McHenry's claim that these comments, made during voir dire of the jury, were prejudicial is without merit, and his defense counsel's failure to object to the comments was not ineffective assistance of counsel.

(c) Failure to Object to Jury Instructions

McHenry alleged that his trial counsel was ineffective for failing to object to vague jury instructions. McHenry does not specify in which trial this failure purportedly occurred. We presume that he is referring to the jury instructions from his second trial.

Some of the jury instructions from McHenry's second trial were addressed in his direct appeal. See *McHenry II*. However, McHenry specifically refers to instruction No. 1 in his postconviction motion, and instruction No. 1 was not addressed in *McHenry II*. Thus, McHenry is not barred from claiming that his attorney should have objected to this instruction.

The transcript shows that instruction No. 1 is a preliminary instruction, which, in relevant part, read: "In determining what the facts are you must rely solely upon the evidence in this trial and that general knowledge that everyone has. You must disregard your personal knowledge of any other specific fact." McHenry claims that "general knowledge" is an example of confusing language because the term is too vague and requires the jury to

discern the difference between general and personal knowledge. In ruling on the postconviction motion, the district court found that neither phrase was a term of art beyond a juror's comprehension and that McHenry had not been prejudiced by the instruction.

[14,15] Defense counsel is not ineffective for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading. See *State v. Tucker*, 257 Neb. 496, 598 N.W.2d 742 (1999). This court has held that a postconviction court is not required to hold an evidentiary hearing on a claim that an attorney was ineffective for failing to propose an alternative instruction when the instruction given was a standard instruction which had consistently been found adequate and constitutional by this court. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

The first sentence which McHenry claims is confusing is identical to language in the standard instructions used in criminal trials, and the second sentence conveys the same meaning. See NJI2d Crim. 1.0(4). The second sentence of the standard instruction provides: "You must disregard anything else you may know about this case." *Id.* In the context of the instruction as a whole, we agree with the district court that the jury was unlikely to have been confused by the use of the expressions "general knowledge" and "personal knowledge" in the same instruction. McHenry has failed to show that the outcome of his trial would have been different if the court had used the exact language of the standard instruction instead of the variation which it used. This claim of ineffective assistance of counsel is without merit.

(d) Speedy Trial Violation

In his motion for postconviction relief, McHenry made several allegations related to his claim that his right to a statutory speedy trial was violated by his trial counsel's deficient performance prior to the commencement of his first trial. McHenry generally alleged that (1) the 6-month statutory limit for trying him on the charges in the original information had expired by the time of his first trial because, in part, McHenry had refused to consent to his trial counsel's request for a continuance, (2) trial counsel failed to assert McHenry's right to a speedy trial or seek a discharge on that ground, and (3) trial counsel colluded with the prosecutor for

the purpose of denying McHenry his right to a speedy trial. McHenry does not claim that he was denied his constitutional right to a speedy trial, and we do not consider such topic.

McHenry specifically alleged in his postconviction motion that in June 1993, his defense counsel approached him with a waiver of his speedy trial right, which he refused to sign. McHenry further alleged that he informed his counsel at the time his counsel approached him with the waiver that he wanted a speedy trial. He alleged that a week after this incident, he received a letter from his attorney stating that the court would grant the continuance even though McHenry had not personally waived his speedy trial right. McHenry alleged that he attempted to call his attorney and immediately wrote back to correct this "misunderstanding" but did not receive a response. The record indicates that after the motion for continuance was filed in June 1993, the court rescheduled trial from July 6 to September 14 because McHenry's counsel was not prepared for trial.

McHenry contends that where he refused to waive his right to a speedy trial, the postconviction court erred in determining that his claim of ineffective assistance of counsel was without merit.

[16-18] Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). Section 29-1207(4)(b) excludes delays "resulting from a continuance granted at the request or with the consent of the defendant *or* his counsel." (Emphasis supplied.) The plain language of § 29-1207(4)(b) anticipates a request for a continuance made solely by counsel, as occurred in this case. See *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002) (in reading statute, court must determine and give effect to purpose and intent of Legislature as ascertained from entire language of statute considered in its plain, ordinary, and popular sense).

[19,20] Under § 29-1207, this court has stated that a defendant has the "right to waive a speedy trial and consent to a continuance as long as he was properly advised either by counsel or the court of his rights to a speedy trial." *State v. Williams*, 211 Neb. 650, 654, 319 N.W.2d 748, 751 (1982). When a delay in trial is

attributable to a defense motion for a continuance filed within the statutory period, defense counsel is not ineffective for failing to file a motion to dismiss. See *State v. Turner, supra* (rejecting defendant's claim on direct appeal of ineffective assistance, based in part on his counsel's alleged failure to renew motion for speedy trial dismissal, when delays, including defense counsel's motions for continuance, were properly excludable under § 29-1207(4)). Although we have not addressed the specific issue of a defendant's refusal to consent to a continuance, we have recognized that defense counsel's reasonable strategic decisions could effectively waive a defendant's statutory right to speedy trial. See *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995) (rejecting defendant's postconviction allegations that defense counsel, in filing motion to suppress, provided ineffective assistance by failing to protect defendant's right to speedy trial). In *Russell*, we stated that "*defense counsel's decision* to toll the 6-month time period in order to move to suppress evidence was a competent decision." (Emphasis supplied.) 248 Neb. at 729, 539 N.W.2d at 14.

[21,22] This court has stated that " 'except for such basic decisions as . . . whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant is bound by the tactical or strategic decisions made by his or her counsel.' " *State v. Nesbitt*, 264 Neb. 612, 623, 650 N.W.2d 766, 778-79 (2002). Given the language of § 29-1207(4)(b) and our case law, it is clear that the statutory right to a speedy trial is not a personal right that can be waived only by a defendant. This conclusion is in accord with cases decided elsewhere under similar statutory language.

Indeed, several courts in other jurisdictions have explicitly held in direct appeals that a defense counsel's request for a continuance in order to prepare for trial waived the defendant's statutory right to speedy trial over the defendant's objection to the continuance. See, *Townsend v. Superior Court*, 15 Cal. 3d 774, 543 P.2d 619, 126 Cal. Rptr. 251 (1975) (concluding that defendant was bound by counsel's continuances, requested because heavy caseload had impeded counsel's preparedness for trial, despite defendant's refusal to waive time on the record and demands to court to be tried); *State v. LeFlore*, 308 N.W.2d 39 (Iowa 1981) (determining that statutory right to speedy trial is not personal; upholding counsel's continuance and waiver of

defendant's statutory right to speedy trial on ground that counsel was unprepared for trial, despite defendant's refusal to sign waiver); *State v. Ward*, 227 Kan. 663, 608 P.2d 1351 (1980) (concluding that matter of trial preparation is strategic and tactical decision; defense counsel's continuances extended statutory period for trial despite defendant's objections); *State v. McBreen*, 54 Ohio St. 2d 315, 376 N.E.2d 593 (1978) (holding that defense counsel had authority to waive statutory time for trial for reasons of trial preparation and that defendant was bound by waiver even though waiver was executed without defendant's consent); *State v. Campbell*, 103 Wash. 2d 1, 691 P.2d 929 (1984) (concluding that defendant could not show prejudice because of defense counsel's continuance over his objections when continuance ensured more effective representation and fair trial). See, also, *State v. Sayers*, 211 Neb. 555, 319 N.W.2d 438 (1982) (citing *Townsend* as example of courts holding that defendant is bound by strategic decisions of defense counsel).

[23,24] It has been recognized that defense counsel's authority to waive a defendant's statutory right to speedy trial cannot extend to excuse " 'representation [that] is so ineffective that it can be described as a "farce and a sham." . . .' " See *Townsend*, 15 Cal. 3d at 781, 543 P.2d at 624, 126 Cal. Rptr. at 256. The instant case presents no such failure. The continuance extended the statutory period for approximately 2 months in a complex murder trial involving two codefendants. Indeed, McHenry may well have been denied effective assistance of counsel if counsel had proceeded to trial unprepared. See *People v. Carr*, 9 Ill. App. 3d 382, 384, 292 N.E.2d 492, 494 (1972) (stating that "[i]f the court had acceded to defendant's demands [for immediate trial], and had defendant been found guilty, the question would surely have arisen as to whether defendant had been denied the effective assistance of counsel who had stated that he was not prepared to defend"). We determine that defense counsel's request for a continuance in order to prepare for trial waived McHenry's statutory right to a speedy trial despite McHenry's objections to the continuance. Where, as here, the continuance was granted before the expiration of the statutory speedy trial time, the period of continuance was properly excludable under § 29-1207(4)(b), and defense counsel was not ineffective by

failing to assert McHenry's right to a speedy trial or by failing to file a motion for discharge. See *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). We conclude that this claim is without merit.

(e) Collusion With Prosecutor

McHenry also alleged that his counsel colluded with the prosecution to deny him his right to a speedy trial. However, the records and files show no evidence of collusion. An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. See *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). This assignment of error is without merit.

4. DENIAL OF EVIDENTIARY HEARING AND FAILURE TO APPOINT COUNSEL

[25] Finally, because we have determined that the records and files show that all of McHenry's allegations are without merit, the court did not abuse its discretion by denying McHenry an evidentiary hearing, see *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003), nor did the court abuse its discretion by failing to appoint counsel when the assigned errors contained no justiciable issue of law or fact. *Id.*

VI. CONCLUSION

We conclude that McHenry's assignments of error are without merit and affirm the judgment of the district court denying postconviction relief.

AFFIRMED.

JONATHAN BOUTILIER, PERSONAL REPRESENTATIVE OF THE ESTATE OF LAURA DIANE CONWAY BOUTILIER, DECEASED, APPELLANT, V. LINCOLN BENEFIT LIFE INSURANCE COMPANY, A NEBRASKA CORPORATION, APPELLEE.

681 N.W.2d 746

Filed June 25, 2004. No. S-03-429.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material

fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Insurance: Contracts: Appeal and Error.** The meaning of an insurance policy is a question of law, which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
3. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions when the contract was made.
4. ____: ____: ____. When the terms of an insurance contract are clear, the court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain meaning of the policy.
5. **Insurance: Contracts.** While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
6. **Contracts: Evidence.** A court may consider extrinsic evidence to determine the meaning of an ambiguous contract.
7. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
8. **Insurance: Contracts: Words and Phrases.** A contract, such as an insurance policy, is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
9. **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.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Maren Lynn Chaloupka and Robert Paul Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

Gary J. Nedved, of Keating, O'Gara, Davis & Nedved, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

Jonathan Boutilier, as personal representative of the estate of Laura Diane Conway Boutilier, his deceased wife, appeals the district court's order granting the motion for summary judgment of appellee, Lincoln Benefit Life Insurance Company (LBL). The court determined that a temporary life insurance policy on

Laura had lapsed. The court also excluded parol evidence of statements made by the agent who sold the policy to show that the time the policy was in effect had been extended. We affirm because Laura died after the temporary insurance agreement terminated and thus there was no coverage.

BACKGROUND

On October 17, 2000, the Boutiliers applied for a life insurance policy through Theodore R. Ziegler, an agent for LBL. According to Jonathan, Ziegler told them that to have immediate coverage under a temporary policy, they needed to submit a check for $50 and complete an application. The Boutiliers gave Ziegler a check, which was cashed by LBL. Jonathan contends that Ziegler represented to them that the temporary coverage was in effect immediately.

Ziegler left a receipt and temporary insurance agreement (TIA) with the Boutiliers. The TIA stated:

> **When Temporary Insurance Starts**
>
> If a first modal premium payment has been accepted by us and if Part I of the application has been completed on or before the date of this Agreement, temporary insurance under the Agreement will start on the date of this Agreement on all persons proposed for insurance except that:
>
> If the answer to Question (G) Section VIII in the application is YES, insurance on all persons proposed for insurance through the application will start when all medical exams and lab tests on each person named in No. (G) in Section VIII are completed.
>
> **When Temporary Insurance Will Stop**
>
> Temporary insurance under this Agreement will stop on the first of the dates below:
>
> 1. The date we notify the Owner that we have stopped considering the application. We have an absolute right to so stop.
>
> 2. The date we notify the Proposed Insured that a medical exam and lab test is required (other than any exams and lab tests referred to in Question G, Section VIII), in which event insurance will stop with respect only to the person(s) required to have a medical exam and lab test . . . .

. . . .

5. Sixty days from the date of this Agreement . . . .
(Emphasis supplied.)

Question (G), section VIII, of the application asked, "Has anyone to be considered been advised they need to have an exam or lab test for this insurance?" The question was answered "Yes" on the application. Ziegler filled out the application after meeting with the Boutiliers and did not give them a copy, but did leave a copy of the TIA. According to Jonathan, Ziegler stated that to obtain a permanent policy, the Boutiliers had to undergo medical examinations and laboratory tests. However, according to Jonathan, Ziegler also represented that the temporary policy was in effect immediately and would be in effect until the examinations and permanent policy were completed. LBL received the results of Laura's medical examinations and laboratory tests on December 19, 2000; on December 21, Laura died. No results were submitted for Jonathan.

LBL sent a letter denying coverage under the TIA, stating: "Our records indicate that the first modal premium payment was $112.20. The amount of the premium submitted was $50.00. Therefore, the requirement of providing a first modal premium payment was not satisfied." The letter continued:

> The application for insurance was completed October 17, 2000. The tragic death of your wife occurred on December 21, 2000. At the time of your wife's death, 65 days had elapsed from the completion of the application for insurance. Therefore, under the provisions of the [TIA], any coverage provided under the [TIA] would end.

Jonathan filed a petition seeking a declaratory judgment. The district court granted LBL's motion for summary judgment, finding that there was no coverage under the policy and that Jonathan could not use parol evidence to show that Ziegler's representations changed the written policy language. Jonathan appeals. We granted Jonathan's motion to bypass.

ASSIGNMENT OF ERROR

Jonathan assigns that the district court erred by granting LBL's motion for summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *City of Lincoln v. PMI Franchising*, 267 Neb. 562, 675 N.W.2d 660 (2004).

[2] The meaning of an insurance policy is a question of law, which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004).

ANALYSIS

Jonathan contends that the TIA was in effect when Laura died because the policy started when Laura turned in her medical results and the TIA continued for 60 days from that time. He also argues that the contract is ambiguous and that the agent's representation acted to extend the time the TIA would run.

[3,4] An insurance policy is to be construed as any other contract to give effect to the parties' intentions when the contract was made. When the terms of the contract are clear, the court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain meaning of the policy. *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998).

[5-7] While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract. *Poulton v. State Farm Fire & Cas. Cos., supra*. Thus, we stated that a court may consider extrinsic evidence to determine the meaning of an ambiguous contract. *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993). But a contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

Jonathan argues that the contract is ambiguous because it is not clear when the insurance started and whether the 60-day expiration period was tolled by the delay in receiving the medical examination results and laboratory tests.

[8,9] A contract, such as an insurance policy, is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. However, 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. *Poulton v. State Farm Fire & Cas. Cos., supra.*

Here, regardless of any ambiguity about when temporary coverage started, we do not find an ambiguity in the "date of this Agreement." The TIA unambiguously stated that coverage would end "sixty days from the date of this Agreement," and the TIA was dated and signed on October 17, 2000. Nothing in the TIA suggests that the 60-day time period may be tolled. Thus, even if coverage did not start until Laura submitted her medical examination results and laboratory tests, it nevertheless terminated 60 days after October 17, which was before her death. See, *Radunz v. Farm Bureau Life Ins. Co.*, 431 N.W.2d 562 (Minn. App. 1988); *Sample v. Penn Mut. Life Ins. Co.*, 67 Fed. Appx. 379 (8th Cir. 2003) (unpublished); *Branton v. Western Reserve Life of Ohio*, 41 Fed. Appx. 40 (9th Cir. 2002) (unpublished) (concluding that similar termination clause ended coverage regardless of any ambiguity about when coverage started).

CONCLUSION

We determine that the TIA terminated 60 days from October 17, 2000, the date of the agreement. Because Laura died after the TIA terminated, there was no insurance coverage.

AFFIRMED.

HENDRY, C.J., not participating.

IN RE GUARDIANSHIP OF D.J., A MINOR. CARLA R., APPELLANT, V. TIM H. AND SHERRY H., GUARDIANS, AND TORY J., APPELLEES.

682 N.W.2d 238

Filed July 2, 2004. No. S-02-129.

1. **Guardians and Conservators: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2002), are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Child Custody: Parental Rights.** Under the principle of parental preference, a court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
4. **Parental Rights: Guardians and Conservators: Presumptions.** In guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.
5. **Child Custody: Parental Rights.** The right of a parent to maintain the custody of his or her child is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child.
6. ____: ____. Under the parental preference principle, a parent's natural right to the custody of his or her children trumps the interest of strangers to the parent-child relationship and the preferences of the child.
7. ____: ____. In a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child.
8. **Constitutional Law: Child Custody: Parental Rights.** A biological or adoptive parent's superior right to custody of the parent's child is acknowledgment that parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship and care as a consequence of the parent-child relationship, a relationship that, in the absence of parental unfitness or a compelling state interest, is entitled to constitutional protection from intrusion into that relationship.
9. **Child Custody: Parental Rights.** The parental superior right to child custody protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by a biological or adoptive parent.
10. ____: ____. Where the custody of a minor child is involved, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.
11. **Constitutional Law: Parent and Child.** The best interests standard is subject to the overriding recognition that the relationship between parent and child is constitutionally protected.

12. **Child Custody: Parental Rights.** While the best interests of the child remain the lodestar of child custody disputes, a parent's superior right to custody must be given its due regard, and absent its negation, a parent retains the right to custody over his or her child.
13. **Guardians and Conservators.** A guardianship is no more than a temporary custody arrangement established for the well-being of a child.
14. **Guardians and Conservators: Parental Rights.** The appointment of a guardian is not a de facto termination of parental rights, which results in a final and complete severance of the child from the parent and removes the entire bundle of parental rights.
15. **Parental Rights.** Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.

Appeal from the County Court for Dundy County: B. BERT LEFFLER, Judge. Reversed and remanded with directions.

Sally A. Rasmussen, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellant.

P. Stephen Potter, P.C., and Jeffrey M. Eastman for appellees Tim H. and Sherry H.

Michael E. Piccolo, of Dawson & Piccolo, for appellee Tory J.

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

GERRARD, J.

At a time of financial and emotional difficulties, the appellant, Carla R., asked her parents to care for her biological child. Thereafter, Carla signed a petition for her parents to be appointed guardians for her child. The county court ordered the guardianship. Three years later, having achieved financial security and emotional well-being, Carla sought to regain custody of her child. Finding that Carla had forfeited her parental rights and that the best interests of her child would be served by continuing the guardianship, the county court denied her petition to terminate the guardianship. Carla appeals, and for the reasons that follow, we reverse, and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

On July 25, 1992, Carla and Tory J. were married. On June 7, 1993, their child, D.J., was born. Thereafter, Carla and Tory's

marriage began to deteriorate, and Tory moved out of their home in 1996. At that time, Carla lived in her own home in Max, Nebraska, but spent much of her time with her parents, Tim H. and Sherry H. (collectively the grandparents), who also lived in Max. Carla worked full time, and, since shortly after D.J.'s birth, most of D.J.'s time was spent with the grandparents.

In July 1997, Carla moved to Lincoln, Nebraska, in search of work. Believing she could not properly care for D.J., and suffering emotionally from the separation with Tory, Carla left D.J. in the care of the grandparents. Carla testified that during her time in Lincoln, she maintained consistent contact with D.J. through monthly visits, telephone calls, and letters and gifts sent via the mail. However, the grandparents dispute the existence of much of this contact.

On June 8, 1998, Carla and Tory filed a petition for appointment of a guardian for D.J. The petition nominated the grandparents to serve as the guardians for D.J. In addition, both Tory and Carla filed corresponding affidavits in support of appointing the grandparents as guardians. On July 7, the grandparents accepted the appointment, and on July 13, the county court filed its order appointing the grandparents as guardians.

Carla testified that prior to filing the petition for guardianship, she consulted a lawyer to discuss her pending divorce action. Carla testified that she informed the lawyer that she wanted custody of D.J., but that the lawyer told her that she could not have custody because D.J. was not living with her at the time. According to Carla, the lawyer then gave her a document, purportedly the petition to establish a guardianship over D.J., for her signature. Carla testified that her mother, who was present at this meeting, told her the purpose of the document was to preclude Tory from taking D.J. in the middle of the night. Carla signed the petition and an affidavit which was notarized by her mother.

According to Carla, the lawyer failed to explain the ramifications of establishing a guardianship and advised her about "the ease" with which a guardianship could be terminated. Carla also testified that the lawyer was representing the grandparents in their attempt to become guardians of D.J. and that the lawyer failed to tell her of this potential conflict of interest. Carla testified to these

facts under oath and discussed them in her appellate brief. However, Carla's pleadings in this proceeding did not allege that the initial establishment of the guardianship was the result of undue influence or fraud. Therefore, we assume for the purposes of deciding this appeal that the guardianship was properly ordered in the first instance.

While in Lincoln, Carla began to abuse alcohol and drugs. In an attempt to solve her substance abuse problem, Carla left Lincoln and moved back into her parents' home in January 1999. Carla stayed with her parents through July, when she returned to Lincoln in search of a job. Carla testified that she attempted to take D.J. with her to Lincoln at this time; however, her parents dispute this claim. In any event, Carla testified that she traveled 240 miles to Max on numerous occasions to visit with D.J. and supplemented those visits with telephone calls and gifts.

On August 12, 2000, Carla married Brian R. At the time of trial, Carla and Brian lived in Roca, Nebraska, with Brian's daughter from his first marriage and a child born to Brian and Carla on February 17, 2001. Carla testified that she has not used illegal drugs since January 1999 and is employed as a licensed practical nurse at a rehabilitation hospital in Lincoln.

Three years after the guardianship was ordered, Carla filed a petition with the county court, pursuant to Neb. Rev. Stat. § 30-2616 (Reissue 1995), to remove the grandparents as guardians of D.J. and terminate the guardianship. In the petition, Carla alleged that she was now able to assume full care, custody, and control of D.J. and that it was in D.J.'s best interests to be reunited with her. The grandparents filed an answer to the petition which disputed these allegations.

After trial, the county court found that D.J. had thrived in the grandparents' care and that D.J. had developed a strong attachment to them. The court recognized that Carla, as the natural parent, had a superior right to the custody of D.J., but determined that she had forfeited that right by "substantial, continuous, and repeated failure to discharge her duties of parental care and protection." The court went on to conclude that it was in the best interests of D.J. to continue in the guardianship, and denied Carla's petition. Carla filed a timely appeal.

ASSIGNMENTS OF ERROR

Carla assigns, restated, that the county court erred in (1) finding that she had forfeited her parental rights to D.J., (2) failing to terminate the guardianship of D.J. and remove the grandparents as guardians, (3) admitting expert testimony without proper foundation, (4) admitting inadmissible hearsay, and (5) failing to maintain an impartial and unbiased role at trial.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2002), are reviewed for error on the record. *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002). When reviewing a judgment 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.*

ANALYSIS

Section 30-2616 states, in relevant part:

> (a) Any person interested in the welfare of a ward . . . may petition for removal of a guardian on the ground that removal would be in the best interest of the ward. . . .
>
> (b) After notice and hearing on a petition for removal . . . the court may terminate the guardianship and make any further order that may be appropriate.

We begin by determining the standard of proof necessary for a biological parent to terminate the guardianship with respect to their child. Specifically, we must determine if under § 30-2616, the sole inquiry in such a termination proceeding is whether it is in the child's best interests to terminate the guardianship and reunite the child with his or her natural parent, or whether the parental preference principle establishes a rebuttable presumption that the best interests of the child are served by terminating the guardianship and reuniting the child with his or her natural parent.

The resolution of this question requires us to examine two different principles found in child custody jurisprudence. On one hand, we have stated that the paramount concern in child custody

disputes is the best interests of the child. See *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002). See, also, § 30-2616(a) ("[a]ny person interested in the welfare of a ward . . . may petition for removal of a guardian on the ground that removal would be in the best interest of the ward").

[3] On the other hand, the principle of parental preference provides that a court "may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right." *In re Interest of Amber G. et al.*, 250 Neb. 973, 982, 554 N.W.2d 142, 149 (1996). See, also, § 30-2608(a) ("[t]he father and mother are the natural guardians of their minor children and are duly entitled to their custody . . . being themselves competent to transact their own business and not otherwise unsuitable").

Obviously, the parties disagree as to the proper interaction of these two principles and their application to the facts before us. Noting the tension between the two aforementioned statutes, Carla argues that the best interests analysis is always subject to the overriding consideration of a natural parent's superior rights, which, as we will discuss below, are founded in the U.S. Constitution. The grandparents dispute this assertion and argue that under § 30-2616, whether to terminate a guardianship is solely a question of the best interests of the ward.

[4] For the following reasons, we conclude that in guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.

[5-7] We have stated that "[t]he right of a parent to maintain the custody of his or her child is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child." *In re Interest of Witherspooon*, 208 Neb. 755, 758, 305 N.W.2d 644, 646 (1981). See, also, *In re Interest of Kimsey*, 208 Neb. 193, 302 N.W.2d 707 (1981). Under the parental preference principle, a parent's natural right to the custody of his or her children trumps the interest of strangers to the parent-child relationship and the preferences of the child. *Blecha v. Blecha*, 257 Neb. 543, 599 N.W.2d 829 (1999). Stated

otherwise, "in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child." *In re Interest of Amber G. et al.*, 250 Neb. at 982, 554 N.W.2d at 149, citing *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992). See, also, *Nielsen v. Nielsen*, 207 Neb. 141, 149, 296 N.W.2d 483, 488 (1980) ("[t]he right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties"). Thus, we have repeatedly held that a court may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998). Accord, *In re Interest of Amber G. et al., supra*; *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992); *Stuhr, supra*; *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987); *Nielsen, supra*; *Marcus v. Huffman*, 187 Neb. 798, 194 N.W.2d 221 (1972); *State ex rel. Cochrane v. Blanco*, 177 Neb. 149, 128 N.W.2d 615 (1964); *Ripley v. Godden*, 158 Neb. 246, 63 N.W.2d 151 (1954); *Norval v. Zinsmaster*, 57 Neb. 158, 77 N.W. 373 (1898). See, also, *In re Interest of A.C.*, 239 Neb. 734, 478 N.W.2d 1 (1991) (order terminating parental rights must be based upon clear and convincing evidence).

[8,9] The primary justification for the parental preference principle is based upon constitutional considerations. As the U.S. Supreme Court stated in *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978):

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 [97 S. Ct. 2094, 53 L. Ed. 2d 14] (1977) (Stewart, J., concurring in judgment).

See, also, *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Shoecraft v. Catholic Social Servs. Bureau*,

222 Neb. 574, 385 N.W.2d 448 (1986). Applying this principle, we have stated:

> A biological or adoptive parent's superior right to custody of the parent's child is acknowledgment that parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship and care as a consequence of the parent-child relationship, a relationship that, in the absence of parental unfitness or a compelling state interest, is entitled to protection from intrusion into that relationship. Hence, the parental superior right to child custody protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by a biological or adoptive parent. See *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979) (both parents and children in a familial relationship are protected by the U.S. Constitution). Establishment and continuance of the parent-child relationship " 'is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic constitutional rights.' " *Johnson v. Hunter*, 447 N.W.2d 871, 876 (Minn. 1989) (quoting from *Ruddock v. Ohls*, 91 Cal. App. 3d 271, 154 Cal. Rptr. 87 (1979)).

Uhing, 241 Neb. at 374-75, 488 N.W.2d at 371.

[10,11] In recognizing the constitutionally protected status of the parent-child relationship, we have often said that "[w]here the custody of a minor child is involved . . . the custody of the child is to be determined by the best interests of the child, with *due regard* for the superior rights of a fit, proper, and suitable parent." (Emphasis supplied.) *Nielsen v. Nielsen*, 207 Neb. 141, 149, 296 N.W.2d 483, 488 (1980). Accord, *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998); *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992); *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992); *State ex rel. Cochrane v. Blanco*, 177 Neb. 149, 128 N.W.2d 615 (1964); *Ripley v. Godden*, 158 Neb. 246, 63 N.W.2d 151 (1954); *Killip v. Killip*, 156 Neb. 573, 57 N.W.2d 147 (1953). Likewise, we held that the " 'best interests' standard is subject to the overriding recognition that 'the relationship between parent

and child is constitutionally protected.' " *Uhing*, 241 Neb. at 373, 488 N.W.2d at 370. In other words, we have repeatedly recognized that in custody disputes between a biological or adoptive parent and a third party, the U.S. Constitution requires that the superior rights of the parent be taken into consideration.

In addition to these constitutional considerations, in custody disputes between a parent and nonparent, courts turn to the parental preference principle because the best interests standard, taken to its logical conclusion, would place the minor children of all but the "worthiest" members of society in jeopardy of a custody challenge. See *Watkins v. Nelson*, 163 N.J. 235, 748 A.2d 558 (2000). Cf., *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996); *Uhing, supra*. Moreover, by establishing a presumption in favor of parental custody, the judiciary's ability to engage in social engineering is dramatically restricted. See *Watkins, supra*. More than 100 years ago, this court stated:

> We are aware that this court has several times asserted that in [child custody] controversies . . . the order should be made with sole reference to the best interests of the child. But this has been broad language applied to special cases. The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would be soon changed . . . .

Norval v. Zinsmaster, 57 Neb. 158, 161-62, 77 N.W. 373, 374 (1898).

[12] Therefore, unless it has been affirmatively shown that a biological or adoptive parent is unfit or has forfeited his or her right to custody, the U.S. Constitution and sound public policy protect a parent's right to custody of his or her child. While the best interests of the child remain the lodestar of child custody

disputes, a parent's superior right to custody must be given its due regard, and absent its negation, a parent retains the right to custody over his or her child. The question remains, however, whether a parent's superior right should also be taken into account during guardianship termination proceedings.

[13,14] A guardianship is no more than a temporary custody arrangement established for the well-being of a child. See, *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996) (noting temporary nature of guardianship); *Dependency of A.V.D.*, 62 Wash. App. 562, 815 P.2d 277 (1991) (noting temporary nature of guardianship). Important here, the "appointment of a guardian is not a de facto termination of parental rights, which results in a final and complete severance of the child from the parent and removes the entire bundle of parental rights." *In re Guardianship of Zyla*, 251 Neb. at 166, 555 N.W.2d at 771. See, also, *In re Interest of Amber G. et al., supra.* Rather, guardianships give parents an opportunity to temporarily relieve themselves of the burdens involved in raising a child, thereby enabling parents to take those steps necessary to better their situation so they can resume custody of their child in the future. See *Dependency of A.V.D., supra.*

The policy behind this rule is straightforward: guardianships are intended to encourage parents experiencing difficulties to temporarily turn over the custody and care of their children—safe in the knowledge that they will be able to regain custody in the future. This policy would be frustrated if guardianships were permanent or resulted in the automatic termination of parental rights, because parents would be less likely to voluntarily petition for a guardian to be appointed to care for their minor children. Therefore, children would unnecessarily be placed in jeopardy in many circumstances.

Furthermore, because a guardianship is temporary and does not terminate parental rights, we conclude that the constitutional concerns which serve as the justification for the parental preference principle in other situations also apply to parents seeking to regain custody by terminating the guardianship with respect to their children. Absent circumstances which terminate a parent's constitutionally protected right to care for his or her child, due regard for that right requires that a biological or adoptive

parent be presumptively regarded as the proper guardian for his or her child.

Thus, we hold that in guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of the child are served by reuniting the minor child with his or her parent. In other words, an individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.

As discussed above, the appointment of a guardian did not terminate Carla's parental rights to D.J. Therefore, unless it was affirmatively proved by clear and convincing evidence that Carla was either unfit or forfeited her right to D.J., the guardianship over D.J. should have been terminated and Carla's custody of D.J. restored.

In denying Carla's petition to terminate the guardianship, the court did not find Carla to be an unfit parent. Because the appellees did not assign this as error by way of cross-appeal, Carla's fitness as a parent is not at issue. However, the court did find that Carla had forfeited her superior right to custody of D.J. by "substantial, continuous, and repeated failure to discharge her duties of parental care and protection." The court, however, did not state the factual basis for this determination.

[15] Our review for error on the record leads us to conclude that the county court's finding of forfeiture is not supported by competent, clear, and convincing evidence. In the past, we have stated that "[p]arental rights may be forfeited by substantial, continuous, and repeated neglect of a child *and* a failure to discharge the duties of parental care and protection." (Emphasis supplied.) *State v. Jenkins*, 198 Neb. 311, 317, 252 N.W.2d 280, 284 (1977). Accord, *In re Interest of Witherspoon*, 208 Neb. 755, 305 N.W.2d 644 (1981); *In re Interest of Kimsey*, 208 Neb. 193, 302 N.W.2d 707 (1981).

Essentially, the grandparents argue that the evidence establishes that Carla forfeited her rights to D.J. by failing to take an

active part in D.J.'s life. Specifically, the grandparents argue that Carla forfeited her right to D.J. by, inter alia, (1) failing to attend D.J.'s parent-teacher conferences; (2) failing to contact D.J.'s schoolteachers to check D.J.'s progress; (3) failing to attend a variety of school activities; (4) failing to supply the grandparents with financial support for D.J.'s care; (5) failing to attend church with D.J.; (6) failing to attend D.J.'s summer activities, including swimming lessons, Bible school programs, and T-ball games; (7) failing to visit D.J.; and (8) failing to show an appropriate amount of interest in D.J.

We disagree. While it is true that Carla missed a variety of activities that one would normally associate with parenting, this is a natural consequence of the establishment of a guardianship. As noted above, guardianships are designed to temporarily relieve parents of the rigors of raising a child. Those appointed as guardians are aware that they become the caretakers of the child during their appointment. In essence, the grandparents ask us to find that parents who have been temporarily relieved of their parenting duties, through the appointment of a guardian, are guilty of failing to do the very duties of which they were expressly relieved. This we will not do. Such a rule would provide a powerful disincentive for parents to come forward and request help during their time of need, defeating the very purpose of guardianships.

Thus, the nature of a guardianship makes it particularly inappropriate in this context to establish the forfeiture of parental rights by solely focusing on a parent's failure to "discharge the duties of parental care and protection." *Jenkins*, 198 Neb. at 317, 252 N.W.2d at 284. There must also be clear and convincing evidence of "substantial, continuous, and repeated neglect of a child." *Id.* See, also, *Gray v. Hartman*, 181 Neb. 590, 596, 150 N.W.2d 120, 123 (1967) ("forfeiture of parental rights may be effected by the indifference of a parent for a child's welfare over a long period of time"); *Raymond v. Cotner*, 175 Neb. 158, 163, 120 N.W.2d 892, 895 (1963) (forfeiture established by parent's "complete indifference" to child's welfare), *overruled on other grounds, Bigley v. Tibbs*, 193 Neb. 4, 225 N.W.2d 27 (1975).

Here, the record does not establish Carla's neglect or complete indifference toward D.J. Instead, the evidence shows that

Carla adequately provided for D.J.'s care by placing D.J. in the capable and loving hands of her parents. Moreover, Carla made substantial and repeated efforts to maintain a relationship with D.J. throughout the guardianship. For example, the record shows that Carla helped care for D.J. when she returned from Lincoln in January 1999 until her departure in July 1999. In addition, despite living in Lincoln, Carla managed to regularly visit D.J. At trial, Carla testified that she saw D.J. 64 times from July 1999 until July 2000 and 74 times from July 2000 until July 2001. In fact, Carla testified that the longest period she went without physical contact with D.J. was for 1 month during which she was not allowed to travel due to complications stemming from her pregnancy. Moreover, Carla supplemented these personal visits with frequent telephone calls, letters, and gifts.

The evidence also demonstrates that Carla maintained a high level of interest in D.J. For example, she attended D.J.'s kindergarten graduation, baptism, and Christmas program. In addition, two of D.J.'s teachers testified that Carla came to school a few times to eat lunch with D.J. and that D.J. brought Carla and Brian's daughter to school for show and tell. Carla also demonstrated her knowledge of D.J.'s interests and activities. In sum, the court's finding of parental forfeiture is not supported by the evidence.

This in no way diminishes the substantial role that is undertaken by guardians on behalf of wards for significant periods of time. The grandparents are to be commended for stepping in on behalf of Carla and caring for D.J. at a crucial time in D.J.'s life. Nonetheless, the evidence adduced at trial, when considered in light of the sound policy behind the parental preference principle in guardianship situations, leads us to conclude that the judgment of the county court must be reversed.

Having concluded that Carla's first and second assignments of error have merit and are dispositive of this appeal, we need not consider her remaining assignments of error. See *Mooney v. Gordon Mem. Hosp. Dist., post* p. 273, 682 N.W.2d 253 (2004).

CONCLUSION

The county court erred in finding that Carla had forfeited her right to parent D.J. and in failing to terminate the guardianship.

The judgment of the court is reversed, and the cause is remanded to the county court with directions to remove the grandparents as guardians, to terminate the guardianship, and to reinstate in Carla the care, custody, and control of her minor child, D.J.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHAN, J., not participating.

NEBRASKA HOSPITAL ASSOCIATION CHARITABLE, SCIENTIFIC, AND EDUCATIONAL FOUNDATION, DOING BUSINESS AS BIO-ELECTRONICS, APPELLANT, V. C & J PARTNERSHIP, A NEBRASKA GENERAL PARTNERSHIP, ET AL., APPELLEES.

682 N.W.2d 248

Filed July 2, 2004. No. S-03-068.

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 the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Property: Sales: Escrow.** If the property in the custody of the escrow holder is either embezzled or lost by it, then, as between the seller and the buyer, the loss falls on the one who owns the property at the time of the embezzlement or loss.
4. **Uniform Commercial Code: Negotiable Instruments: Words and Phrases.** As defined by Neb. U.C.C. § 3-201(a) (Reissue 2001), negotiation is a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.
5. **Negotiable Instruments: Sales: Words and Phrases.** The remitter of a negotiable instrument is the owner of the instrument until ownership is transferred to the seller by delivery. The remitter is a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.
6. **Uniform Commercial Code: Negotiable Instruments.** Under Neb. U.C.C. § 3-203(a) (Reissue 2001), an instrument is deemed transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

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

Charles M. Pallesen, Jr., and Jeffrey E. Mark, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Tim Engler, of Harding, Shultz & Downs, for appellees.

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

MCCORMACK, J.

NATURE OF CASE

Appellant, Nebraska Hospital Association Charitable, Scientific, and Educational Foundation doing business as Bio-Electronics (Bio-Electronics), brought an action for specific performance of a real estate purchase agreement against appellees, C & J Partnership, Krieger Family Children's Trust, Chuck Uribe, John Daubert, and Albert Pepler (collectively C & J Partnership). Bio-Electronics and C & J Partnership filed motions for summary judgment and for partial summary judgment, respectively. The district court for Lancaster County, Nebraska, sustained C & J Partnership's partial motion for summary judgment and dismissed Bio-Electronics' petition for specific performance. The issue we must resolve is whether a genuine issue of material fact exists regarding which party to a real estate transaction must bear the loss when funds are embezzled by an escrow agent before closing.

BACKGROUND

The parties in this action have a long history together. At the time this action was filed, the real property at issue in this case had been the subject of an ongoing lease agreement between Bio-Electronics and C & J Partnership for over 15 years. On November 9, 2001, Bio-Electronics offered to purchase the leased property located in Lincoln, Nebraska, for $152,000. A few days later, C & J Partnership accepted Bio-Electronics' offer by and through one of its partners, Uribe. The sale was scheduled to close on December 20, 2001, at the offices of State Title Services, Inc. (State Title), in Lincoln.

At the scheduled closing on December 20, 2001, Bio-Electronics delivered a cashier's check made payable to C & J Partnership for the agreed-upon net purchase price. Uribe signed

the back of the check on behalf of C & J Partnership. The closing, however, was not completed on that date because one of C & J Partnership's partners had not yet signed the warranty deed.

In their briefs, both parties describe State Title as the escrow agent. Bio-Electronics describes the nature of this case as "this dispute was not completed because the purchase price that was placed in escrow with a title company was embezzled." Brief for appellant at 2. C & J Partnership states that "State Title served as the title company as well as the escrow/title agent . . . ." Brief for appellees at 5. We will, therefore, treat this as an escrow case.

On January 28, 2002, before the warranty deed was fully executed, State Title filed for chapter 7 bankruptcy as the result of an alleged embezzlement of corporate funds by its president. Among the funds embezzled were $152,870 from the December 20, 2001, scheduled closing. The real property at issue is currently encumbered by a deed of trust from C & J Partnership to Union Bank and Trust Company.

On February 15, 2002, Bio-Electronics filed a petition for specific performance in the district court. The petition requested that the court compel C & J Partnership to do equity and (1) release from escrow and deliver to Bio-Electronics the warranty deed of conveyance with clear title or execute and deliver to Bio-Electronics a substitute warranty deed with clear title and (2) to compel C & J Partnership to cause the property at issue to be released from the deed of trust to Union Bank and Trust Company.

Bio-Electronics contended in its motion for summary judgment that it delivered payment for the real estate to C & J Partnership, giving C & J Partnership dominion and control over the funds. As such, Bio-Electronics contended that C & J Partnership failed to perform under the purchase agreement by wrongfully withholding a fully executed warranty deed. In its cross-motion, C & J Partnership contended, in relevant part, that Bio-Electronics was the rightful owner of the funds when they were embezzled by the escrow agent. Accordingly, C & J Partnership contended that Bio-Electronics breached the purchase agreement by failing to deliver the purchase price to C & J Partnership.

During the hearing on the parties' motions, C & J Partnership admitted that because the parties had contemplated exchanging

the deed and purchase price during the December 20, 2001, closing, an escrow had not been established for the closing. In Uribe's affidavit, which was admitted into evidence at the hearing, Uribe stated that he signed the back of the cashier's check on behalf of C & J Partnership in order to allow Bio-Electronics to deposit the proceeds in escrow with State Title. The evidence is inconclusive regarding whether the unexecuted warranty deed is currently in escrow with State Title, as Bio-Electronics contends, or was simply left with State Title on December 20 pending closing, as C & J Partnership contends.

The district court granted C & J Partnership's motion for partial summary judgment and denied Bio-Electronics' motion for summary judgment. The district court noted that the issue in this case centered on which party must bear the loss of funds apparently embezzled by the title agent. The court noted that both parties agreed that the general rule applicable in this case is that if an escrow agent " 'embezzles the funds before the time has come to release them, he has embezzled the funds of the depositor.' " That is, the district court noted, the wrong of an escrow holder must be borne by the party who, at the time of its occurrence, was lawfully entitled to the right or property affected.

The district court recognized that to circumvent the general rule that absconded funds are the funds of the depositor, there must be a finding that the funds had been transferred to another party. The court stated that Uribe's endorsement of the cashier's check did not give control of the funds to C & J Partnership because C & J Partnership had not yet delivered a fully signed warranty deed. The court found that State Title was to have served as Bio-Electronics' agent to protect its funds and as C & J Partnership's agent to protect its real estate. At oral argument, Bio-Electronics contended that because of a long relationship between the parties, it was not insisting on an escrow to deliver the $152,870 cashier's check. The record is not clear which party, Bio-Electronics, C & J Partnership, or State Title requested the escrow. The district court concluded that Bio-Electronics retained title to the funds and, accordingly, that Bio-Electronics bore the risk of loss.

While the district court found that specific performance was an appropriate remedy, it concluded that it would be inequitable

under the circumstances to order Bio-Electronics' specific performance under the terms of the contract. Accordingly, the district court overruled both parties' respective requests for specific performance and granted C & J Partnership's request to dismiss the petition.

ASSIGNMENTS OF ERROR

Bio-Electronics assigns that the district court erred in concluding that (1) the loss of the embezzled funds must fall on Bio-Electronics because the evidence clearly established that the funds were transferred to C & J Partnership before they were embezzled; (2) Bio-Electronics breached the purchase agreement because Bio-Electronics fully performed all conditions pursuant to the purchase agreement; and (3) the loss should fall on Bio-Electronics because, as between these two innocent parties, C & J Partnership's inaction set in motion the events that allowed the funds to be embezzled by State Title.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004); *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Misle v. HJA, Inc.*, 267 Neb. 375, 674 N.W.2d 257 (2004); *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003).

ANALYSIS

Bio-Electronics contends that the evidence admitted at the hearing on the parties' respective motions for summary judgment clearly establishes that Bio-Electronics transferred the funds to C & J Partnership before they were deposited with State Title. Bio-Electronics contends that its delivery to Uribe of the

cashier's check made payable to C & J Partnership constituted a negotiation under article 3 of the Nebraska Uniform Commercial Code (U.C.C.). As such, Bio-Electronics contends that ownership of the funds was transferred to C & J Partnership.

[3] Both parties contend in their briefs that the controlling rule of law in this case is that if an escrow agent "embezzles the funds before the time has come to release them, he has embezzled the funds of the depositor." See 28 Am. Jur. 2d *Escrow* § 31 at 30 (2000). Several other jurisdictions have adopted the general rule that " '[i]f the property in the custody of the escrow holder is either embezzled or lost by it, then, as between the seller and the buyer, the loss falls on the one who owns the property at the time of the embezzlement or loss.' " *Bixby Ranch Co. v. U.S.*, 35 Fed. Cl. 674, 679 (1996). See, *Schmidt et ux. v. Fitzsimmons et ux.*, 190 Or. 415, 226 P.2d 304 (1951); *Stuart v. Clarke*, 619 A.2d 1199 (D.C. App. 1993); *Zaremba v. Konopka*, 94 N.J. Super. 300, 228 A.2d 91 (1967).

[4-6] Bio-Electronics contends article 3 of the U.C.C., which governs negotiable instruments, including cashier's checks, applies to determine who had ownership of the funds in question. "Negotiation" is defined under the U.C.C. as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." Neb. U.C.C. § 3-201(a) (Reissue 2001). Comment 2 to U.C.C. § 3-201 provides that the remitter is the owner of the check until ownership is transferred to the seller by delivery. The "[r]emitter" of a negotiable instrument is "a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser." Neb. U.C.C. § 3-103(11) (Reissue 2001). In this case, Bio-Electronics is the remitter of the cashier's check made payable to C & J Partnership. An instrument is deemed transferred "when it is delivered by a person other than its issuer *for the purpose of giving to the person receiving delivery the right to enforce the instrument.*" (Emphasis supplied.) Neb. U.C.C. § 3-203(a) (Reissue 2001).

At the December 20, 2001, closing, Bio-Electronics presented the cashier's check to C & J Partnership. Uribe, of C & J Partnership, took possession or delivery of the cashier's check

and endorsed it. The possession of the cashier's check, therefore, went from Bio-Electronics to Uribe, of C & J Partnership, who endorsed the check, and then to State Title. The undisputed facts show that the check was negotiated and that C & J Partnership is the "depositor." As the depositor, C & J Partnership bears the risk of loss of embezzlement by the escrow agent with whom C & J Partnership deposited the funds. Contrary to the district court's ruling, C & J Partnership did not show it was entitled to judgment as a matter of law, and we must reverse the district court's orders on summary judgment.

CONCLUSION

We reverse the holding of the district court, vacate the order of dismissal, and remand the cause with directions to enter an order granting the specific relief sought by Bio-Electronics.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

OTTACO ACCEPTANCE, INC., APPELLANT, V.
JANET M. HUNTZINGER ET AL., APPELLEES.

682 N.W.2d 232

Filed July 2, 2004. No. S-03-143.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.
4. **Statutes: Legislature: Intent: Time.** In noncriminal cases, substantive statutes are generally not given retroactive effect unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively.
5. **Tax Sale: Deeds: Presumptions: Proof.** In suits relating to the rights of the purchaser, a county treasurer's tax deed is presumptive evidence that all things whatsoever required by law to make a good and valid tax sale and vest title in the purchaser were done. The presumption is not conclusive and may be rebutted but the burden is upon the party attacking the validity of such a deed to show by competent evidence some jurisdictional defect voiding the deed.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Reversed and remanded with directions.

Robert S. Lannin, of Shively Law Offices, P.C., L.L.O., for appellant.

Jason S. White, of Schaper & White Law Firm, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Ottaco Acceptance, Inc. (Ottaco), appeals from a judgment entered against it by the district court for Custer County. Ottaco sought to quiet title to three separate tracts of property, alleging that it was the owner of the properties by virtue of treasurer's tax deeds it acquired. The district court found that Ottaco failed to give proper notice to the record owner of the properties, Janet M. Huntzinger, and to the tenants in possession of the properties and thus denied Ottaco's petition. We reverse, and remand with directions.

BACKGROUND

On July 24, 1996, tax sales certificates Nos. 307, 308, and 340 were sold by the Custer County treasurer on real estate described, respectively, as follows: The west half of the northeast quarter and the north half of the northwest quarter of Section 23, Township 14 North, Range 18 West of the 6th P.M., Custer County, Nebraska; the north half of the southeast quarter and the southwest quarter of the southeast quarter of Section 23, Township 14 North, Range 18 West of the 6th P.M., Custer County, Nebraska; and the south half of the southwest quarter of Section 26, Township 14 North, Range 18 West of the 6th P.M., Custer County, Nebraska.

The purchaser of the tax certificates later assigned them to Ottaco. The record owner of each of the three properties was Huntzinger. In April 1999, Ottaco sent notices to Huntzinger containing the information required by Neb. Rev. Stat. § 77-1831 (Reissue 2003). The notices were sent by certified mail to Huntzinger at "555 Russell Rd A-5 Westfield, MA 01086." The

record contains signed certified mail receipts indicating that on May 18, 1999, "J Huntzinger" received the notices. Stamps on the notices indicate that they were received in Wheeling, Illinois.

Huntzinger testified at trial that she never signed the certified mail receipts, never authorized anyone to sign on her behalf, and never received the notices sent by Ottaco. She testified that she lived at the Westfield, Massachusetts, address from September 1994 to September 1998, at which time she moved to Wheeling, Illinois. The Massachusetts address was the address on file with the Custer County treasurer. Huntzinger testified that she did not inform the Custer County treasurer of her change of address but did arrange with the post office to have all her mail forwarded to her in Wheeling. She further testified that she was present in Wheeling on May 18, 1999.

On January 12, 2000, Ottaco received treasurer's tax deeds for the three properties. Shortly thereafter, it initiated this action. Ottaco's petition placed five properties at issue, although the parties' dispute over two of them was eventually settled and only the three properties mentioned above remain at issue in this appeal. Ottaco's petition also alleged, among other things, that Wiese Brothers, a partnership between Dean Wiese and Duane Wiese, may claim an interest in the properties as a tenant in possession. Wiese Brothers filed an answer admitting that it was a tenant in possession of the properties at issue, but denying that it received proper notice.

Following a bench trial, the district court denied Ottaco's petition on January 30, 2003. The court found that neither Huntzinger nor the tenant in possession received notice as required by law; thus, the treasurer's tax deeds were unlawfully issued and conveyed no valid title to Ottaco. The court specifically said that "[Huntzinger's] testimony shows that she did not sign the mail receipts and that she was not living at the address shown on the receipts at the time alleged." Ottaco appealed, and we moved the case to our docket.

ASSIGNMENTS OF ERROR

Ottaco assigns that the district court erred in (1) refusing to quiet title in favor of Ottaco, (2) finding that Huntzinger's signature did not appear on the certified mail receipts, (3) finding that

notice was not provided to Huntzinger, (4) finding that notice was required to an unidentified farm tenant, (5) applying the statutory presumption in Neb. Rev. Stat. § 77-1842 (Reissue 2003), and (6) finding that Huntzinger could maintain her claim without satisfying Neb. Rev. Stat. §§ 77-1843 and 77-1844 (Reissue 2003).

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity. *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

When a county treasurer sells real property for delinquent taxes under chapter 77 of the Nebraska Revised Statutes, the purchaser receives a tax sale certificate which acts as a lien against the property for the taxes paid by the purchaser. Neb. Rev. Stat. § 77-1818 (Reissue 2003). After a period of 3 years, the purchaser can elect to acquire a deed to the property by either requesting a treasurer's tax deed under the procedures of article 18 or commencing a foreclosure action under article 19. Neb. Rev. Stat. §§ 77-1837 (Reissue 1996) and 77-1902 (Reissue 2003). In this case, Ottaco requested and obtained treasurer's tax deeds under article 18.

Ottaco argues, in part, that Huntzinger is precluded from contesting the title it acquired to the properties by virtue of those treasurer's tax deeds. It relies upon § 77-1844, which provides:

> No person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and *that all taxes due upon the property had been paid by such person* or the persons under whom he claims title as aforesaid.

(Emphasis supplied.)

Ottaco specifically argues that Huntzinger failed to pay all taxes due upon the properties. Our most recent interpretation of

the italicized language above came 90 years ago in *Cornell v. Maverick Loan & Trust Co.*, 95 Neb. 842, 843, 147 N.W. 697, 698 (1914), where we stated that

> we are of the opinion that it makes no difference whether at the time of the commencement of the suit the taxes due are paid or not. The "showing" of taxes paid is at the trial, and if all taxes are paid before or during the trial, or before final judgment, that is enough. *The "showing" is made by the evidence, and not by the pleadings alone.*

(Emphasis omitted.) (Emphasis supplied.)

[3] In this case, Huntzinger did not "show" by the evidence that she had paid all taxes due on the properties. Trial in this case was held on October 30, 2002, and the district court entered judgment on January 30, 2003. The transcript includes a copy of a receipt from the Custer County treasurer indicating that "Jason White, Trustee for Janet M. Huntzinger Trust" paid $45,050.01. The receipt itself is dated January 24, 2003. The copy of the receipt in the transcript is file stamped by the clerk of the district court as being received on January 30, 2003. However, this receipt was not offered and received into evidence in this case; it was merely included in the transcript. We have repeatedly held that a bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered. *Coates v. First Mid-American Fin. Co.*, 263 Neb. 619, 641 N.W.2d 398 (2002). Thus, under *Cornell v. Maverick Loan & Trust Co., supra*, there has been no showing of compliance with § 77-1844, and Huntzinger is precluded from questioning the titles acquired by Ottaco.

Ottaco's petition was also challenged by Wiese Brothers. Wiese Brothers' answer asserted that at all relevant times, it was the tenant in possession of each of the properties at issue. It further asserted that it did not receive notice from Ottaco as required by law and that, therefore, Ottaco's treasurer's tax deeds were not valid.

Prior to requesting a treasurer's tax deed, Ottaco was required to comply with the notice provisions of § 77-1831 and Neb. Rev. Stat. § 77-1832 (Reissue 1996). Section 77-1831 requires that a purchaser of a tax sale certificate serve or cause to be served notice at least 3 months before applying for the deed. It further addresses

the required contents of such notice. Section 77-1832 sets forth how and to whom such notice must be served. It provides:

> Service of the notice provided by section 77-1831 shall be made *on every person in actual possession or occupancy of the real property*, upon the person in whose name the title to the real property appears of record, and upon every encumbrancer of record in the office of the register of deeds of the county if, upon diligent inquiry, he or she can be found in the county. Whenever the record of a lien shows the post office address of the lienholder, notice shall be sent by certified or registered mail to the holder of such lien at the address appearing of record.

(Emphasis supplied.) See, also, Neb. Const. art. VIII, § 3 (providing in part that "occupants shall in all cases be served with personal notice before the time of redemption expires").

[4] We note that § 77-1832 was revised by 2003 Neb. Laws, L.B. 319, effective April 3, 2003. It no longer requires that notice be served upon "every person in actual possession or occupancy of the real property." The amendment became effective after the district court entered judgment and Ottaco filed its notice of appeal in this case. Thus, we apply the prior version of § 77-1832 quoted above. See, generally, *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002) (in noncriminal cases, substantive statutes are generally not given retroactive effect unless Legislature has clearly expressed intention that new statute is to be applied retroactively).

If a request is made within the proper timeframe, the county treasurer shall execute and deliver a treasurer's tax deed to the purchaser of a tax sale certificate "*upon compliance with the provisions of sections 77-1801 to 77-1837.*" (Emphasis supplied.) § 77-1837. Thus, compliance with the notice provisions of §§ 77-1831 and 77-1832 is a prerequisite to the county treasurer's execution and delivery of a treasurer's tax deed.

The burden of proving such noncompliance with respect to the tenant in possession falls upon Wiese Brothers in this case. Section 77-1842 provides:

> Deeds made by the county treasurer shall be presumptive evidence in all courts of this state, in all controversies and suits in relation to the rights of the purchaser and his or her

> heirs or assigns to the real property thereby conveyed, of the following facts: . . . (7) that the notice had been served or due publication made as required in sections 77-1831 to 77-1835 before the time of redemption had expired . . . .

[5] We have held that in suits relating to the rights of the purchaser, a county treasurer's tax deed is presumptive evidence that all things whatsoever required by law to make a good and valid tax sale and vest title in the purchaser were done. *Kuska v. Kubat*, 147 Neb. 139, 22 N.W.2d 484 (1946). The presumption is not conclusive and may be rebutted but the burden is upon the party attacking the validity of such a deed to show by competent evidence some jurisdictional defect voiding the deed. *Id.* Thus, in this case, we must consider whether Wiese Brothers rebutted the presumption that Ottaco complied with the notice provisions of §§ 77-1831 and 77-1832.

Wiese Brothers did not appear at trial. The *only* evidence received at trial that remotely deals with the tenant in possession is the following question by Huntzinger's attorney and her answer: "Q. Do you know whether or not your tenants on the property received notice? A. I have not heard from them that they received anything."

In our de novo review, we conclude that this evidence was insufficient to rebut the presumption under § 77-1842 that Wiese Brothers had received proper notice.

CONCLUSION

Based on our de novo review, we conclude that Huntzinger is precluded from questioning the titles acquired by Ottaco because of her failure to satisfy § 77-1844. We further conclude that the tenant in possession did not rebut the presumption that it was properly served with the notice required by §§ 77-1831 and 77-1832. We reverse the district court's judgment in favor of Huntzinger and remand the cause with directions to enter judgment quieting title to the properties in favor of Ottaco.

REVERSED AND REMANDED WITH DIRECTIONS.

LEOTA SWANSON, APPELLANT, V. DAVID H. PTAK, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILMA L. PRITCHARD, DECEASED, APPELLEE.

682 N.W.2d 225

Filed July 2, 2004. No. S-03-183.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
5. **Negligence: Actions: Attorney and Client.** Although an attorney-client relationship rests in contract, an attorney's professional misconduct does not give rise to a breach of contract action, but, rather, gives rise to a professional negligence action.
6. **Negligence.** A cause of action for negligence depends upon the breach of a duty by the defendant to use due care to avoid injury to the plaintiff.
7. **Attorney and Client: Parties.** A lawyer owes a duty to his or her client to use reasonable care and skill in the discharge of his or her duties, but ordinarily this duty does not extend to third parties absent facts establishing a duty to them.
8. **Decedents' Estates: Attorney and Client.** When an attorney is employed to render services in settling an estate, he or she acts as attorney for the personal representative.

Appeal from the District Court for Madison County: DARVID D. QUIST, Judge. Affirmed.

George H. Moyer, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

STEPHAN, J.

Leota Swanson brought this action against David H. Ptak to recover an inheritance she contends she should have received

from an estate. Ptak, an attorney, serves as personal representative of the estate. The district court for Madison County granted Ptak's motion for summary judgment and dismissed the action after determining that Ptak owed no legal duty to Swanson. Swanson perfected this appeal, which we removed to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTS

Allan L. Pritchard and Wilma L. Pritchard were married late in their lives and had no children. Prior to the marriage, Allan had accumulated a substantial estate. Allan died intestate on April 19, 1997, in Norfolk, Nebraska, leaving Wilma as his only heir. Wilma died intestate on August 21, 1998, in Norfolk, leaving as her only legal heirs a brother, Thomas Fillmore of Klamath Falls, Oregon, and a sister, Nona Fillmore Wittler of Hoskins, Nebraska, now deceased.

Swanson is Allan's niece. After Wilma's death, Swanson, Wittler, and other family members went to Ptak's law office in Norfolk to inquire about her estate. Ptak had performed legal services for both Allan and Wilma during their lifetimes. Ptak generally advised the family members that he was not aware of any will left by Wilma and that under the laws of intestate succession, Fillmore and Wittler would inherit the entire estate unless they agreed to surrender half of the estate to Allan's family, including Swanson. Ptak diagrammed for the family members the approximate distribution of the estate if such an agreement were reached. Under this scenario, Swanson would have received one-fourth of the estate, amounting to approximately $250,000.

Ptak was subsequently appointed the personal representative of Wilma's estate. On October 7, 1998, Ptak sent a letter to Fillmore, Swanson, and the other family members, describing how the estate would be distributed if Wilma's heirs agreed to give 50 percent to Allan's family, including Swanson. In this letter, Ptak stated:

> If this is correct and you are agreeable to this distribution of the estate, I will need to prepare an agreement to be signed by Wilma's heirs which consents to this distribution. I met with Nona Wittler last week and went over this distribution with her and she is agreeable to it.

Swanson continued to receive correspondence from Ptak, in his capacity as personal representative, regarding the estate. The correspondence generally indicated that the estate would be distributed half to Wilma's heirs and half to Allan's heirs. In June 1999, Swanson informed Ptak that she and her husband wished to purchase a new condominium and asked if she could obtain a partial distribution of her one-fourth interest in the estate. On September 13, 1999, Ptak issued Swanson a check for $99,000 as a partial distribution.

In late November 1999, Ptak received a telephone call from Fillmore's wife informing him that Fillmore had never agreed to share the estate with Swanson and other descendants of Allan. Shortly thereafter, Ptak received letters from Fillmore and Wittler confirming that they would not agree to share the estate with Allan's descendants. In his subsequent deposition testimony, Fillmore denied that he had ever agreed to share any portion of the estate with Swanson.

Upon receipt of the letters from Fillmore and Wittler, Ptak wrote to Swanson and the other family members involved advising them that Fillmore and Wittler had notified him that they would not consent to an equal division of the estate with Allan's family. This was the first notice Swanson had that Ptak had not obtained a written agreement from Wilma's heirs to share the estate with Allan's family. Ptak requested that Swanson return the $99,000 partial distribution and eventually filed suit as the personal representative to recover the money from Swanson. The record in this case does not reflect any final disposition of that separate proceeding, in which Swanson asserted a counterclaim against Ptak in his capacity as personal representative.

Swanson filed this action against Ptak in his individual capacity. She alleged three theories of recovery: professional negligence, breach of contract, and negligent failure to furnish accurate information. With respect to all three theories of recovery, she alleged that Ptak's negligence caused her (1) to incur legal fees defending against Ptak's lawsuit for the return of the $99,000, (2) to make gifts to each of her two children of $10,000, and (3) to fail to receive the remaining $90,900 of her one-fourth share of Wilma's estate. Pursuant to a motion to strike by Ptak, the district court struck the allegation that

Ptak's negligence caused Swanson to make the $10,000 gifts to her children.

In granting Ptak's motion for summary judgment and dismissing the action, the district court determined as a matter of law that Ptak owed no legal duty to Swanson.

ASSIGNMENTS OF ERROR

Swanson assigns, restated and consolidated, that the district court erred in (1) finding that Ptak owed her no duty, (2) finding there was no genuine issue of material fact and sustaining Ptak's motion for summary judgment, and (3) striking the language regarding the gifts she made to her children from the petition.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004); *First Colony Life Ins. Co. v. Gerdes*, 267 Neb. 632, 676 N.W.2d 58 (2004). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *First Colony Life Ins. Co. v. Gerdes, supra*; *Misle v. HJA, Inc.*, 267 Neb. 375, 674 N.W.2d 257 (2004).

[3,4] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003); *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Fu v. State, supra*; *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001).

ANALYSIS

The issue of law presented in this case is whether Ptak had a duty to secure an inheritance for Swanson from the estate of Wilma. We begin by noting that upon Wilma's death, Swanson

had no legal entitlement to any portion of the intestate estate because she was not a legal heir of the deceased. See Neb. Rev. Stat. § 30-2303 (Reissue 1995). Any "inheritance" which Swanson might receive from the estate could only occur as a result of a gratuitous undertaking by the legal heirs to share the estate with Swanson and the other members of Allan's family. See Neb. Rev. Stat. § 30-24,110 (Reissue 1995).

PROFESSIONAL NEGLIGENCE

[5] In her first theory of recovery, Swanson alleges that Ptak was acting as her attorney in his efforts to obtain the written agreement from Fillmore and Wittler. In her second theory of recovery, she asserts that Ptak breached a contract because he undertook to perform a service for her, i.e., to obtain the written agreement of Fillmore and Wittler to an equal division of the estate, and failed to do so. Although an attorney-client relationship rests in contract, an attorney's professional misconduct "does not give rise to a breach of contract action, but, rather, gives rise to a professional negligence action." *Gravel v. Schmidt*, 247 Neb. 404, 408, 527 N.W.2d 199, 202 (1995). We therefore consider Swanson's first and second theories of recovery as a single professional negligence claim against Ptak.

[6,7] A cause of action for negligence depends upon the breach of a duty by the defendant to use due care to avoid injury to the plaintiff. *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980). Under Nebraska law, a lawyer owes a duty to his or her client to use reasonable care and skill in the discharge of his or her duties, but ordinarily this duty does not extend to third parties absent facts establishing a duty to them. *Landrigan v. Nelson*, 227 Neb. 835, 420 N.W.2d 313 (1988); *Ames Bank v. Hahn, supra.* Thus, in determining whether Ptak owed a professional duty to Swanson, we must first determine whether she was his client.

[8] Swanson admitted that she had no written agreement with Ptak regarding legal representation and that he never billed her for professional services. However, she "felt" that as personal representative of the estate, he was representing her legal interests. This perception on the part of Swanson is contrary to the principle that when an attorney is employed to render services in

settling an estate, he or she acts as attorney for the personal representative. See *In re Estate of Wagner*, 222 Neb. 699, 386 N.W.2d 448 (1986). See, also, *In re Estate of Snover*, 4 Neb. App. 533, 548, 546 N.W.2d 341, 352 (1996) ("when a personal representative hires an attorney, the *personal representative* is the attorney's client, not the estate"). Thus, any legal services which Ptak performed in connection with the administration of the estate of Wilma were on behalf of himself as personal representative of the estate.

Swanson argues that while there was no written agreement whereby Ptak would serve as her lawyer, the existence of an attorney-client relationship is implicit from his conduct with respect to the proposed agreement of Fillmore and Wittler to share the estate with Swanson. In this regard, Swanson relies on *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 458-59, 466 N.W.2d 499, 506 (1991), in which we stated:

> "An attorney-client relationship ordinarily rests on contract, but it is not necessary that the contract be express or that a retainer be requested or paid. The contract may be implied from the conduct of the parties. . . . The relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance. . . . In appropriate cases the third element may be established by proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it."

Quoting *Kurtenbach v. TeKippe*, 260 N.W.2d 53 (Iowa 1977).

In *McVaney*, we held that an attorney-client relationship existed in the absence of an express employment agreement when there was evidence of a longstanding relationship between the client and the attorney and there was both general and specific discussion of what action the client wished the attorney to undertake with regard to a specific matter. In this case, there is no evidence that Ptak had ever served as Swanson's attorney. Her primary argument in support of her assertion that there was an implied attorney-client relationship with Ptak was that she

understood that Ptak was advocating for her. This understanding was based upon the fact that Ptak suggested that the division of the estate between Allan's family and Wilma's heirs would be fair and then undertook steps to seek the consent of Fillmore and Wittler to such distribution. Swanson further argues that the $99,000 advance distribution which Ptak made to her from the estate is evidence that he was advocating her position and that his efforts to settle the dispute after it became apparent Fillmore did not intend to sign the agreement demonstrate that Ptak was acting as her attorney. Although Swanson's unilateral belief that Ptak was acting as her attorney may have been sincere, it was based upon a misunderstanding of his duties as personal representative of the estate. We conclude as a matter of law that there are no facts in this record upon which an attorney-client relationship between Ptak and Swanson can be implied.

This does not end the inquiry, inasmuch as our law recognizes that an attorney's duty may extend to a third party if there are "facts establishing a duty." *Landrigan v. Nelson*, 227 Neb. 835, 836, 420 N.W.2d 313, 314 (1988). Accord *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980). However, there are no such facts in this record. We have held that the duty of a lawyer who drafts a will on behalf of a client does not extend to heirs or purported beneficiaries who claim injury resulting from negligent draftsmanship. *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554 (1983); *St. Mary's Church v. Tomek*, 212 Neb. 728, 325 N.W.2d 164 (1982). Here, the basis for extending the lawyer's duty to a third party is even more tenuous than in those cases, given the nature of Swanson's claim to a share of the estate. No lawyer, and particularly not one who serves as the personal representative of an intestate estate, could compel persons who are lawful heirs to share the estate with persons who are not. We therefore conclude that as an attorney, Ptak had no professional duty to secure a gratuitous agreement from Wilma's heirs for the benefit of Swanson.

Negligent Failure to Furnish Accurate Information

As an alternative theory of recovery, Swanson alleges that as an attorney and personal representative of the estate, Ptak had a

duty "as a trustee" to furnish accurate information to Swanson regarding the administration of the estate and her "status as a beneficiary." She further alleges that Ptak breached this duty by providing her with information which he knew or should have known to be inaccurate.

The precise legal underpinning of this theory of recovery is unclear. Swanson cites *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737 (1952), in which this court held that a petition alleged extrinsic fraud sufficient to justify setting aside the probate of a will. No fraud is alleged here. Swanson also relies upon Restatement (Second) of Torts § 323 at 135 (1965), which provides that "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking . . ." if certain conditions are met. Swanson alleges no "physical harm." She also relies on Restatement, *supra*, § 552 (1977), adopted by this court in *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 370, 518 N.W.2d 910, 921 (1994), which creates liability on the part of one who negligently supplies false information " 'for the guidance of others in their business transactions.' " The damages recoverable under this theory of liability are limited to " 'pecuniary loss caused . . . by . . . justifiable reliance upon the information.' " *Id.* at 370, 518 N.W.2d at 921, quoting Restatement, *supra*. Here, Swanson does not contend that Ptak furnished false information for her guidance in any "business transaction," and the damages she claims are not reliance damages, but, rather, the difference between the $99,000 advance she received and the total amount she would have received if Wilma's heirs had agreed to share the estate.

The record reflects that Ptak initially proceeded as personal representative of the estate under the belief, based upon statements made to him by Wittler in 1998, that Fillmore and Wittler would agree to share one-half of the estate with Swanson and other descendants of Allan. In 1999, when Fillmore and Wittler advised Ptak that they would not agree to this division of the estate, Ptak promptly notified Swanson. Fillmore denied that he had ever agreed to share any portion of the estate with Swanson.

These facts do not establish any legal duty on the part of Ptak in his individual capacity which would form the basis of the recovery sought by Swanson in this action.

CONCLUSION

Finding no error in the conclusion of the district court that Ptak, in his individual capacity, owed no legal duty to Swanson, we affirm the judgment of dismissal.

AFFIRMED.

GERRARD, J., not participating.

YVONNE MOONEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ADA I. HAMILTON, DECEASED, APPELLEE, v. GORDON MEMORIAL HOSPITAL DISTRICT, A NEBRASKA POLITICAL SUBDIVISION, DOING BUSINESS AS GORDON COUNTRYSIDE CARE CENTER, APPELLANT.

682 N.W.2d 253

Filed July 2, 2004. No. S-03-311.

1. **New Trial: Appeal and Error.** In reviewing a district court's order granting a new trial, the decision of the trial court will be upheld in the absence of an abuse of discretion.
2. **Trial: Appeal and Error.** One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong.
3. **Trial: Judges: Appeal and Error.** One 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.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON and BRIAN SILVERMAN, Judges. Reversed and remanded with direction.

Lyman L. Larsen, Neil B. Danberg, and Andrew C. McElmeel, of Stinson, Morrison & Hecker, L.L.P., for appellant.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, and Patrick M. Connealy, of Crites, Shaffer, Connealy, Watson & Harford, for appellee.

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

GERRARD, J.

After a bench trial resulting in an unfavorable verdict, Yvonne Mooney, the plaintiff, filed a motion for new trial, based on her allegation that the district court judge had not been fair and impartial. The court granted Mooney's motion for new trial. The primary issues presented in this appeal are whether Mooney's objection to the judge's conduct was timely and, if so, whether Mooney's allegations were sufficient to warrant granting her motion for new trial.

BACKGROUND

Mooney's mother, Ada I. Hamilton, died in 1999 following a fall at the Gordon Community Care Center, where she resided. Mooney, in her capacity as personal representative of her mother's estate, filed an action against the Gordon Memorial Hospital District (Gordon) pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Cum. Supp. 2002), alleging that negligence by Gordon's employees had caused Hamilton's death.

The matter proceeded to a bench trial, after which the court found generally for Gordon, entered judgment in favor of Gordon, and dismissed Mooney's petition. Mooney filed a motion for new trial, which generally listed *all* of the grounds for a new trial set forth in Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002). However, the basis for the motion was specified in the sole piece of evidence offered in support of the motion: Mooney's own affidavit. Because the averments contained in that affidavit are essential to our analysis of the issues presented in this appeal, the substance of the affidavit is set forth below in its entirety.

> THE UNDERSIGNED, being first duly sworn upon oath, deposes and says as follows:
>
> 1. I am the plaintiff in the above-captioned action.
>
> 2. Trial in this matter was held before Judge [Paul] D. Empson on January 8, 9, and 10, 2003.
>
> 3. My attorneys in this matter are Michael J. Javoronok and Patrick M. Connealy.
>
> 4. On Friday, January 10, 2003, Judge Empson had called for a luncheon recess, and I was still in the courtroom with

both of my attorneys when I overheard a conversation initiated by Judge Empson with Attorney Javoronok.

5. Opposing counsel was also present in the courtroom.

6. Judge Empson stated to Attorney Javoronok that he had met Mr. Javoronok's ex-wife, and that she had spoken highly of him. Attorney Javoronok's response was to the effect of, "Oh, that's good."

7. Judge Empson then stated that Mr. Javoronok's ex-wife told him that things just didn't work out for them. Mr. Javoronok advised that he had been the custodial parent of his daughter, and Judge Empson replied "I bet you learned a lot from her." Mr. Javoronok replied that he had learned nurturing and patience.

8. Mr. Javoronok then advised Judge Empson that he was engaged to be married. A strange look came over Judge Empson's face, he became rather animated, and he said, "Well, if you have done anything improper, then you should get down on your knees and ask your fiancee for forgiveness." Mr. Javoronok replied that he had done nothing to warrant such an apology. Judge Empson became even more animated, repeating the same, and then offered to provide what appeared to be marital and sexual counseling to my attorney, Mr. Javoronok, as well as cautioning him about what appeared to be pre-marital sex.

9. At this point, I felt very uncomfortable about Judge Empson and the trial. I left the courtroom before I could hear the remainder of the conversation.

10. I am a Christian, but it troubles me that Judge Empson was asking searching questions of my lawyer in an area that I felt was inappropriate and embarrassing to me.

11. I am concerned that Judge Empson decided the case on something other than the facts. It was clear that my mother was placed in the care of the defendant rest home, they did not care for her and she received catastrophic injuries which hastened her death. I cannot see anyway [sic] that the court could have ruled against me on the above case, unless it was something outside the evidence that was presented in the courtroom.

> 12. I feel that justice was not done, and I was done a disservice by Judge Empson's comments during the trial, particularly when he stated that he would ignore the testimony of our expert, Mary Hollins, and he sat through her videotaped deposition with his eyes primarily closed.
>
> 13. Judge Empson's warnings to Mr. Javoronok concerning sexual impropriety lead me to believe he was judging my attorney and not the facts being presented. His apparent dismissal of Mary Hollins' deposition after argument by Mr. Javoronok further exasperates this concern. Other comments that I cannot fully recall at this time were peppered with smart remarks that made me feel once again that justice was not done, and I did not have a fair and impartial judge.
>
> FURTHER AFFIANT SAITH NOT.

At the hearing on the motion for new trial, Gordon specifically argued that the issues raised by Mooney's affidavit should have been objected to at the time and presented by a timely motion for mistrial. Nonetheless, the court ruled:

> Okay. I'm going to grant the motion. Here's why: I am sure that counsel knows, as Mr. Javoronok knows, I was just yanking his chain. But his client doesn't know that. His client feels like she got ripped, and I take her affidavit to be true.
>
> And so if she thinks she didn't get a fair trial, I want to make sure that she gets a chance to get a fair trial. . . .
>
> Motion for new trial is granted.

Gordon asked that it be allowed to submit its own affidavits. The court permitted Gordon to submit affidavits, although the court indicated that it would not change its ruling. Gordon submitted the affidavit of Andrew McElmeel, counsel for Gordon, who related his recollection of the conversation described in Mooney's affidavit. McElmeel averred, in relevant part, that the conversation was "jovial and light-hearted in nature," that the judge had merely suggested that "the secret of a good marriage was to start with a clean slate and ask for forgiveness for anything done prior to the marriage," that Javoronok had not appeared to be offended by the judge's remarks, and that generally, "[t]he comment was nothing more than good-natured

banter, and appeared to be taken in that vein by everyone who was present."

The record does not reflect that any objection, or motion for mistrial or recusal, was made for any reason during the proceedings, including any of the instances discussed in Mooney's affidavit, prior to the motion for new trial.

The judge entered an order granting the motion for new trial and recused himself. The case was reassigned to another judge, who denied Gordon's motions for reconsideration or to alter or amend the judgment. Gordon filed this timely appeal.

ASSIGNMENTS OF ERROR

Gordon's 13 assignments of error, restated, consolidate to form 5: The district court erred in (1) accepting Mooney's affidavit into evidence, (2) granting a motion for new trial on grounds that had not been raised during the course of the trial, (3) granting a new trial when no prejudice was shown, (4) not assigning the motion for new trial to another judge for disposition, and (5) failing to grant Gordon's motion to reconsider.

STANDARD OF REVIEW

[1] In reviewing a district court's order granting a new trial, the decision of the trial court will be upheld in the absence of an abuse of discretion. *Bowley v. W.S.A., Inc.*, 264 Neb. 6, 645 N.W.2d 512 (2002).

ANALYSIS

[2] We first turn to Gordon's second assignment of error, because our determination in that regard is dispositive of this appeal. As will be explained more fully below, the incidents forming the basis for Mooney's motion for new trial were known to the parties before the cause was submitted to the court for disposition. Yet Mooney made no complaint about the fairness or impartiality of the district court judge until after an adverse judgment was rendered. One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). The court abused its discretion in granting Mooney's motion for new trial when the issue presented by that motion was untimely.

Our disposition of this appeal is controlled by our decision in *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993). In *Wolfe*, a medical malpractice case, a verdict was returned in favor of the defendants, and the district court sustained the plaintiffs' motion for new trial based, in part, on the defendants' improper closing argument. On appeal, we concluded that the court had abused its discretion in granting a new trial when the plaintiffs had not made a timely objection to the alleged impropriety. *Id.* We noted the "controlling principle" that "one may not waive an error, gamble on a favorable verdict, and, upon obtaining an unfavorable result, assert the previously waived error." *Id.* at 343, 506 N.W.2d at 697. Accordingly, we concluded that in order to preserve the alleged misconduct as a ground of appeal, the plaintiffs were required to make an objection no later than the conclusion of the closing argument, and reversed the district court's order granting a new trial. See, also, *Martindale v. Weir*, 254 Neb. 517, 577 N.W.2d 287 (1998); *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

[3] Those principles are equally applicable to the situation presented in the present case. The fact that the alleged misconduct in this case was committed by the trial court, instead of counsel, does not distinguish this situation. "One 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. 403, 405, 440 N.W.2d 686, 688 (1989). In fact, we specifically noted in *Wolfe* that "[i]n point of fact, we do not permit a party to gamble on a favorable result and later complain of a waived error *even where the misconduct spews from the mouth of the trial judge*." (Emphasis supplied.) 244 Neb. at 344, 506 N.W.2d at 697, citing *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984).

Nor is this case distinguished by the fact that this was a bench trial, instead of a jury trial. Mooney was still obligated to make a timely objection to any perceived misconduct by the trial judge, and if the judge's fairness or impartiality was called into question, Mooney should have moved for recusal prior to submitting the case for disposition. See *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995), *disapproved on other grounds, Gibilisco*

v. Gibilisco, 263 Neb. 27, 637 N.W.2d 898 (2002). As previously noted, Mooney made no timely objection or motion based upon the incidents that formed the basis of her motion for new trial. Specifically, Mooney's affidavit discusses a conversation that occurred between the trial judge and counsel during the noon recess on the final day of trial. No mention of this conversation appears in the record prior to submission of the cause. The bill of exceptions shows that after the noon recess, Mooney concluded cross-examination of the defendant's expert witness, and redirect and recross-examination were had. Mooney was herself recalled to the stand for further direct examination. Before the cause was submitted, both parties made motions to dismiss which were denied, and closing arguments were made. In short, the record establishes that Mooney had ample opportunity to object to the court's conduct after the recess, but did not do so.

Mooney's affidavit also claims that the trial judge "stated that he would ignore the testimony of our expert, Mary Hollins, and he sat through her videotaped deposition with his eyes primarily closed." This appears to refer to the judge's remarks, made on the record, which questioned the relevance of the expert's deposition testimony. In response to Gordon's objection to the deposition, the trial judge stated that the evidence was "singularly unhelpful," but that he had been "listening intently" for evidence that was pertinent to the issues presented in the case. In ruling on the objection, the judge informed the parties, "So I'm not going to kick it out, but I'm letting you know how much weight it has. The objection is overruled. It didn't help me much, if at all." Mooney's counsel responded to this ruling by stating, "I suppose we'll argue that later." The judge replied, "Yeah, you can argue it to your heart's content. Well, almost."

We assume, based on our review of the bill of exceptions, that this is the exchange to which Mooney's affidavit referred, although the judge's comments to the parties were directed at the issues presented, and would not appear to call the judge's fairness or impartiality into question. Mooney's counsel, instead of objecting or asking for the judge's recusal, simply declared his intent to argue to the court about why the evidence should be given more weight. This did not preserve or raise any question of bias on the part of the trial judge.

The only other allegation of misconduct contained in Mooney's affidavit is her reference to "[o]ther comments" made by the trial court that "were peppered with smart remarks." Neither Mooney's affidavit, nor the appellee's brief, make any effort to identify for this court what those "smart remarks" might have been. We have nonetheless examined the record in search of those instances, both to determine whether timely objections were made, and to evaluate the possibility of plain error. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004) (plain error may be asserted for first time on appeal or noted by appellate court on its own motion).

We have stated that a trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004); *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). Our application of this objective standard to the record in this case reveals no conduct on the part of the trial judge that would satisfy this standard, much less any comments that were the basis of a timely objection or motion for recusal.

In short, to the extent that we have located references in the record to the incidents forming the basis for Mooney's motion for new trial, we cannot locate any corresponding objection, or motion for recusal or mistrial. Based on *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993), we conclude that the court abused its discretion in granting Mooney's motion for new trial where Mooney was aware of the basis for that motion during trial, gambled on a favorable judgment from the court, and, upon obtaining an unfavorable result, asserted the previously waived error. We conclude that Gordon's second assignment of error has merit and is dispositive of this appeal. Having so concluded, we need not consider Gordon's remaining assignments of error. See *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

CONCLUSION

The district court erred in granting Mooney's motion for new trial after Mooney failed to object during trial to the judge's

alleged misconduct. We reverse the district court's order granting a new trial, and remand the cause with the direction that the district court reinstate the order of judgment of dismissal originally filed on January 27, 2003.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., participating on briefs.

DAVID J. CAMPBELL, APPELLEE, V. CITY OF OMAHA POLICE AND FIRE RETIREMENT SYSTEM BOARD OF TRUSTEES, APPELLANT.

682 N.W.2d 259

Filed July 2, 2004. No. S-03-408.

1. **Administrative Law: Evidence: 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. 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.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Mark E. Novotny and Craig F. Martin, of Lamson, Dugan & Murray, L.L.P., for appellant.

Thomas M. White, Michaela M. White, and C. Thomas White, of White & Wulff, for appellee.

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

STEPHAN, J.

The City of Omaha Police and Fire Retirement System Board of Trustees granted Officer David J. Campbell a disability pension based on a service-connected injury to his T6 vertebra that

occurred in 1993. Campbell filed a petition in error, and the district court for Douglas County determined that the board of trustees erred in calculating the amount of the pension and further erred in basing it solely on the T6 injury. The board of trustees filed this timely appeal.

BACKGROUND

Campbell began his service as an Omaha police officer in 1974. On February 20, 1993, Campbell was injured when his police cruiser, which was parked at the scene of an accident investigation, was struck from the rear by a motorist who lost control of a vehicle while traveling on Interstate 680 in Omaha, Nebraska. Campbell suffered a thoracic compression fracture of his T6 vertebra and a neck injury. Subsequently, he suffered a right shoulder injury and aggravated the neck injury during a struggle to effectuate an arrest on February 14, 2000; an aggravation of the shoulder and neck injuries during shotgun qualification training on August 10; and a further aggravation of the thoracic compression fracture and shoulder and neck injuries during self-defense training on January 2, 2001. He also suffered from hypertension in the years following the 1993 motor vehicle accident. It is generally undisputed that Campbell is no longer physically fit for active duty with the Omaha Police Department.

Campbell filed an action against the City of Omaha under the Americans with Disabilities Act, and a jury returned a verdict in his favor in late 2000. He subsequently perceived that the city was engaging in retaliatory behavior toward him and filed another suit against the city. On December 3, 2001, Campbell and the city entered into a written settlement agreement which provided that Campbell would receive $7,814.17 as "Back Pay," $50,000 as "Front Pay," $200,000 for "Pain and Suffering and Compensatory Damages," and $175,000 in "Attorney Fees." The agreement further provided in relevant part:

> The back pay will be tendered to David Campbell retroactively and applied during the period of February 1, 1999 through December 2000 through the regular City payroll and subject to all normal deductions for taxes and pension benefits.

> The front pay will be tendered to David Campbell in thirteen (13) equal installments through the regular City payroll (in addition to his current salary) and subject to all normal deductions for taxes and pension benefits, commencing on December 10, 2001, or the first pay period thereafter, and continuing each following pay period for a total of thirteen (13) pay periods. The City agrees that the front pay described above represents the amount a Sergeant in the Omaha Police Department could earn in a fiscal year in addition to his normal salary through overtime and other special pay for testimony, training, etc.
>
> The parties agree that David Campbell, by virtue of the decision not to promote him to Sergeant, was denied the opportunity to earn such additional monthly compensation. Therefore, as part of the settlement and compromise of this litigation the City of Omaha and David Campbell specifically agree that the front and back pay shall be considered to be "monthly compensation" included in the amounts used to calculate his pension benefits as defined in Omaha Municipal Code Chapter [2]2, Art. III, Section 22-76 (1996) and *Brunken v. Board of Trustees of City of Omaha Police and Fire Retirement System*, 261 Neb. 626, 624 N.W.2d 629 (2001). It is in reliance on this agreement that David Campbell agrees to retire as is provided for subsequently in this document.

Arguments presented to the board of trustees further clarified that the settlement agreement was intended to acknowledge that Campbell was illegally passed over for sergeant and to compensate him as he would have been had he been lawfully promoted.

On April 12, 2002, Campbell filed an application with the board of trustees for a service-connected disability pension due to hypertension, neck disorder, T6 compression fracture, and right shoulder disorder. On June 20, the board of trustees heard the application and received evidence in support thereof, but deferred ruling on it for 30 days, or until July 18. At the July 18 meeting of the board of trustees, Campbell reoffered all of the exhibits he originally offered at the June 20 hearing. At the close of the July 18 meeting, the board of trustees again deferred ruling on the application. Campbell thereafter successfully sought

a writ of mandamus ordering the board of trustees to make a decision on his application at its August 15 meeting.

During the August 15, 2002, hearing, Campbell again offered into evidence all exhibits offered at the previous hearings, as well as a transcript of the July 18 hearing. After considering the evidence before it and various options for how to calculate Campbell's pension benefit, the board of trustees determined that Campbell's pension benefit would be calculated based solely on his salary as a patrolman, without considering the additional amounts he received monthly pursuant to his settlement agreement with the city. The board of trustees further determined that the sole basis of the disability pension was the injury Campbell received to his T6 vertebra in the 1993 accident.

Campbell filed a petition in error in the district court for Douglas County, contending that the board of trustees improperly refused to calculate his pension benefit based upon his monthly compensation received pursuant to the settlement agreement and further erred in relating his disability solely to the injury suffered to his T6 vertebra in the 1993 accident. The district court concluded that the board of trustees erred in calculating Campbell's pension and in determining the disabling injury, and remanded the cause to the board of trustees with directions to make an appropriate award. The board of trustees filed this timely appeal.

ASSIGNMENTS OF ERROR

The board of trustees assigns, restated, that the district court erred in (1) finding that the board of trustees should have considered the settlement between Campbell and the City of Omaha in calculating Campbell's disability benefit and (2) finding that the board of trustees incorrectly determined the basis for Campbell's disability benefits.

STANDARD OF REVIEW

[1] 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. *Cornett v. City of Omaha Police & Fire Ret. Sys.*, 266 Neb. 216, 664 N.W.2d 23

(2003). 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. *Id.*

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Brunken v. Board of Trustees*, 261 Neb. 626, 624 N.W.2d 629 (2001).

ANALYSIS

Calculation of Disability Benefit

In its first assignment of error, the board of trustees contends that the district court erred in finding that its calculation of the amount of Campbell's disability pension benefit was improper. This assignment requires us to examine the evidence offered before the board of trustees and the applicable sections of the Omaha Municipal Code.

The record includes medical records and copies of relevant portions of the Omaha Municipal Code which Campbell submitted to the board of trustees in support of his application for a service-connected disability pension. Chapter 22, article III, of the Omaha Municipal Code is entitled "Police and Fire Retirement System." The award of disability pensions is governed by Omaha Mun. Code, ch. 22, art. III, § 22-78 (1996), which provides in relevant part:

> 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, equal to 50 percent of such member's *average final monthly compensation.* In addition thereto, such annuitant shall be paid medically necessary covered services which may be incurred as a result of such sickness or injury.

(Emphasis supplied.) Omaha Mun. Code, ch. 22, art. III, § 22-63 (1995) defines "[a]verage final monthly compensation" as used

in article III as "[t]he member's highest average monthly compensation during any consecutive 26 pay periods, during the member's last five years of service as a member of the system for which service credit has been earned."

The dispute in this case is whether the board of trustees erred in ignoring Campbell's settlement agreement with the city and the resulting increase in his monthly pay when determining his "average final monthly compensation." We addressed a similar issue in *Brunken, supra*, and both parties rely on *Brunken* to support their arguments. In that case, Donald E. Brunken, an Omaha firefighter, applied for general retirement benefits under Omaha Mun. Code, ch. 22, art. III, § 22-76 (1996). Section 22-76 is the provision for age-related retirement, and its provisions are very similar to § 22-78. Most notably, § 22-76 provides in relevant part that participants in the city's fire and police systems " 'shall be entitled, upon . . . retirement, to a monthly service retirement pension payable each month for the remainder of [his or her] natural life after retirement equal to [a certain percentage] of the member's *highest average monthly compensation*' during any year of the member's last 5 years of service." (Emphasis supplied.) *Brunken*, 261 Neb. at 627, 624 N.W.2d at 631. Brunken argued that the board of trustees erred in calculating his retirement pension because it refused to consider a one-time, lump-sum payment he received in 1995 of $7,117.38, representing retroactive wages from 1994, in his overall total income for the year 1995. The retroactive wage payment was a result of contract negotiations between the firefighters and the city.

In analyzing Brunken's claim, we determined that although the backpay was part of his total compensation for the year 1995, it was not "monthly compensation" as contemplated by § 22-76 because it was a one-time payment, not "regular compensation received every month." *Brunken v. Board of Trustees*, 261 Neb. 626, 632, 624 N.W.2d 629, 634 (2001). We thus determined that the " 'happenstance' " receipt of the backpay in 1995 did not alter Brunken's regular "monthly compensation" in that year and that thus, the board of trustees did not err in calculating Brunken's retirement benefit without reference to the lump-sum backpay. *Id.*

In this action, the board of trustees argues that Campbell's receipt of the moneys outlined in his settlement agreement with

the city is similarly only happenstance. In addition, the board of trustees contends that it should not be bound by the settlement agreement, to which it was not a party, when calculating Campbell's disability pension benefits.

As an initial matter, we note that the clear language of § 22-78 does not give the board of trustees discretion in calculating pension benefits. The board of trustees' sole duty under § 22-78 is to award a disability pension based upon a member's "average final monthly compensation." Thus, if Campbell's agreement with the city results in a higher average monthly compensation than he would otherwise receive, the board of trustees is bound to award him a disability pension based upon that amount regardless of whether it was privy to the settlement agreement. The issue is not whether the board of trustees is bound by Campbell's settlement with the city, but, rather, whether certain funds which Campbell actually received pursuant to the settlement were part of his "monthly compensation" as that term is defined under the applicable ordinance.

In this respect, the instant case is distinguishable from *Brunken*, which involved a single lump-sum payment for backpay. The settlement agreement at issue in this case specifically and clearly provides that the front pay awarded to Campbell was to be disbursed through the regular city payroll in regular monthly installments. Moreover, it is equally clear from the terms of the settlement agreement that its purpose was to put Campbell in the position he would have been in had the city lawfully promoted him to the rank of sergeant, and thus the fact that the additional payments were regularly awarded on a continuing monthly basis for 13 months was hardly happenstance. Because Campbell was thus receiving regular monthly compensation in an amount greater than that considered by the board of trustees in calculating his pension benefit, its calculation was not based upon sufficient relevant evidence and the district court correctly concluded that the board of trustees erred in making its calculations.

Basis of Disability Pension

In its second assignment of error, the board of trustees contends that the district court erred in finding that there was not sufficient relevant evidence to support its decision to base the

disability pension on Campbell's T6 injury. Campbell requested a pension based on disability for "Hypertension, Neck Disorder, Right Shoulder Disorder, and T-6 Compression Fracture." According to the transcript of the August 15, 2002, meeting, the board of trustees awarded Campbell a "service-connected disability for T6." The district court found that the board of trustees erred in not awarding the disability pension based also on "various physical conditions [Campbell] incurred while in the course of duty after February 20, 1993." The basis of the disability pension is significant because § 22-78 provides that the disabled member will be paid, in addition to the disability pension, for "medically necessary covered services which may be incurred as a result of" the injury forming the basis of the disability pension.

The board of trustees argues in its brief that there is sufficient relevant evidence in the record to support its award of the disability pension based solely on the 1993 injury. Notably, however, the record clearly reveals that the disability pension was not based on "the 1993 injury," but, rather, on only the T6 injury which Campbell sustained in the 1993 motor vehicle accident. It appears that the board of trustees simply ignored substantial evidence in the record that Campbell suffered other service-related injuries in that accident and afterward.

The board of trustees relies heavily upon a June 10, 2002, "DISABILITY EVALUATION REPORT" submitted by Dr. Dean K. Wampler. However, in doing so, the board of trustees appears to mischaracterize the findings in this report. A review of the report reveals that Wampler found nine "*Diagnoses*" for Campbell:

> 1. Chronic Cervical Pain (connected to 1993 work injury).
> 2. Chronic Headaches (connected to 1993 work injury).
> 3. Interscapular Thoracic Pain (caused by T6 compression deformity in 1993 injury).
> 4. Right Shoulder Impingement and AC Joint Arthritis (alleged due to work injury of 2/00).
> 5. Bilateral Upper Extremity Paresthesia (cause unknown).
> 6. Past History of Lumbar Strain (cause not evaluated).
> 7. Hypertension (cause *alleged* to work related stresses).

8. Situational Anxiety and Single Panic Attack (alleged to work-related stresses).

9. Cervical Degenerative Spine Disease (condition of life).

In his "*Treatment Suggestions*" following his diagnoses, Wampler noted that Campbell remained symptomatic for *all* of his conditions. In stating his prognosis, Wampler concluded that Campbell's "neck and upper back" symptoms would remain largely unchanged over time and that it was unknown whether his high blood pressure could be controlled adequately. Finally, in assessing Campbell's "*Work Abilities*," Wampler concluded:

> Mr. Campbell has conditions that make him medically unsuitable for many duties of an Omaha Police Officer. Limitations resulting from his medical conditions include restriction from potentially combative suspects through arrests or interrogation. More importantly, his perceived level of stress and its aggravation to his high blood pressure will be a problem in many circumstances, including office work.

Wampler stated that Campbell's hypertension "requires continuous medication treatment."

Taken as a whole, Wampler's report does not constitute sufficient relevant evidence to support the board of trustees' decision to limit the basis of Campbell's disability to only the T6 compression fracture sustained in 1993. Notably, Wampler diagnosed Campbell with injuries related to the 1993 accident other than the T6 injury, as well as other injuries related to subsequent events. Additional evidence in the record further documents those injuries and the fact that they are service related. Moreover, Wampler's report puts significant weight upon the disabling effects of Campbell's hypertension, which is attributed by Wampler to general work stresses and is not specific to either the 1993 accident or the T6 compression fracture. Wampler's report, therefore, does not support the board of trustees' position. Rather, it establishes that Campbell's inability to continue work as a police officer, and thus his disability, is based on various conditions, including those arising from the 1993 accident and his subsequent service-related injuries and conditions. For these reasons, the district court correctly reversed the board of trustees' award of a disability based solely on the T6 injury.

CONCLUSION

The board of trustees has no discretion under the Omaha Municipal Code to determine the amount of disability pension that should be awarded to a retirement system member. Instead, it is required to award a disability pension based upon the member's "average final monthly compensation" as that term is defined by § 22-63. Because Campbell was paid additional compensation pursuant to his settlement with the city in regular monthly installments, the board of trustees erred in disregarding these amounts in calculating his final monthly compensation. Moreover, the board of trustees' decision to award the disability pension based solely on the 1993 T6 compression fracture is not supported by sufficient relevant evidence, as the record clearly establishes that Campbell's disability and resulting lack of fitness for duty are due to this and other service-related injuries and illnesses. For the foregoing reasons, we affirm the judgment of the district court reversing the decision of the board of trustees and remanding the cause to the board of trustees for recalculation of Campbell's disability retirement benefits in a manner consistent with its opinion.

AFFIRMED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. LUIS FERNANDO-GRANADOS, ALSO KNOWN AS LUIS VARGAS, APPELLANT.

682 N.W.2d 266

Filed July 2, 2004. No. S-03-471.

1. **Motions to Suppress: Miranda Rights: Waiver: Proof.** Where suppression of a statement is sought based upon a claimed violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the State bears the burden of proving waiver by a preponderance of the evidence.
2. **Constitutional Law: Motions to Suppress: Self-Incrimination: Waiver: Appeal and Error.** On appellate review of a trial court's ruling on a motion to suppress a custodial statement based upon a claimed inadequacy of *Miranda* warnings, findings of fact as to the warnings given are reviewed for clear error, and the determination of whether such warnings were sufficient to form the basis of a knowing and intelligent waiver of the Fifth Amendment privilege against compulsory self-incrimination is reviewed de novo.

3. **Expert Witnesses.** The standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), require proof of the scientific validity of principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and reliability of that opinion.
4. **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.
5. **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 the judicial system.
6. **Courts: Expert Witnesses.** Under the framework set out in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the trial court must act as a gatekeeper to ensure the evidentiary relevance and reliability of the expert's opinion. This entails a preliminary assessment of 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.
7. ____: ____. In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that 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.
8. ____: ____. Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), expert evidence is admissible so long as foundation is presented to satisfy the court of the validity of the theory or methodology underlying the proffered opinion.
9. ____: ____. It is not enough for the trial court to determine that an expert's methodology is valid in the abstract. The trial court must also determine if the witness has applied the methodology in a reliable manner.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

STEPHAN, J.

After a bench trial, Luis Fernando-Granados, also known as Luis Vargas, was convicted of one count of first degree murder and one count of use of a deadly weapon to commit a felony. He was sentenced to life in prison on the first degree murder conviction and to 10 to 20 years' incarceration on the weapon conviction, the sentences to be served consecutively. He perfected this appeal in which he contends that the district court erred in denying his motion to suppress statements he made to police because he was inadequately advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prior to making the statements. He also contends that the district court erred in receiving certain DNA evidence at his trial.

I. BACKGROUND

On Sunday, May 26, 2002, the body of Mindy Schrieber was found in the parking lot of a restaurant in Douglas County where she was employed as a manager. Schrieber had been responsible for closing the restaurant on the evening of May 25. Investigators at the crime scene observed a tire tread pattern on the curb near the location where Schrieber's body was found and on the body itself. Other markings on the body were found to be consistent with markings on the oil pan of a Ford Escort automobile. The cause of death was determined to be multiple stab wounds and blunt trauma consistent with being struck by a motor vehicle.

Fernando-Granados and his girl friend were living together in May 2002. Fernando-Granados had been employed as a cook at the same restaurant where Schrieber had worked. Fernando-Granados' girl friend testified that on May 25, Fernando-Granados left their residence with Victor Hernandez in a Ford Escort owned by Hernandez. Fernando-Granados returned at approximately 3 o'clock the next morning, and on the following day, Fernando-Granados and his girl friend made a downpayment of $600 on a used car. Fernando-Granados made the payment in $100 bills. His girl friend learned of the homicide from news reports and on June 5, called Crimestoppers to leave an

anonymous tip that Hernandez may have been involved. On June 6, Fernando-Granados' girl friend found Schrieber's checkbook and driver's license hidden in a box of crackers in a kitchen cupboard of the residence she shared with Fernando-Granados.

On June 5, 2002, Omaha police notified the Douglas County Sheriff's Department that they were holding Fernando-Granados on an unrelated charge. Deputy Robert Jones and Det. John Pankonin interviewed Fernando-Granados at Omaha police headquarters on that day. Prior to this interview, Fernando-Granados was advised of his *Miranda* rights, in Spanish, from a form utilized by the sheriff's office. He indicated in Spanish that he understood the warnings and agreed to speak to the officers. During an interview that lasted approximately 1 hour, Fernando-Granados denied any involvement in the death of Schrieber.

On June 6, 2002, Hernandez implicated Fernando-Granados in the homicide. Deputies reinterviewed Fernando-Granados later that same day. Prior to this second interview, he was again advised of his rights in Spanish using the same advisory form and again indicated that he understood and agreed to give a statement. During this second interview, Fernando-Granados admitted that he killed Schrieber in the course of robbing the restaurant where they had worked. Prior to trial, Fernando-Granados filed a motion to suppress the statements which he gave to law enforcement officers. The district court denied the motion.

Fernando-Granados also filed a pretrial motion in limine to exclude evidence of DNA testing and the results of such testing. A hearing was conducted on whether the evidence was admissible under the standards articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). At the conclusion of the hearing, the court overruled the motion in limine.

Fernando-Granados waived his right to a jury trial, and a bench trial was conducted on March 20 and 21, 2003. At trial, the State offered the statements Fernando-Granados made to law enforcement officers and DNA evidence relating to blood found on a $1 bill taken during the robbery and on a portion of the wheel well of the Ford Escort owned by Hernandez. Fernando-Granados renewed the objections asserted in his pretrial motions, and the court overruled the objections and received the evidence.

Additional facts will be included in our analysis of the issues presented for appellate review.

II. ASSIGNMENTS OF ERROR

Fernando-Granados assigns, restated, that the trial court committed reversible error (1) by denying his motion to suppress his statements because the rights advisory form written in Spanish did not conform to the requirements established by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and (2) by admitting evidence and testimony concerning DNA testing, analysis, and results because the State failed to meet the foundational requirements of *Daubert, supra.*

III. ANALYSIS

1. Denial of Motion to Suppress

(a) *Miranda v. Arizona*

The Fifth Amendment to the Constitution of the United States provides in part that no person "shall be compelled in any criminal case to be a witness against himself." This constitutional privilege against compulsory self-incrimination "is also protected by the Fourteenth Amendment against abridgment by the States." *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

In *Miranda*, the U.S. Supreme Court specifically addressed the application of the Fifth Amendment to interrogation of persons held in the custody of law enforcement agencies. The Court held in *Miranda* that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. Specifically, the Court in *Miranda* held that

> when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise

> of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

384 U.S. at 478-79. The Court further held that such warnings and waiver "are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement" made by a defendant in police custody. 384 U.S. at 476. *Miranda* announced a "constitutional rule" which "requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored." *Dickerson v. United States*, 530 U.S. 428, 442, 444, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

(b) Suppression Hearing

[1] In this case, Fernando-Granados filed a pretrial motion seeking to suppress "any and all statements obtained from him by members of the Douglas County Sheriff's Department or members of the FBI on or about June 7, 2002." The bases for his motion included that the statements were obtained "without properly advising him of his right to counsel, and his right against compulsory self-incrimination" and that he "did not make a knowing, voluntary and intelligent waiver of his right to counsel, and his right against compulsory self-incrimination." Where, as in this case, suppression of a statement is sought based upon a claimed violation of *Miranda*, the State bears the burden of proving waiver by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed.

2d 473 (1986); *Lego v. Twomey*, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972).

The State called Jones, Pankonin, and Gilberto Balli as witnesses at the suppression hearing. Jones was a deputy for the Douglas County sheriff's office, and Pankonin worked as a detective for that office. On June 5, 2002, they interviewed Fernando-Granados and three other individuals at the Omaha central police station in connection with the investigation of the death of Schrieber. The interviews were conducted by Pankonin. Jones, who is fluent in Spanish, assisted with translation where necessary.

At the beginning of the June 5, 2002, interview, Jones and Pankonin ascertained that Fernando-Granados spoke both English and Spanish. It was agreed that the interview would be conducted in English and that Jones would translate it into Spanish if necessary. Before the interview began, Jones advised Fernando-Granados of his rights utilizing a "Rights Advisory Form (Spanish)" bearing the letterhead of the Douglas County Sheriff's Department. The form consisted of six questions printed in Spanish:

> Q. Le hago intender que yo soy oficial de la policia. ¿Usted entiende eso?
>
> Q. Usted tiene el derecho de quedarse callado y no hacer ningún comentario ni contestar ninguna de mis preguntas. ¿Usted entiende eso?
>
> Q. Cualquier cosa que usted diga se puede usar, y se usará en contra de usted en la corte. ¿Usted entiende eso?
>
> Q. Usted tiene el derecho de consultar con un abogado y tener presente al abogado con usted durante las preguntas. ¿Usted entiende eso?
>
> Q. Si usted no tiene el dinero para emplear a un abogado, la corte puede nombrar uno par que lo representa. ¿Usted entiende eso?
>
> Q. Entendiendo sus derechos en esta situación, ¿esta usted despuesto a hacer una declaración conmigo ahora?

The form contained a blank space beneath each question in which the answer was to be written. After Jones read each question aloud in Spanish, Fernando-Granados indicated that he understood and Jones wrote "si" in the corresponding space on

the form. Fernando-Granados then initialed each "si" response and signed the form.

The actual interview was conducted in English, although Fernando-Granados requested that a few questions be rephrased in Spanish. During this interview, which lasted approximately 1 hour, Fernando-Granados did not request a lawyer or express an unwillingness to talk to the officers. He denied any involvement in the robbery of the restaurant or the Schrieber homicide.

After obtaining additional information which implicated Fernando-Granados in the crimes, officers interviewed him a second time on June 6, 2002. On this occasion, Pankonin was accompanied by Balli, a special agent with the Federal Bureau of Investigation (FBI) assigned to its Omaha office. Balli is fluent in Spanish and certified by the FBI as a Spanish speaker. Balli conducted the interview after first advising Fernando-Granados of his rights, in Spanish, utilizing another copy of the same form which had been used in the first interview. Balli testified that he read the rights to Fernando-Granados from the form. Fernando-Granados gave affirmative responses to each question and signed the form. Balli ascertained from Fernando-Granados that he would be more comfortable speaking in Spanish, so he conducted the interview in that language, although at times during the interview, Fernando-Granados made comments in English. After initially denying involvement, Fernando-Granados admitted committing the robbery and homicide. All three officers involved in the two interviews denied making any threats, promises, or inducements to Fernando-Granados, and testified that he appeared willing to speak to them and did not request a lawyer.

During the suppression hearing, both Jones and Balli translated the substantive content of the rights advisory form from Spanish to English. The two substantially agreed that the translation of the first through fourth and sixth questions, with the English translation noted in brackets, was as follows:

> Le hago intender que yo soy oficial de la policia. ¿Usted entiende eso? ["I will have you understand that I am an officer or agent of the police. Do you understand that?"]
>
> . . . Usted tiene el derecho de quedarse callado y no hacer ningún comentario ni contestar ninguna de mis preguntas. ¿Usted entiende eso? ["You have the right to remain silent

> and not make any statements nor answer my questions. Do you understand that?"]
>
> . . . Cualquier cosa que usted diga se puede usar, y se usará en contra de usted en la corte. ¿Usted entiende eso? ["Anything you make can be used against you and will be used against you in court. Do you understand that?"]
>
> . . . Usted tiene el derecho de consultar con un abogado y tener presente al abogado con usted durante las preguntas. ¿Usted entiende eso? ["[Y]ou have the right to consult with a lawyer and have a lawyer present with you during questioning. Do you understand this?"]
>
> . . . .
>
> . . . Entendiendo sus derechos en esta situación, ¿esta usted despuesto a hacer una declaración conmigo ahora? ["Understanding your rights in this situation are you willing to make a statement with me now?"]

During direct examination, Jones and Balli were questioned concerning the fifth rights advisement on the form, which provided, "Si usted no tiene el dinero para emplear a un abogado, la corte puede nombrar uno par que lo representa. ¿Usted entiende eso?" Both testified that this advisement provided that if the suspect did not have money to hire an attorney, the court "will appoint" one. On cross-examination, however, both conceded that by utilizing the Spanish word "puede," the advisement did not say "will," but, rather, that the correct translation was "the court may" or the court "has the ability to" appoint a lawyer.

Fermin Garcia testified on behalf of Fernando-Granados at the hearing on the motion to suppress. Garcia is a professor of Spanish language and literature at the University of Nebraska at Omaha. Garcia translated the fifth advisement to provide:

> "If you don't have money to employ a lawyer, the court," and this is the difficult thing, puede, p-u-e-d-e, could be translated into could, could be — be able to name or would name, and also "may" is implied with that puede. So the court could or be able to or may name one, one lawyer to represent, to represent the person.

He stated that in his opinion, the language was ambiguous because "it implies that it might not happen. It's not said clearly that he or she will get one — somebody to represent the person.

It implies that it could happen. So it leaves the person in doubt that may not have one to represent that person." Garcia further testified that the Spanish language rights advisement form utilized by the FBI uses language which, translated into English, states: "If you, the person, cannot pay the expenses of a lawyer, one will be assigned before initiating the interrogation. And if you desire that way, if you so desire."

In its order denying the motion to suppress, the district court found that Fernando-Granados

> was told in his native language that he had a right to remain silent, that anything he said could be used against him in court, that he had a right to speak to an attorney and have an attorney present during questioning. He was further advised that if he did not have the money to pay for a lawyer the Court [could, may, can] had the ability to appoint one for him.

The district court further found that "[a]t no time during the interviews did [Fernando-Granados] indicate he did not understand or comprehend what was going on. He never indicated he wanted an attorney or could not understand what was being said about the lawyer." Based upon these findings of fact, the district court concluded that Fernando-Granados made "a knowing, voluntary, and intelligent waiver of his rights" and overruled his motion to suppress.

(c) Standard of Review

Although the motion to suppress was based upon alternative grounds, in this appeal, Fernando-Granados contends that the district court erred in denying it for a single reason; namely, that the advisements given to him in Spanish did not conform to the requirements of *Miranda* because they did not inform him that an indigent suspect "will be" provided an attorney at no cost if he cannot afford counsel. He makes no claim on appeal that the statements should have been suppressed as the product of threats, promises, or inducements. Compare *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004) (applying clearly erroneous standard of review to district court's determination that defendant's statement was voluntarily made and not product of promise of leniency).

We have not previously articulated the standard by which we review the denial of a motion to suppress a defendant's custodial statement based solely upon a claim that the *Miranda* warnings given were incomplete or otherwise inadequate to effectuate a knowing waiver of the defendant's Fifth Amendment privilege. Appellate review of such a claim involves two distinct inquiries. First, what warnings were actually given before the statement was obtained? Second, were such warnings legally sufficient under *Miranda* to form the basis of a knowing waiver of the privilege against compulsory self-incrimination? The first inquiry involves review of the factual determinations made by the district court, while the second requires consideration of whether the district court correctly assessed the legal consequences which flow from its factual determinations.

In *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995), the U.S. Supreme Court held that whether a suspect is "in custody" and therefore entitled to *Miranda* warnings presents a mixed question of law and fact. Based upon this holding, we concluded in *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000), that appellate review of this Fifth Amendment issue should be governed by the two-stage standard set forth in *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), with respect to mixed questions of law and fact in a Fourth Amendment context. See, also, *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). We therefore held in *Burdette* that in reviewing a motion to suppress statements to determine whether an individual was "in custody" for purposes of *Miranda*, findings of fact as to the circumstances surrounding the interrogation are reviewed for clear error, and the determination of whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave is reviewed de novo.

Other appellate courts have applied this two-stage standard in reviewing a trial court's determination regarding a waiver of *Miranda* rights. See, e.g., *People v. Platt*, 81 P.3d 1060 (Colo. 2004) (holding trial court's determination of whether there has been valid waiver of *Miranda* rights involves both factfinding and law application; former entitled to deference if supported by competent evidence, and latter reviewed de novo on appeal);

State v. Jaco, 130 Idaho 870, 873, 949 P.2d 1077, 1080 (Idaho App. 1997) (factual findings reviewed for substantial evidence, and " 'free review of the lower court's decision as to whether the constitutional requirements have been satisfied in light of the facts found,' " quoting *State v. Carey*, 122 Idaho 382, 834 P.2d 899 (Idaho App. 1992)); *State v. Lockhart*, 830 A.2d 433, 442 (Me. 2003) ("[a]lthough the suppression court's factual findings are reviewed for clear error, the issue of whether rights under *Miranda* have been knowingly and intelligently waived is reviewed de novo"); *State v. Dominguez-Ramirez*, 563 N.W.2d 245, 252 (Minn. 1997) ("[o]n appeal, this court will independently determine, on the basis of the facts as found by the district court, whether the state has shown by a fair preponderance of the evidence that the waiver was knowing, intelligent, and voluntary"); *State v. Barrera*, 130 N.M. 227, 234, 22 P.3d 1177, 1184 (2001) ("we review the trial court's findings of fact for substantial evidence and review de novo the ultimate determination of whether a defendant validly waived his or her *Miranda* rights prior to police questioning"); *State v. Ramirez-Garcia*, 141 Ohio App. 3d 185, 187, 750 N.E.2d 634, 636 (2001) (factual findings supported by evidence are accepted, and based on those facts, "we then must determine 'without deference to the trial court, whether the court has applied the appropriate legal standard,' " quoting *State v. Anderson*, 100 Ohio App. 3d 688, 654 N.E.2d 1034 (1995)). Contra *Jackson v. Com.*, 266 Va. 423, 432, 587 S.E.2d 532, 540 (2003) ("[w]hether the waiver was made knowingly and intelligently is a question of fact that will not be set aside on appeal unless plainly wrong").

[2] We therefore hold that on appellate review of a trial court's ruling on a motion to suppress a custodial statement based upon a claimed inadequacy of *Miranda* warnings, findings of fact as to the warnings given are reviewed for clear error, and the determination of whether such warnings were sufficient to form the basis of a knowing and intelligent waiver of the Fifth Amendment privilege against compulsory self-incrimination is reviewed de novo.

(d) Resolution

Advising persons in police custody of what "have come to be known colloquially as '*Miranda* rights' " prior to interrogation is

"embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 435, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). "*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored." *Dickerson*, 530 U.S. at 442. "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 170, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). A " 'defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly, and intelligently.' " *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986), quoting *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The waiver inquiry has "two distinct dimensions":

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran, 475 U.S. at 421. In this case, we focus on the second dimension of the waiver inquiry to determine if the advisements given were sufficient to establish a knowing and intelligent waiver of Fernando-Granados' Fifth Amendment privilege.

It is undisputed that Fernando-Granados was advised, in his native language, that he had a right to remain silent and that anything he said could be used against him in a court of law. He was thus made aware "not only of the privilege, but also of the consequences of forgoing it." See *Miranda*, 384 U.S. at 469. Likewise, it is undisputed that Fernando-Granados was advised, in Spanish, that he had a right to consult with a lawyer and to have a lawyer present during interrogation. The Court in *Miranda* held this right to be "indispensable to the protection of

the Fifth Amendment privilege" delineated in its opinion. See 384 U.S. at 469.

The issue presented for our review is whether Fernando-Granados was adequately warned of the remaining "*Miranda* right," i.e., that "if he is indigent a lawyer will be appointed to represent him." See 384 U.S. at 473. The Court in *Miranda* reasoned:

> Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

Id.

With respect to this warning, the district court made a factual determination that Fernando-Granados was advised that "if he did not have the money to pay for a lawyer the Court [could, may, can] had the ability to appoint one for him." Fernando-Granados does not assign nor do we find clear error in this finding of historical fact, and we therefore accept it as true and proceed with our independent evaluation of whether this advisement, together with those that preceded it, was legally sufficient to effectuate an intelligent and knowing waiver of Fernando-Granados' Fifth Amendment privilege under *Miranda*.

Other courts have held that a defendant's statement must be suppressed under *Miranda* if there is a complete failure to advise of the right of an indigent person to appointment of counsel. See, e.g., *United States v. Fox*, 403 F.2d 97, 100 (2d Cir. 1968) (holding defendant's statement inadmissible where "[n]othing at all was said to [defendant] about his right to have an attorney appointed prior to questioning if he could not afford one, as *Miranda* requires"); *Thompson v. State*, 595 So. 2d 16, 17 (Fla. 1992) (holding "police must somehow communicate to the accused the basic idea of the right to consult a free attorney

before being questioned"); *State v. Ford*, 713 So. 2d 1214 (La. App. 1998) (finding error in failing to suppress statement where there was no evidence that defendant was advised of his right to court-appointed counsel if he was indigent). The instant case is distinguishable from the foregoing, however, in that prior to any questioning, Fernando-Granados was given an advisement on the subject of court-appointed counsel. His contention is that this advisement was legally inadequate because it "indicates a mere possibility, instead of an absolute right to have appointed counsel." Brief for appellant at 9.

The U.S. Supreme Court has "never insisted that *Miranda* warnings be given in the exact form described in that decision." *Duckworth v. Eagan*, 492 U.S. 195, 202, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989). The "'"rigidity" of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant,' and . . . 'no talismanic incantation [is] required to satisfy its strictures.'" *Duckworth*, 492 U.S. at 202-03, quoting *California v. Prysock*, 453 U.S. 355, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981). A court "need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. *The inquiry is simply whether the warnings reasonably 'conve*[*y*] *to* [*a suspect*] *his rights as required by* Miranda.'" (Emphasis supplied.) *Duckworth*, 492 U.S. at 203, quoting *Prysock, supra.*

Fernando-Granados relies principally upon three cases in support of his argument that this standard was not met. In *U.S. v. Higareda-Santa Cruz*, 826 F. Supp. 355 (D. Or. 1993), a defendant was purportedly advised of his *Miranda* rights through the use of a card on which the rights were printed in Spanish. After making a specific finding that the defendant was never in fact shown "the Spanish *Miranda* card," the court noted in dicta that even if the card had been shown, its statement of the defendant's rights was inadequate. *Higareda-Santa Cruz*, 826 F. Supp. at 359. As translated, the card stated: "'In case that you do not have money, you have the right to petition an attorney from the court.'" *Id.* at 359-60. Without referring to the *Duckworth* standard, the court reasoned that this statement implied both that the defendant must be completely without money before an appointed attorney could be obtained and that the defendant might not even then obtain counsel because he had to somehow

"petition" the court for an attorney. *Higareda-Santa Cruz*, 826 F. Supp. at 360.

Fernando-Granados also relies upon *State v. Ramirez*, 135 Ohio App. 3d 89, 732 N.E.2d 1065 (1999), and *People v. Diaz*, 140 Cal. App. 3d 813, 189 Cal. Rptr. 784 (1983). In *Ramirez*, the court concluded that attempts to advise the defendant of his *Miranda* rights failed due to a poor Spanish translation which utilized a term that meant " 'right hand side' " instead of " 'legal right,' " and also did not inform the defendant that anything he said could be used against him and that "he had the right to an attorney free of charge during all stages of questioning." *Ramirez*, 135 Ohio App. 3d at 94-95, 732 N.E.2d at 1068-69. In *Diaz*, the court stated in dicta that a warning stating that " '[i]f you cannot *get* a lawyer, one can be named before they ask you questions' " did not comply with *Miranda* because the defendant "was never advised that he had the right to appointed counsel if he could not *afford* one." 140 Cal. App. 3d at 822, 824, 189 Cal. Rptr. at 789-90.

The State argues that the facts in *Duckworth v. Eagan*, 492 U.S. 195, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989), demonstrate the degree of grammatical latitude which may be taken with respect to the *Miranda* warnings. After being advised of his right to remain silent, the consequences of forgoing that right, and his right to counsel before and during any interrogation, the defendant was advised that he had the right to the advice and presence of a lawyer even if he could not afford to hire one. Then, police informed him, " '*We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.*' " *Duckworth*, 492 U.S. at 198. The Court of Appeals for the Seventh Circuit held that because this statement conveyed the impression that the suspect would be entitled to appointment of counsel only at some point after interrogation, the warning was constitutionally inadequate. Viewing the warnings in their totality, the U.S. Supreme Court held that they reasonably conveyed the suspect's rights as required by *Miranda*, noting that "*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." *Duckworth*, 492 U.S. at 204.

In *U.S. v. Soria-Garcia*, 947 F.2d 900 (10th Cir. 1991), the court applied the *Duckworth* rationale to a *Miranda* warning which was given in Spanish. One of the arresting officers testified that the English translation was: " 'If you don't have the money to employ a lawyer one will be appointed to you before answering any questions, if you so decide.' " (Emphasis omitted.) *Soria-Garcia*, 947 F.2d at 901. An interpreter for the district court translated the sentence as follows: " 'If you do not have the money to employ an attorney, one can be obtained for you before we ask you any questions, if you so desire.' " *Id.* The district court determined this warning to be deficient because it did not include an advisement that a lawyer would be appointed " 'at no cost.' " *Id.* Focusing primarily on this issue, the court of appeals reversed, determining that under the *Duckworth* standard, the "thrust of the warning, regardless of which translation is used," " 'reasonably conveyed' " the suspect's rights as required by *Miranda*. *Soria-Garcia*, 947 F.2d at 902-03.

Fernando-Granados was advised in Spanish that " 'you have the right to consult with a lawyer and have a lawyer present with you during questioning.' " After answering " 'si,' " he was then advised that "if he did not have the money to pay for a lawyer the Court [could, may, can] had the ability to appoint one." The precise issue presented is whether the two warnings, read together, would create a misunderstanding that a court has discretion to deny an indigent person's request for appointment of counsel.

Under similar circumstances, other state and federal courts have resolved this question in the negative. For example, in *State v. Rhines*, 548 N.W.2d 415, 428 (S.D. 1996), the defendant was told " 'if you cannot afford an attorney an attorney can be appointed for you free of charge.' " The court concluded that given that the police had correctly informed the defendant of his other rights, the " 'can' be appointed" language would not have misled him into believing that a request for an attorney could have been denied. *Id.* Similarly, in *U.S. v. Miguel*, 952 F.2d 285, 287 (9th Cir. 1991), the defendant was told " '[y]*ou may have an attorney appointed* by the U.S. Magistrate or the court to represent you, if you cannot afford or otherwise obtain one.' " The court determined that read within the context of the other warnings, which were correctly given, the defendant would have been

"able to grasp the substance of what he was told—that he had the right to appointed counsel if he could not afford a lawyer." *Id.* at 288. Likewise, in *Commonwealth v. Colby*, 422 Mass. 414, 418, 663 N.E.2d 808, 811 (1996), the defendant was told that " 'if he could not afford an attorney, the Commonwealth would attempt to provide one for him.' " The court refused to suppress the defendant's incriminating statements, noting that "[t]he departure from the standard Miranda language here seems less harmful than the departure tolerated in the *Duckworth* case." 422 Mass. at 418, 663 N.E.2d at 811.

Considering in their totality the advisements given in this case, Fernando-Granados was clearly advised of his right to remain silent, the consequences of forgoing that right, and his right to have an attorney present during questioning. The challenged warning, while not a verbatim Spanish translation of the language used in *Miranda*, was sufficient to accomplish what the U.S. Supreme Court stated as its purpose, namely, to prevent a misunderstanding that the right to consult a lawyer is conditioned upon having the funds to obtain one. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Fernando-Granados was effectively advised that if he wanted a lawyer and could not afford one, he could request appointed counsel and that the court had the authority to grant his request. Although the phrase "will appoint" was not used, the advisement was nevertheless sufficient to reasonably inform him of his right to an attorney, and to apprise him that a method, i.e., appointment by the court, existed for ensuring that an attorney was available to him. Considered in their entirety, the warnings given to Fernando-Granados do not imply that the court had discretion to deny a request for appointment of counsel. After the prosecution had demonstrated "the use of procedural safeguards effective to secure the privilege against self-incrimination," see *Miranda*, 384 U.S. at 444, as a matter of law, the district court did not err in denying the motion to suppress the statements given by Fernando-Granados while in custody.

2. Admission of DNA Evidence

(a) Additional Background

In the statement given on June 6, 2002, Fernando-Granados told authorities that he stabbed Schrieber in the course of robbing

the restaurant. After the killing, Fernando-Granados ran over Schrieber's body in the parking lot with Hernandez' Ford Escort. Fernando-Granados stated that he and Hernandez, who had been waiting for him in the restaurant parking lot, then went to a friend's home.

Pursuant to a search warrant, police searched the residence identified by Fernando-Granados and recovered cash wrapped in a towel. A substance having the appearance of blood was found on one of the bills. DNA testing was later performed to determine the source of the blood found on the bill and additional blood found on the body of the Ford Escort owned by Hernandez. The tests disclosed that the blood contained genetic markers consistent with the known genetic markers of Schrieber and a high probability that she was the source of the blood.

Fernando-Granados filed a pretrial motion in limine to exclude the DNA evidence, contending that it was inadmissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) and the interpretative principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), which principles were adopted by this court in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). Following an evidentiary hearing, the district court made specific findings that the scientific evidence was admissible under *Daubert/Schafersman* and overruled the motion. Fernando-Granados preserved his objection at trial. On appeal, Fernando-Granados argues the State failed to establish the evidentiary reliability and relevance of the DNA evidence under the *Daubert/Schafersman* standard, and thus the district court erred in admitting the DNA evidence.

(b) Standard of Review

[3-5] The *Daubert* standards require proof of the scientific validity of principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and reliability of that opinion. *Perry Lumber Co. v. Durable Servs.*, 266 Neb. 517, 667 N.W.2d 194 (2003); *Schafersman, supra.* A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004); *Perry Lumber Co., supra.* A

judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Carlson, supra.*

(c) Resolution

[6-8] Under the *Daubert/Schafersman* framework, the trial court must act as a gatekeeper to ensure the evidentiary relevance and reliability of the expert's opinion. *Carlson, supra*; *Schafersman, supra.* This entails a preliminary assessment of 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. *Id.* In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that might bear on a judge's gatekeeping determination. *Id.* 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. *Id.* 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. *Id.* Under *Daubert* and *Schafersman*, expert evidence is admissible "so long as foundation is presented to satisfy the court of the validity of the theory or methodology underlying the proffered opinion." *Schafersman*, 262 Neb. at 233, 631 N.W.2d at 877.

The DNA evidence in this case was presented through the expert testimony of Dr. James Wisecarver and a medical technologist, Kelly Duffy. Both were associated with the molecular diagnostics laboratory at the University of Nebraska Medical Center. They employed a DNA testing methodology known as polymerase chain reaction short tandem repeat (PCR-STR). In *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998), we held

that the trial court did not err in finding that the PCR-STR DNA test was generally accepted within the scientific community under the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which then governed the admissibility of scientific evidence in this state.

Wisecarver is a pathologist who also holds a doctorate in physiology. He serves as the medical director of the molecular diagnostics laboratory at the University of Nebraska Medical Center, which has conducted forensic DNA testing since 1996. Wisecarver testified that the laboratory did not conduct such testing prior to that date because of concerns about the certainty of interpretation in the restriction fragment length polymorphism (RFLP) methodology which preceded PCR-STR. He testified that after the PCR-STR methodology was developed and validated in the early 1990's, his laboratory began using it, initially in connection with bone marrow transplants and then for forensic purposes.

Wisecarver testified that PCR-STR is generally accepted in the scientific community and is used widely by forensic laboratories across the country, including those of the FBI and the Armed Forces Institute of Pathology. Wisecarver's laboratory has developed protocols for performing the PCR-STR analysis which have been reviewed by the American Society of Crime Laboratory Directors (ASCLD), a credentialing body which reviews and accredits forensic DNA laboratories. Among the ASCLD quality assurance standards for forensic DNA testing laboratories is a requirement that the laboratory have a program of proficiency testing which "measures the capability of its examiners and the reliability of its analytical results." The molecular diagnostics laboratory participates in a proficiency testing program and was accredited by the ASCLD at the time of Wisecarver's testimony in this case.

The PCR-STR analysis of blood on blood involves several steps. First, presumptive testing is done to confirm the presence of hemoglobin in specimens thought to contain traces of blood. If the presence of blood is thus confirmed, nucleic acids containing DNA are extracted from the specimen and exposed to a reacting agent. Instruments are then utilized to amplify DNA fragments, separate them by size, and label them with a fluorescent

marker. This process results in 15 short tandem repeat genetic markers designating the location on the gene and another marker, known as amelogenin, which designates gender. This raw data is then subjected to a computer program, known as Genotyper, which assigns an allelic designation to each marker. The results are then compared to a reference sample from a known individual. If the genetic profile obtained from the sample being tested does not match the reference sample, the submitter of the sample is excluded as a contributor of the test specimen. However, if a match is produced, a statistical analysis is performed utilizing a population database to determine the frequency of occurrence of the fragment sizes identified in the test. The database used in this case was published in the Journal of Forensic Sciences in 2001. A technique known as the "product rule" is then utilized to determine the probability of an unrelated individual matching the DNA profile obtained from the test specimen. Wisecarver testified that the published source of the database is a peer-reviewed scientific journal and that the "product rule" is peer-reviewed and accepted in the scientific community.

The district court took judicial notice of the Nebraska DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2002), which became effective on September 1, 2001, and provides a procedure whereby a convicted person in custody may seek previously unavailable DNA testing which may be used to secure release or a new trial. See, §§ 29-4120 and 29-4123; *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004). The act includes a legislative finding that "[b]ecause of its scientific precision and reliability, DNA testing can, in some cases, conclusively establish the guilt or innocence of a criminal defendant" and in other instances "may have significant probative value to a finder of fact." § 29-4118(2). The Legislature further found that

> new forensic DNA testing procedures, such as polymerase chain reaction amplification, DNA short tandem repeat analysis, and mitochondrial DNA analysis, make it possible to obtain results from minute samples that previously could not be tested and to obtain more informative and accurate results than earlier forms of forensic DNA testing could produce.

§ 29-4118(3). The act further provides that any DNA testing done pursuant to its provisions must be performed in a laboratory accredited by one of several national accrediting bodies, including the ASCLD, or a public agency with equivalent requirements. § 29-4120(6).

[9] Based upon this record, we conclude that the district court did not abuse its discretion in finding that the PCR-STR DNA testing methodology employed in this case "is a reliable technique, validated and generally accepted within the scientific community and has been subjected to peer review." However, as recently stated in *Carlson v. Okerstrom*, 267 Neb. 397, 413, 675 N.W.2d 89, 105 (2004), "it is not enough for the trial court to determine that an expert's methodology is valid in the abstract. The trial court must also determine if the witness has applied the methodology in a reliable manner."

Here, the trial court made an additional finding that "Medical Technician Kelly Duffy followed the protocol in place to ensure that the tests were performed properly and with a known rate of error." The record supports this finding. Duffy holds a bachelor of science degree with majors in microbiology and medical technology and a minor in chemistry. She completed a 1-year internship in medical technology, and she holds certifications as a medical technologist, a clinical histocompatibility technologist, and a clinical histocompatibility specialist. At the time of her testimony, she had been employed at the molecular diagnostics laboratory since 1988. She performed the DNA testing in this case utilizing the approved protocols for PCR-STR DNA testing, with minor deviations approved by Wisecarver which had no impact on the process. She examined 12 submitted items of evidence and a known reference specimen from Schrieber. Presumptive testing for hemoglobin eliminated 5 of 12 evidence specimens submitted and confirmed the presence of hemoglobin (presumptive for blood) on the other 7 specimens. Of these seven specimens, five were subjected to further testing. After determining that DNA from these five specimens, including the $1 bill and wheel-well cover, matched the reference specimen from Schrieber, Duffy did a frequency analysis which determined that Schrieber was not excluded as a major contributor of the blood on the specimens and that the probability of an unrelated individual matching the major

DNA profile was 1 in 280 quadrillion for Caucasians, 1 in 37 quintillion for African Americans, and 1 in 16.2 quintillion for American Hispanics. Duffy prepared a report documenting the tests performed pursuant to protocol and the results obtained. The report was reviewed and signed by Wisecarver, by the laboratory director, and by Duffy.

Because the record reflects that the DNA testing in this case was properly performed in accordance with a scientifically reliable methodology, we conclude that the district court did not abuse its discretion in finding that the results offered by the State were reliable and relevant and that their probative value outweighed the risk of unfair prejudice. Our research indicates that every jurisdiction that has addressed the admissibility of PCR-STR DNA analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), has found the evidence admissible. *U.S. v. Ewell*, 252 F. Supp. 2d 104 (D.N.J. 2003); *U.S. v. Trala*, 162 F. Supp. 2d 336 (D. Del. 2001); *People v. Shreck*, 22 P.3d 68 (Colo. 2001); *Commonwealth v. Rosier*, 425 Mass. 807, 685 N.E.2d 739 (1997); *State v. Butterfield*, 27 P.3d 1133 (Utah 2001).

IV. CONCLUSION

Finding no error in the admission of the statements given by Fernando-Granados while in custody or the results of DNA testing conducted by the State, we affirm the convictions and sentences imposed by the district court.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ROGER R. HOLTHAUS, RESPONDENT.

686 N.W.2d 570

Filed July 2, 2004. No. S-04-044.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, Roger R. Holthaus, was admitted to the practice of law in the State of Nebraska on June 27, 1972, and at all times relevant hereto was engaged in the private practice of law in Omaha, Nebraska. On January 12, 2004, formal charges were filed against respondent. The formal charges set forth one count that included charges that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule), and Canon 6, DR 6-101(A)(3) (neglecting legal matter), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). On May 17, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly did not challenge or contest the truth of the allegations that he violated DR 1-102(A)(1) and DR 6-101(A)(3), as well as his oath of office as an attorney, and waived all proceedings against him in connection therewith in exchange for a 6-month suspension of his license to practice law. Upon due consideration, the court approves the conditional admission and orders that respondent be suspended from the practice of law in the State of Nebraska for 6 months.

FACTS

In summary, the formal charges allege that respondent neglected his responsibilities as the attorney for the personal representative of a probate estate by not timely filing pleadings in the probate case, not filing tax returns, not communicating with the residual beneficiary, and not properly handling estate assets. As a result of respondent's failure to properly handle the probate proceedings, the estate's residual beneficiary filed a petition to surcharge the personal representative and respondent, which resulted in a judgment against respondent and the personal representative. Respondent has satisfied the judgment.

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission

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

Pursuant to rule 13, we find that respondent knowingly does not challenge or contest the essential relevant facts outlined in the formal charges and knowingly does not challenge or contest that he violated DR 1-102(A)(1) and DR 6-101(A)(3), as well as his oath of office as an attorney. We further find that respondent waives all proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1) and DR 6-101(A)(3), as well as his oath of office as an attorney, and that respondent should be and hereby is suspended for a period of 6 months, effective immediately, after which time respondent may apply for reinstatement. Respondent shall comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V. DARRELL J. VAUGHT, APPELLANT.

682 N.W.2d 284

Filed July 9, 2004. No. S-02-1480.

1. **Rules of Evidence: Appeal and Error.** 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. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
2. **Constitutional Law: Trial: Rules of Evidence: Hearsay.** Where testimonial statements are at issue, the Confrontation Clause demands that such hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination.
3. **Constitutional Law: Evidence.** The Confrontation Clause does not exclude the admission of medical diagnosis and treatment statements, whether or not the record shows that the declarant is unavailable.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Douglas County, JOHN D. HARTIGAN, JR., Judge. Judgment of Court of Appeals affirmed.

Thomas C. Riley, Douglas County Public Defender, and Timothy P. Burns for appellant.

Jon Bruning, Attorney General, and James H. Spears for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Darrell J. Vaught was convicted in the district court for Douglas County of first degree sexual assault on a child. Over Vaught's objection, the emergency room physician who treated and diagnosed the victim testified that the victim had identified Vaught as the perpetrator of the assault. Vaught's conviction and sentence were affirmed on appeal to the Nebraska Court of Appeals. *State v. Vaught*, 12 Neb. App. 306, 672 N.W.2d 262 (2003). We granted Vaught's petition for further review in which

he asserts that the Court of Appeals erred (1) in concluding that the district court had not erred in admitting the physician's testimony and (2) in concluding that trial counsel was not ineffective for failing to object to the physician's testimony on confrontation grounds. We affirm the Court of Appeals' decision.

STATEMENT OF FACTS

The facts of this case are set forth in the Court of Appeals' opinion as follows:

> The victim in this case was the 4-year-old daughter of Vaught's half sister. The events which gave rise to the present action occurred on or about August 23, 2000. On that date, the victim and her mother were staying at the residence of the victim's grandparents; Vaught also resided there. The victim's mother testified that the victim called Vaught "[D]J." The victim's mother testified that she put the victim to sleep on the couch wearing a nightgown and underwear. When the victim's mother left the victim, Vaught was the only other person awake in the house, and he was watching television near the victim.
>
> The next morning the victim's mother noticed that the victim awoke without any underwear on. Although the victim's mother acknowledged that the victim would sometimes change her underwear during the night if she wet herself, on this occasion the victim's missing underwear were never located and the couch was not at all wet. The victim begged her mother to allow her to go to her father's house. The victim then went to the residence of her father and his wife.
>
> That evening, the victim wet herself and the victim's father's wife gave her a bath. During the bath, the victim's father's wife noticed that the victim's genital area was red and swollen. The victim's father's wife had a conversation with the victim about what had happened, which conversation prompted the victim's father's wife to ask the victim's father who "[D]J" was. The victim's mother was then called, and the victim was taken to the hospital to be examined.
>
> Dr. Larry Lamberty testified that he was the emergency room physician who examined the victim. He testified that

> he saw the victim in one of the examination rooms, that he introduced himself as a doctor, and that he had no concerns that the victim was unable to understand where she was or who he was. He further testified that he explained to the victim that he was going to do an examination and that he asked her what had happened to her. Over hearsay objections, he testified that the victim said that "her Uncle DJ put his finger in her pee-pee." His examination indicated that the victim's "hymen was intact."
>
> Dr. Cathy Hudson testified that she saw the victim a few days later for a more thorough examination, including the use of a colposcope. The colposcopic examination indicated a small puncture wound in the victim's vaginal area where "the distal-most portion of her vagina meets the hymenal tissue." She testified that the injury was consistent with digital penetration.
>
> On September 28, 2000, Vaught was charged by information with first degree sexual assault on a child. Prior to trial, Vaught requested a psychological examination of the victim. The court overruled this request. After a bench trial, including the evidence and testimony set forth above, the court found Vaught guilty on June 24, 2002. On December 5, the court sentenced Vaught to 6 to 10 years' incarceration. This appeal followed.

Vaught, 12 Neb. App. at 307-08, 672 N.W.2d at 265-66.

On appeal to the Court of Appeals, Vaught made five assignments of error. The Court of Appeals rejected Vaught's five assignments of error and affirmed his conviction. Vaught's petition for further review is limited to the decision of the Court of Appeals with respect to only two of the five initial assignments of error; therefore, only the two relevant assignments of error will be discussed herein. Before the Court of Appeals, Vaught essentially asserted that (1) the district court had erred in admitting Dr. Larry Lamberty's testimony regarding the victim's statements as statements made by a declarant patient for the purpose of medical diagnosis or treatment under Neb. Rev. Stat. § 27-803(3) (Cum. Supp. 2002) and (2) trial counsel had provided ineffective assistance by failing to object to such testimony on confrontation grounds. The Court of Appeals rejected both assignments of error.

The following additional information with respect to the testimony at issue in these two assignments of error is found in the opinion of the Court of Appeals as follows:

> [T]he statement at issue was made by the victim during the course of a medical examination by Dr. Lamberty in the emergency room. Dr. Lamberty testified that he was dressed as a doctor at the time, that he was speaking to the victim in an examination room at the hospital, that he had explained to her that he was going to do an examination, and that he had no concerns that the victim did not understand where she was or who he was. Additionally, Dr. Lamberty testified that it is important for a medical professional in the situation he was in to obtain a thorough history regarding the causation and nature of the injury. Dr. Lamberty further testified that it is important for him, in assessing the patient's condition and determining treatment, to know who the perpetrator was, both so that he does not release a patient into the care of a perpetrator and for purposes of treating the patient's mental well-being. In this case, when Dr. Lamberty asked the victim what had happened to her, she replied that "her Uncle DJ put his finger in her pee-pee," and she indicated that she meant her vagina.

State v. Vaught, 12 Neb. App. 306, 310-11, 672 N.W.2d 262, 267 (2003).

After finding no merit to Vaught's assignments of error, the Court of Appeals affirmed Vaught's conviction. Vaught petitioned for further review. We granted Vaught's petition for further review.

ASSIGNMENTS OF ERROR

Vaught asserts that the Court of Appeals erred in concluding that the district court did not err in admitting Dr. Lamberty's testimony and in concluding that trial counsel was not ineffective for failing to object to the testimony on confrontation grounds.

STANDARD OF REVIEW

[1] 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.

Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

ANALYSIS

Admissibility Under § 27-803(3).

At trial, Vaught's counsel objected on hearsay grounds to Dr. Lamberty's testimony that the victim identified Vaught as the perpetrator of the assault. Vaught asserts on further review that the Court of Appeals erred in affirming the district court's decision to admit Dr. Lamberty's testimony. We conclude that the testimony by Dr. Lamberty regarding what the victim-declarant stated was admissible pursuant to § 27-803(3), and, insofar as there was no confrontation violation as indicated below, we reject Vaught's first assignment of error.

Section 27-803(3) provides that among statements that are not excluded by the hearsay rule even though the declarant is available as a witness are "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

In rejecting Vaught's hearsay argument, the Court of Appeals noted that this court has previously found statements similar to the statement admitted in this case and made under somewhat similar circumstances to be admissible under § 27-803(3). The Court of Appeals cited two Nebraska appellate cases in which it was decided that a child victim's statement to a doctor identifying the perpetrator of a sexual assault was admissible. See, *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992) (10-year-old victim made statements to doctor in context of medical examination and diagnosis identifying mother's boyfriend as perpetrator of sexual assault); *State v. Max*, 1 Neb. App. 257, 492 N.W.2d 887 (1992) (3-year-old victim being treated for genital warts made statements to doctor identifying her adoptive father as perpetrator of sexual assault).

On further review, Vaught urges this court to adopt a rule enunciated by the U.S. Court of Appeals for the Eighth Circuit

with regard to statements made by children for purposes of medical treatment. In *Olesen v. Class*, 164 F.3d 1096 (8th Cir. 1999), the Eighth Circuit considered a habeas corpus case which originated in state court in South Dakota in which one victim, a 5-year-old girl, made a statement to an examining physician which identified the defendant as the perpetrator of a sexual assault. The trial court had admitted the physician's testimony regarding the victim's statement pursuant to a South Dakota statute similar to § 27-803(3). The Eighth Circuit concluded that such statement was inadmissible.

In concluding that the victim's statement in *Olesen* was inadmissible, the Eighth Circuit stated that the hearsay exception for statements made for purposes of medical treatment "is bottomed upon the premise that a patient's 'selfish motive' . . . in receiving the proper treatment guarantees the trustworthiness of the statements made to her physician." 164 F.3d at 1098. Focusing on the victim's state of mind, the Eighth Circuit held that such statements were

> admissible only when the prosecution is able to demonstrate that the victim's motive in making the statement was consistent with the purpose of promoting treatment—that is, "where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding."

Id. The Eighth Circuit Court of Appeals determined that the prosecutor in *Olesen* had failed to establish that this victim's frame of mind at the time of the examination was that of a patient seeking medical treatment and that there was no evidence that the physician had explained to her that his questions regarding the identity of her abuser were important to diagnosis or treatment or that she understood the medical significance of being truthful in identifying her abuser to the doctor. The Eighth Circuit Court of Appeals reversed the federal district court's ruling as to this victim.

Although we decline Vaught's invitation to explicitly adopt the rule in *Olesen*, the discussion in *Olesen* by the Eighth Circuit Court of Appeals regarding the purposes behind the exception for statements made for the purpose of medical diagnosis or

treatment informs our analysis in this case. In order for testimony to be admissible under § 27-803(3), it is necessary to establish that the statement at issue falls within the exception, bearing in mind the purposes noted by the court of appeals in *Olesen.* Therefore, the evidence must satisfactorily demonstrate that the circumstances under which the statement was made were such that the declarant's purpose in making the statement was to assist in the provision of medical diagnosis or treatment, that the declarant's statement was reasonably pertinent to such diagnosis or treatment and, further, that a doctor would reasonably rely on such statement. Under § 27-803(3), there need not be direct evidence of the declarant's state of mind, as seems to be required under *Olesen*; instead, the appropriate state of mind of the declarant may be reasonably inferred from the circumstances. We note that § 27-803(3) does not make any exceptions or qualifications based on the age of the declarant, and we decline to presume that children speaking to physicians are not truthful and are not motivated by promoting medical treatment. See *U.S. v. Edward J.*, 224 F.3d 1216 (10th Cir. 2000) (rejecting such presumptions under Fed. R. Evid. 803(4) and declining to adopt *Olesen* rationale). However, we recognize that cases where the declarant is a child, as compared to an adult, may require additional evidence of the circumstances surrounding the statement in order to establish that the state of mind of the declarant was consistent with the objective of medical diagnosis or treatment.

In the present case, we determine that the evidence was sufficient for the district court to conclude that the victim's statement to Dr. Lamberty qualified under § 27-803(3) as a statement "made for purposes of medical diagnosis or treatment and describing . . . the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Dr. Lamberty testified in detail regarding the circumstances under which the victim made her statement. As described, those circumstances were such that the 4-year-old victim clearly understood that a medical examination was being performed, that the purpose of the doctor's questions was to assist in medical diagnosis and treatment and, thus, that the victim's statements were motivated by seeking treatment. Dr. Lamberty testified that he had no concerns that the victim did not understand the nature of the

examination, and his testimony indicates his state of mind was such that he reasonably relied on the victim's statement. Dr. Lamberty also testified that there were valid medical treatment purposes for learning the identity of the perpetrator and that such purposes were pertinent to diagnosis and treatment. Such testimony by Dr. Lamberty was sufficient to infer the victim's state of mind in making the statement.

Dr. Lamberty's testimony regarding the circumstances surrounding the victim's statement was sufficient for the district court to conclude that the victim's statement was of the type described in § 27-803(3) and therefore admissible under that statute. We conclude that the Court of Appeals did not err in affirming the district court's admission under § 27-803(3) of Dr. Lamberty's testimony regarding the victim's identification of Vaught as the perpetrator.

Ineffective Assistance of Counsel and Confrontation Clause.

Vaught's trial counsel objected to Dr. Lamberty's testimony on hearsay grounds but did not specifically object on Confrontation Clause grounds. Vaught asserted on appeal that his trial counsel was ineffective for failing to make this latter objection. The Court of Appeals rejected this argument.

Vaught asserts on further review that the Court of Appeals erred in concluding that trial counsel did not provide ineffective assistance by failing to make an objection on the basis of the Confrontation Clause. We conclude that the admission of Dr. Lamberty's testimony did not violate the Confrontation Clause, that trial counsel was not ineffective for failing to object on confrontation grounds, and that the decision by the Court of Appeals regarding this issue was not in error.

The Confrontation Clause, U.S. Const. amend. VI, provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Neb. Const. art. I, § 11, provides, in relevant part: "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ." We have held that the analysis under article I, § 11, is the same as that under the Sixth Amendment to the U.S. Constitution. *State v. Jacobs*, 242 Neb. 176, 494 N.W.2d 109 (1993).

We have previously stated that analysis of the issue of whether the Confrontation Clause prohibits admission of hearsay testimony is made by reference to the U.S. Supreme Court's decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). See *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000). In *Sheets*, we stated that in *Roberts*,

> the U.S. Supreme Court determined that when a witness is unavailable for cross-examination, his or her statements are admissible only if they bear adequate indicia of reliability. Reliability can be inferred, without more, in a case in which the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, absent a showing by the State of particularized guarantees of trustworthiness.

Sheets, 260 Neb. at 336, 618 N.W.2d at 127.

[2] However, in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court recently altered the test enunciated in *Roberts*. *Crawford* was filed subsequent to the decision by the Court of Appeals, which decision is now on further review. In *Crawford*, the U.S. Supreme Court held that where "testimonial" statements are at issue, the Confrontation Clause demands that such hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination. 541 U.S. at 68. Therefore, at least with respect to testimonial statements, the Court overruled the holding in *Roberts* that hearsay statements could be admitted despite the absence of a prior opportunity for cross-examination if the statements fell within a firmly rooted hearsay exception or the statements bore particularized guarantees of trustworthiness.

Because *Crawford* limited its holding to testimonial statements, our initial step is to determine whether the statements at issue in the present case were testimonial in nature. The U.S. Supreme Court in *Crawford* declined to provide a comprehensive definition of "testimonial" but stated that the term applied at a minimum to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68. We note that Justice Thomas joined the opinion of the Court in *Crawford* and that further illumination of the term

"testimonial" may be found in Justice Thomas' concurrence in *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992). In his concurrence in *White*, Justice Thomas noted that the United States, as an amicus, had suggested in *White* that "the Confrontation Clause should apply only to those persons who provide in-court testimony or the functional equivalent, such as affidavits, depositions, or confessions that are made in contemplation of legal proceedings." 502 U.S. at 364. Justice Thomas proposed that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." 502 U.S. at 365.

Although the U.S. Supreme Court has not fully defined "testimonial," it did provide three formulations of the core class of testimonial statements which the Court of Appeals for the First Circuit described as follows:

> In the first, testimonial statements consist of "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." . . . The second formulation described testimonial statements as consisting of "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." . . . Finally, the third explained that testimonial statements are those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." . . . While the Court declined to settle on a single formulation, it noted that, "[w]hatever else the term [testimonial] covers, it applies . . . to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. These are the modern abuses at which the Confrontation Clause was directed."

(Citations omitted.) *Horton v. Allen*, No. 03-1423, 2004 WL 1171383 at *6 (1st Cir. May 26, 2004).

We agree with the First Circuit's analysis. The victim's statement herein did not fit any of these formulations, nor did it share

characteristics of these formulations. We believe on the facts of this case that the victim's statement to the doctor was not a "testimonial" statement under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). As discussed above, the victim's identification of Vaught as the perpetrator was a statement made for the purpose of medical diagnosis or treatment. In the present case, the victim was taken to the hospital by her family to be examined and the only evidence regarding the purpose of the medical examination, including the information regarding the cause of the symptoms, was to obtain medical treatment. There was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination. See *Evans v. Luebbers*, No. 03-1900, 2004 WL 1277980 (8th Cir. June 10, 2004). Compare *Snowden v. State*, 156 Md. App. 139, 846 A.2d 36 (2004) (stating in child sexual abuse case that where children were interviewed for express purpose of developing their testimony, statements of victims presented by social worker were "testimonial" under *Crawford*). Our decision as to whether the statement at issue is "testimonial" under *Crawford* does not preclude a different conclusion based on a different set of facts.

Because the U.S. Supreme Court specifically referred to testimonial statements in its holding in *Crawford*, the effect of the Confrontation Clause on the admission of nontestimonial hearsay statements post-*Crawford* is unclear. The Court in *Crawford* stated that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." 541 U.S. at 68. The Court made no explicit statement regarding nontestimonial statements but did suggest that either such statements required no Confrontation Clause scrutiny or that prior standards developed under *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), or its progeny still applied to nontestimonial hearsay evidence. Our observation in this regard is consistent with post-*Crawford* jurisprudence. See, e.g., *U.S. v. Reyes*, 362 F.3d 536, 540 n.4 (8th Cir. 2004) (stating that "*Crawford* did not provide additional protection for nontestimonial statements, and indeed,

questioned whether the Confrontation Clause protects nontestimonial statements at all").

Therefore, if after *Crawford*, nontestimonial statements require no Confrontation Clause scrutiny, the nontestimonial statement of the victim in this case was admissible under the hearsay rule analysis recited above. To the extent that after *Crawford*, the confrontation-based standards developed in *Roberts* and its progeny still apply to nontestimonial statements, as explained below, the admission of the statements in the present case did not violate the Confrontation Clause. In this regard, we note that subsequent to *Roberts* and prior to *Crawford*, the U.S. Supreme Court considered the effect of the Confrontation Clause on the admission of statements made for the purpose of medical diagnosis and treatment in *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992). We consider the possible impact of *White* upon this case.

[3] In *White*, the Court analyzed medical diagnosis and treatment statements under the *Roberts* test and held that (1) a determination that a declarant was unavailable was a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding and (2) that the hearsay exception for statements made for purposes of medical diagnosis or treatment was a firmly-rooted hearsay exception. The Court held in *White* that the Confrontation Clause did not exclude the admission of medical diagnosis and treatment statements, whether or not the record showed that the declarant was unavailable. As we noted above, the victim's identification of Vaught in the present case was a statement made for purposes of medical diagnosis or treatment. Thus, to the extent *White* survives *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), under *White*, whether or not the victim in this case was unavailable as a witness, the Confrontation Clause would not exclude the admission of such a statement.

Given our analysis of confrontation law in the area of the medical diagnosis and treatment hearsay exception, we conclude that whether such nontestimonial statements are exempt from Confrontation Clause scrutiny after *Crawford* or whether pre-*Crawford* case law, including *White*, is still applicable, the

admission of the statement in the present case did not violate the Confrontation Clause. Because there was no Confrontation Clause violation, Vaught's counsel was not ineffective for failing to object on confrontation grounds. We conclude that the Court of Appeals did not err in rejecting this assignment of error.

VI. CONCLUSION

We conclude that Dr. Lamberty's testimony regarding the victim's identification of Vaught as the perpetrator was admissible under § 27-803(3). We further conclude that under the facts of this case, the statement at issue was nontestimonial under *Crawford* and that its admission did not violate the Confrontation Clause. In view of our analysis, trial counsel did not provide ineffective assistance by failing to object to the physician's testimony on confrontation grounds. We affirm the Court of Appeals' decision affirming Vaught's conviction and sentence.

AFFIRMED.

DEANNA WRIGHT MILLER, APPELLEE, V.
JOHN P. STEICHEN, APPELLEE, AND COREGIS INSURANCE COMPANY, INC., GARNISHEE-APPELLANT.

682 N.W.2d 702

Filed July 9, 2004. No. S-03-226.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
2. **Motions to Vacate: Judgments: Evidence: Appeal and Error.** The decision to vacate an order is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion. A much stronger showing is required to substantiate an abuse of discretion when a judgment is vacated than when it is not.
3. **Pleadings: Jurisdiction.** Under the statutory pleading rules applicable to actions commenced prior to January 1, 2003, a party could file a special appearance for the sole purpose of objecting to the court's assertion of personal jurisdiction over the objector.
4. ____: ____. An appearance is special when its sole purpose is to question the jurisdiction of the court; however, a further or later request for other relief may be a general appearance.

5. **Default Judgments: Proof: Time.** Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.
6. **Default Judgments: Motions to Vacate: Words and Phrases.** In the context of a motion to vacate a default judgment, a meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.
7. **Default Judgments: Motions to Vacate.** Although a defendant seeking to vacate a default judgment is required to present a meritorious defense, it is not required that the defendant show he will ultimately prevail in the action, but only that the defendant show that he has a defense which is recognized by the law and is not frivolous.
8. **Insurance: Contracts.** An insurance policy is a contract, and when the facts are undisputed, whether or not a claimed coverage exclusion applies is a matter of law.

Appeal from the District Court for Douglas County: MARY G. LIKES and GARY B. RANDALL, Judges. Reversed and remanded with directions.

Gerald L. Friedrichsen and Susan H. Carstens, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., and Jeffrey A. Goldwater, Michelle M. Bracke, and Frank Valenti, of Bollinger, Ruberry & Garvey, for garnishee-appellant.

James E. Harris and Britany S. Shotkoski, of Harris, Feldman Law Offices, for appellee Deanna Wright Miller.

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

STEPHAN, J.

The district court for Douglas County entered a judgment in the amount of $325,000 in favor of Deanna Wright Miller against John P. Steichen in this professional liability action. The issues presented in this appeal involve a garnishment proceeding against Coregis Insurance Company, Inc. (Coregis), which is alleged to have issued a professional liability insurance policy providing coverage for Miller's claim against Steichen. A default judgment was entered against Coregis, which it unsuccessfully challenged by special appearance and by a motion to vacate. In this appeal, Coregis contends that the district court erred in not sustaining its special appearance or, in the alternative, in overruling its motion to vacate the default judgment.

BACKGROUND

After obtaining her judgment against Steichen, Miller served a summons and order of garnishment and interrogatories in aid of execution on Coregis to recover the amount of the judgment. The summons was addressed to "Sally Ann Hawk, President, 181 West Madison Street, Suite 2600, Chicago, IL 60602." In Coregis' 2000 annual statement, Sally Ann Hawk was named as the "Chairman, President & Chief Executive Officer" as well as one of the "Directors or Trustees." The 2000 annual statement also lists the Chicago address as Coregis' main administrative office, mailing address, and primary location of books and records.

Miller filed a proof of service with the district court on December 4, 2001. Coregis did not respond to the interrogatories. On December 14, Miller sent a copy of her application for judgment and notice of hearing to Coregis by regular mail to Hawk at the Chicago office. Following a hearing, the district court entered a default judgment against Coregis on December 21, finding that

> pursuant to Neb. Rev. Stat. § 25-1028 [(Reissue 1995)], Garnishee, Coregis . . . in failing to answer the Interrogatories within ten (10) days from the date of service upon it, is presumed to be indebted to the Defendant/Judgment Debtor . . . Steichen, in the full amount of the claim of Plaintiff/Judgment Creditor . . . Miller.

Coregis filed a special appearance on January 8, 2002, arguing that it did not receive proper and sufficient service of summons. Coregis argued that Hawk "was not an employee of Coregis . . . at the time of the purported service." In addition, it argued that the affidavit and praecipe for summons was improperly issued because there was no merit to Miller's contention that Coregis was indebted to Steichen under his professional liability insurance policy in light of the U.S. District Court's memorandum opinion in *Coregis Ins. Co. v. Fellman*, 8:99CV14 (D. Neb. May 23, 2000), which found in part that the same policy did not require Coregis to defend or indemnify Steichen in regard to Miller's claim.

The district court overruled Coregis' special appearance on March 4, 2002, finding that "the return receipt would lead a reasonable person to conclude that proper service was had on the

individual purporting to be the President of Coregis" and that the issues before the U.S. District Court were distinguishable from the issues before the Douglas County District Court.

On April 17, 2002, Coregis, purporting to renew and preserve its special appearance, filed a motion to vacate the December 21, 2001, default judgment. The motion reiterated Coregis' arguments regarding insufficiency of process and alleged that it was not until on or about January 1, 2002, that Coregis' claim representative became aware of the summons and notice of hearing and that thereafter, Coregis promptly filed its special appearance. Coregis argued that it "should be given a full opportunity to present its contentions in court and be given full relief against slight and technical omissions." The district court overruled the motion to vacate in a September 6, 2002, journal entry.

On September 16, 2002, Coregis, again purporting to renew and preserve its special appearance, filed three motions: a motion to alter or amend the judgment and order, a motion for new trial, and a motion to set aside the order or judgment. In each of the motions, Coregis moved the court to reconsider the motion to vacate and grant Coregis a trial on the merits. The district court overruled all three motions in an October 1 docket entry and subsequently filed an order reaffirming that entry on October 29.

Coregis appealed from the March 1, September 6, and October 1, 2002, orders. The Nebraska Court of Appeals dismissed the appeal pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001), because the September 6 journal entry purporting to overrule the motion to vacate was neither signed nor date stamped and therefore did not constitute a final, appealable judgment. See *Miller v. Steichen*, 11 Neb. App. lxix (No. A-02-1249, Dec. 5, 2002). Pursuant to Coregis' motion, the district court entered a final, appealable order overruling the motion to vacate on January 30, 2003. Coregis then filed this appeal, which we moved to our docket pursuant to our authority to regulate the caseloads of this court and the Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

On appeal, Coregis assigns, restated, (1) that the district court erred in overruling its special appearance because Miller failed to

properly serve Coregis with summons and (2) that the district court abused its discretion in failing to vacate the default judgment against Coregis because Coregis acted promptly to obtain relief and presented a meritorious defense to the garnishment action.

STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003).

[2] The decision to vacate an order is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion. *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999). A much stronger showing is required to substantiate an abuse of discretion when a judgment is vacated than when it is not. *Id.*

ANALYSIS

We begin by addressing Miller's argument that we should affirm the judgment of the district court under the principle that a party cannot complain of error which the party has invited the court to commit. See, *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003); *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997). Miller's argument focuses on the motion filed by Coregis in the district court after the Court of Appeals dismissed its first appeal on the jurisdictional ground that there was no final, appealable order. We view this motion as a request that the district court correct a procedural defect with respect to its entry of judgment. This is not "invited error" which would preclude our substantive review of the judgment, but, rather, a legitimate request to correct an error by the district court which prevented its judgment from becoming final and thereby deprived Coregis of its right to appellate review. Contrary to Miller's assertion, this circumstance is clearly distinguishable from *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004), in which we held that a plaintiff could not voluntarily dismiss a case without prejudice, consent to entry of such an order, and then seek appellate review of an adverse pretrial order.

[3,4] Turning to the merits of the appeal, we begin by noting our agreement with Miller's contention that Coregis appeared generally in the district court. Under the statutory pleading rules applicable to actions commenced prior to January 1, 2003, a party could file a special appearance for the sole purpose of objecting to the court's assertion of personal jurisdiction over the objector. See Neb. Rev. Stat. § 25-516.01 (Reissue 1995 & Cum. Supp. 2002). An appearance is special when its sole purpose is to question the jurisdiction of the court; however, a further or later request for other relief may be a general appearance. *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996); *West Town Homeowners Assn. v. Schneider*, 221 Neb. 674, 380 N.W.2d 265 (1986); *Ivaldy v. Ivaldy*, 157 Neb. 204, 59 N.W.2d 373 (1953). Under § 25-516.01 (Reissue 1995), where a special appearance is overruled, a "defendant's participation in proceedings on any issue other than jurisdiction over the person waives any objection that the court erred in overruling the special appearance except the objection that the defendant is not amenable to process issued by a court of this state."

Coregis has never contended that it is not amenable to process issued by a Nebraska court, only that such process was not properly served. Here, however, the special appearance filed by Coregis asserted not only the alleged defect in service of process, but also a contention that Coregis was not obligated under its professional liability policy based upon a previous declaratory judgment issued by a federal court. This assertion is incorporated by reference in Coregis' motion to vacate. Because the coverage defense asserted by Coregis involves issues unrelated to personal jurisdiction, we conclude that Coregis appeared generally and subjected itself to the jurisdiction of the district court.

This general appearance, however, does not resolve the question of whether the district court had personal jurisdiction over Coregis when it entered the default judgment. In *Ivaldy v. Ivaldy, supra*, the defendant appeared specially after a default judgment had been entered against him and objected to the court's jurisdiction over his person. Before any ruling on the special appearance, the defendant moved to vacate the judgment on the ground that he had a meritorious defense. This court held that while the latter filing was a general appearance which subjected the defendant to

the jurisdiction of the district court, it did not relate back to validate the default judgment, which judgment was entered at a time when the defendant had not been properly served, and was therefore void. Applying the same principle to this case, we conclude that Coregis subjected itself to the jurisdiction of the district court after entry of the default judgment but is not foreclosed from challenging the validity of that judgment on the ground that the court lacked personal jurisdiction, due to defective service of process, at the time the judgment was entered.

Given that Coregis subjected itself to the jurisdiction of the district court prospectively, the issue is whether that court erred in not setting aside the prior default judgment on one of two alternate grounds: (1) that Coregis had demonstrated the existence of a meritorious defense or (2) that the judgment was void because the district court lacked personal jurisdiction over Coregis at the time of entry, due to a defect in service of process.

Neb. Rev. Stat. § 25-2001(1) (Cum. Supp. 2002) provides that "[t]he inherent power of a district court to vacate or modify its judgments or orders during term may also be exercised after the end of the term, upon the same grounds, upon a motion filed within six months after the entry of the judgment or order." The district court for Douglas County has a term coextensive with the calendar year. See Rules of Dist. Ct. of Fourth Jud. Dist. 4-1C (rev. 1995). In this case, the default judgment was entered on December 21, 2001, and the motion to vacate was filed on April 17, 2002. Because the motion was filed after term but less than 6 months after the default judgment, § 25-2001(1) applies and the district court had the discretion under its statutory power to vacate the judgment on the same grounds as if it had been within term.

[5] Generally,

> [w]here a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.

Steinberg v. Stahlnecker, 200 Neb. 466, 467, 263 N.W.2d 861, 862 (1978). This court has further stated:

> "It is the policy of the law to give a litigant full opportunity to present his contention in court and for this purpose to give full relief against slight and technical omissions. On the other hand, it is the duty of the courts to prevent an abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice. . . . *Mere mistake or miscalculation of a party or his attorneys is not sufficient, in itself, to warrant the refusal to set aside a default judgment, when there is a good defense pleaded or proved and no change of position or substantial misjustice [sic] will result from permitting a trial on the merits.*"

(Emphasis supplied.) (Emphasis in original.) *DeVries v. Rix*, 203 Neb. 392, 402, 279 N.W.2d 89, 95 (1979), quoting *Beliveau v. Goodrich*, 185 Neb. 98, 173 N.W.2d 877 (1970).

[6,7] The record discloses that Coregis acted promptly when it learned that a default judgment had been entered against it on December 21, 2001. It filed its special appearance on January 8, 2002, contending that summons was not properly served and that it had a defense to the garnishment proceeding. The critical issue, therefore, is whether Coregis made the requisite showing that it has a meritorious defense to the garnishment proceeding. In this context, " '[a] meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.' " *Steinberg v. Stahlnecker*, 200 Neb. at 468, 263 N.W.2d at 862-63, quoting *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977). Although a defendant seeking to vacate a default judgment is required to present a meritorious defense, it is not required that the defendant "show he will ultimately prevail in the action, but only that the defendant show that he has a defense which is recognized by the law and is not frivolous." *Beren Corp. v. Spader*, 198 Neb. at 685, 255 N.W.2d at 253. Accord *Steinberg v. Stahlnecker, supra.*

Coregis seeks to assert a defense that it has no assets from which the judgment against Steichen can be satisfied because the professional liability insurance policy which it issued to him excludes coverage for the acts or omissions by Steichen upon which Miller's claim embodied in the default judgment is based. In this regard, Coregis presented to the district court a judgment

entered in the U.S. District Court for the District of Nebraska, finding in part that Coregis had no duty under the policy in question to defend or indemnify Steichen or his law firm for claims made regarding his representation of Miller. That judgment was based on an exclusion in Steichen's policy which excludes coverage for claims "arising out of conversion [or] misappropriation." The court concluded that "[w]hen the direct and precipitating cause of the claim against the insured is an act within the exclusion, e.g., theft, embezzlement, misappropriation, or conversion, the insured's negligent failure to supervise the wrongdoer 'does not change the fact that the exclusionary clause precludes coverage.' " Coregis argues that this judgment, although not necessarily res judicata as to Miller, raises a question of law that deserves a hearing on the merits and is clearly nonfrivolous.

Miller contends, however, that Coregis has failed to present a meritorious defense because although Steichen may have been guilty of conversion and misappropriation of funds, such acts were not the direct and precipitating cause of Miller's claim or the basis of her malpractice claim. Rather, she argues that it was Steichen's failure to communicate settlement offers and his allowing the case to be dismissed outside the statute of limitations that formed the basis of the claim. Miller further argues that because she was not a party to the federal declaratory judgment action, it is not binding upon her under our decision in *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998). Therefore, Miller contends that the exclusion does not apply and that the district court did not abuse its discretion when it denied Coregis' motion to vacate.

[8] An insurance policy is a contract, and when the facts are undisputed, whether or not a claimed coverage exclusion applies is a matter of law. See, *City of Scottsbluff v. Employers Mut. Ins. Co.*, 265 Neb. 707, 658 N.W.2d 704 (2003); *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002). Coregis demonstrated that it had a defense which is "recognized by the law and is not frivolous" and is thus " 'worthy of judicial inquiry.' " *Steinberg v. Stahlnecker*, 200 Neb. 466, 468, 263 N.W.2d 861, 863 (1978), quoting *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977). This showing was sufficient under our law to warrant setting aside the default judgment so

that the garnishment proceeding could be resolved on the merits. The district court therefore abused its discretion in overruling, without explanation, Coregis' motion to vacate and subsequent motion to alter and amend the judgment. In reaching this conclusion, we express no opinion as to whether Coregis will ultimately prevail on its coverage defense.

Having determined that the district court erred in not setting aside the default judgment on the ground that Coregis demonstrated a meritorious defense, it is not necessary for this court to further determine whether or not Coregis was properly served.

CONCLUSION

For the reasons set forth herein, we reverse the judgment of the district court and remand the cause with directions to the district court to (1) vacate the default judgment entered against Coregis on December 21, 2001, and (2) give Coregis a reasonable time in which to file an appropriate responsive pleading.

REVERSED AND REMANDED WITH DIRECTIONS.

WAYNE KUBIK, INDIVIDUALLY AND AS A REPRESENTATIVE OF SAND CREEK FARMS, INC., APPELLANT, V. MARVIN KUBIK AND SHARON THOMPSON, APPELLEES.

683 N.W.2d 330

Filed July 9, 2004. No. S-03-765.

1. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
2. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, a petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled.
3. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
4. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.
5. **Derivative Actions: Words and Phrases.** A derivative action is a suit brought by a shareholder to enforce a cause of action belonging to the corporation.

6. **Derivative Actions: Pleadings: Corporations.** Normally, to maintain a derivative action, a shareholder must allege the making of a demand upon the corporation unless circumstances excuse the stockholder from making such a demand.
7. ____: ____: ____. In a shareholder derivative action, the demand notice and request should set forth the persons to be sued, and should describe all the causes of action which it is intended to assert. The demand must clearly state the corporate wrongs complained of and should state any facts upon which its charges were based.
8. **Derivative Actions.** A shareholder is not required to make a demand if it would be unavailing.
9. **Derivative Actions: Pleadings.** In order to state a derivative action, a petition must allege the fact that a demand has been made or that such a demand would be futile.
10. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pled.
11. **Pleadings: Appeal and Error.** As a general rule, an appellate court disposes of a case on the theory presented in the district court.
12. **Appeal and Error.** An issue not presented to or decided by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Reversed and remanded with directions.

John H. Sohl and Jaron J. Bromm, Senior Certified Law Student, of Edstrom, Bromm, Lindahl, Sohl & Freeman-Caddy, for appellant.

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

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

STEPHAN, J.

Wayne Kubik (Kubik) appeals from an order of the district court for Saunders County dismissing a derivative action he brought on behalf of Sand Creek Farms, Inc. (SCF), against his brother and sister who are the majority shareholders and directors of the corporation.

BACKGROUND

On December 3, 2002, Kubik commenced this derivative action on behalf of SCF against the majority shareholders and directors of SCF, Marvin Kubik and Sharon Thompson (collectively the defendants). In response to the original petition, the defendants filed an answer asserting various defenses,

including the insufficiency of the alleged demand made upon them by Kubik. Kubik filed a reply generally denying the defenses asserted in the answer. The defendants then filed a motion for summary judgment. In the district court's ruling on this motion, it noted that the action had been commenced under the code pleading rules which existed in this state prior to January 1, 2003, and that under those rules, our cases held that a motion for summary judgment was an inappropriate method for challenging the sufficiency of the pleadings. Accordingly, the district court treated the motion as a demurrer, sustained the demurrer, and granted Kubik leave to amend. Kubik then filed a first amended petition which is his operative pleading. We summarize here the factual allegations contained therein.

SCF was funded, organized, and incorporated by Edward and Blanche Kubik, husband and wife, in 1976. Edward died February 21, 1979, and Blanche died March 27, 1997. Kubik, Marvin Kubik, and Sharon Thompson are their only children. Marvin Kubik is a director of SCF and was elected as its president on or about March 19, 1998. Sharon Thompson is now and at all relevant times has been the secretary and treasurer of SCF. SCF has not held regular meetings of its shareholders, officers, or board of directors since before Blanche's death.

Kubik alleged that the following individuals are shareholders of SCF:

Shareholder	Number of Shares	Percentage of Shares
Marvin Kubik	16,666⅔	33.3
Wayne Kubik	14,612⅔	29.2
Sharon Thompson	13,160⅔	26.3
Sharon Thompson (custody Vickie Thompson)	1,240	2.5
Duane Thompson	1,840	3.7
Kellie A. Weston	1,240	2.5
Julie L. Bose	1,240	2.5
	50,000	100

Kubik further alleged on information and belief that without his prior knowledge, the number of outstanding shares was increased to 66,666⅔ shares, as evidenced by a January 1, 2002, domestic corporation occupation tax report, which is attached to the first

amended petition. The record does not disclose who owns or controls the additional 16,666⅔ shares.

More than 90 days prior to filing this action, Kubik served a written demand upon SCF to take the following actions:

> 1) That [SCF] remove from the Board of Directors, Marvin Kubik and Sharon Thompson;
>
> 2) That [SCF] make a full and complete accounting of all income received by the Corporation since Marvin Kubik became President;
>
> 3) That [SCF] make a full and complete accounting of all expenditures incurred for [SCF] since Marvin Kubik became President;
>
> 4) That [SCF] make a full and complete disclosure of any and all contracts entered into by [SCF] since Marvin Kubik became president;
>
> 5) That [SCF] hold regular Board of Directors Meetings;
>
> 6) That [SCF] hold regular, annual Shareholder Meetings;
>
> 7) That [SCF] bring an action against Marvin Kubik and Sharon Thompson for negligence in the administration of [SCF];
>
> 8) That [SCF] bring an action against Marvin Kubik and Sharon Thompson for disbursing Corporate funds to themselves without appropriate corporate/shareholder action;
>
> 9) That [SCF] be reimbursed for expenses incurred by said Corporation for the benefit of Marvin Kubik and Sharon Thompson without appropriate corporate/shareholder action; and
>
> 10) That Shareholder, Wayne Kubik, believes that Marvin Kubik and Sharon (Kubik) Thompson have been aware of some, if not all, of the above requests for more than ninety days; and
>
> 11) That unless an immediate restraining order is issued and/or immediate compliance with the above request is had by [SCF] irreparable harm would occur if the Corporation and/or the Shareholder(s) would await to take action.

Kubik alleged that he had requested but had not received financial information from SCF and that he was removed as the registered agent of the corporation without a directors meeting, approval of shareholders, or his consent. He alleged that the

corporation changed its name and filed new articles of incorporation without a board of directors meeting, approval of the shareholders, or his consent and that the defendants have accepted improper fees from the corporation, entered into improper long-term leases, and incurred "exorbitant legal fees to the detriment of the corporation's shareholders all without Board or Shareholder approval." Kubik further alleged that the defendants were in possession and control of the business and assets of SCF, that the defendants had utilized the corporation for various improper purposes "since at least March 19, 1998," and that irreparable harm would occur if the actions he demanded were not taken. Kubik sought appointment of a receiver and other relief, including compliance with the aforementioned demands.

In response to the amended petition, the defendants filed a motion to dismiss. The motion requested dismissal of the action

> pursuant to [Neb. Ct. R. of Pldg. in Civ. Actions] 12(b)(6) [(rev. 2003)] for failure to state a cause of action, or in the alternative an Order for Summary Judgment herein, concerning the issue of whether the written demand which was the prerequisite to filing the Petition herein pursuant to Neb. Rev. Stat. §21-2072 (Reissue 1995) was legally sufficient.

At a hearing on this motion, the defendants argued that Kubik's demand was deficient. Kubik argued that the demand was legally sufficient and that he could not be more specific in his allegations because the defendants refused to hold shareholder meetings and/or give him the information he requested. The district court entered an order of dismissal, reasoning:

> In the present case, a review of the Amended Petition and the demand attached thereto, it is clear that the demand made does not comport with the requirements set forth in [*Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 507 N.W.2d 665 (1993)]. Whether this case is treated as one filed before the adoption of Nebraska's new civil procedure rules—in which case the matter would be treated as a Demurrer or Motion for Judgment on the Pleadings or whether it is treated as one to which the new rules would apply—in which case it would be treated as a 12(b)(6) motion, the result is the same. Plaintiff has failed to

> allege that a demand, meeting the specificity requirements and giving rise to authority to sue was served upon the corporation. Given that the demand itself was attached to the Amended Petition, it appears unlikely that the Plaintiff would be able to amend the petition to cure the defect. Given this, the Amended Petition fails to state a claim. The matter is dismissed.

Kubik filed this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

Kubik assigns, restated and consolidated, that the district court erred in dismissing the action.

STANDARD OF REVIEW

Nebraska's new rules of pleading apply to "civil actions filed on or after January 1, 2003." Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2003). Because this action was filed prior to that date, we treat this as an appeal from an order sustaining a demurrer without leave to amend and dismissing the action.

[1-4] In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003); *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003); *Regier v. Good Samaritan Hosp.*, 264 Neb. 660, 651 N.W.2d 210 (2002). In determining whether a cause of action has been stated, a petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled. *Rodehorst v. Gartner, supra*; *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002); *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001). Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Rodehorst v. Gartner, supra*; *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003). When a demurrer to a petition is sustained,

a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Regier v. Good Samaritan Hosp., supra*; *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002).

ANALYSIS

[5,6] A derivative action is a suit brought by a shareholder to enforce a cause of action belonging to the corporation. *Sadler v. Jorad, Inc., ante* p. 60, 680 N.W.2d 165 (2004); *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 507 N.W.2d 665 (1993). Normally, to maintain a derivative action, a shareholder must allege the making of a demand upon the corporation unless circumstances excuse the stockholder from making such a demand. *Sadler v. Jorad, Inc., supra*. See, *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990); *Kowalksi v. Nebraska-Iowa Packing Co.*, 160 Neb. 609, 71 N.W.2d 147 (1955); *Association of Commonwealth Claimants v. Hake, supra*; Neb. Rev. Stat. § 21-2072(1) (Reissue 1997). Kubik argues on appeal that he satisfied the demand requirement, or, in the alternative, that he was excused from making a demand because to do so would have been futile.

Was Demand Legally Sufficient?

[7] Section 21-2072(1) provides:

> No shareholder may commence a derivative proceeding until:
>
> (a) A written demand has been made upon the corporation to take suitable action; and
>
> (b) Ninety days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the ninety-day period.

The statute does not address the required substantive content of the demand, and this court has not had occasion to consider the legal sufficiency of a demand made pursuant to § 21-2072(1). However, the Nebraska Court of Appeals addressed this issue in *Association of Commonwealth Claimants v. Hake, supra*. In that case, the assignees of depositors and creditors of an insolvent industrial loan and investment company brought a derivative

action against the former directors of the company, the former general counsel, and other alleged coconspirators, to recover for alleged mismanagement and other improprieties which resulted in the insolvency. The assignees appealed from a district court order dismissing the case after granting the defendant's demurrers. The demurrers were sustained on the basis that the assignees had failed to fulfill the demand requirement. Regarding the sufficiency of the demand, the Court of Appeals stated: " 'The demand notice and request should set forth the persons to be sued, and should describe all the causes of action which it is intended to assert. The demand must clearly state the corporate wrongs complained of and should state any facts upon which its charges were based.' " *Id.* at 130, 507 N.W.2d at 669-70, quoting 13 William Meade Fletcher et al., Cyclopedia of the Law of Private Corporations § 5968 (rev. perm. ed. 1991). We agree and adopt this principle of law.

The demand considered in *Hake* stated generally that the plaintiff had " 'reasonable grounds to believe' " that he had " 'meritorious causes of action' " against " 'members and directors.' " *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. at 130, 507 N.W.2d at 670 (1993). The Court of Appeals determined that the alleged demand was not legally sufficient because it failed to name specific persons or facts giving rise to the alleged causes of action and that the allegations in the demand were "mere conclusions." *Id.*

We agree with the determination of the district court in this case that the demand attached to the amended petition and incorporated by reference therein "[did] not comport with the requirements set forth in *Hake*." Although the demand identifies the specific individuals to be sued, it provides no detail regarding the specifications of alleged negligence on the part of those individuals or the date or amounts of any alleged improper disbursements made or expenses incurred. The demand fails to state specific facts " 'upon which its charges [are] based.' " *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 130, 507 N.W.2d 665, 670 (1993). See 13 Fletcher et al., *supra*, §§ 5963 and 5968 (rev. perm. ed. 1995) (demand should provide directors with sufficient information regarding relief sought and grounds for such relief so demand can be evaluated). Like the alleged

demand in *Hake*, Kubik's demand is based on mere conclusions. Accordingly, the district court did not err in finding that Kubik failed to allege the making of a demand which met the specificity requirements giving rise to authority to sue.

WAS DEMAND EXCUSED?

[8] As noted, Kubik makes an alternative argument in this appeal that he was excused from the demand requirement because demand would have been futile. We have held that a "shareholder is not required to make [a demand] if it would be unavailing." *Sadler v. Jorad, Inc., ante* p. 60, 66, 680 N.W.2d 165, 170 (2004). See, also, *Anderson v. Clemens Mobile Homes,* 214 Neb. 283, 333 N.W.2d 900 (1983) (minority shareholder not required to make demand where action would require majority shareholder to require his own accounting to corporation); *Association of Commonwealth Claimants v. Hake, supra* (it is generally accepted rule of corporate law that it is futile to request directors accused of wrongdoing to sue themselves); Carol B. Swanson, *Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball*, 77 Minn. L. Rev. 1339, 1351 (1993) ("[a]s a general rule, some level of directorial involvement in a challenged transaction excuses demand").

[9] However, the record does not reflect that Kubik ever made this argument in the district court. His operative amended petition alleged that a demand was made, not that it was futile, and his arguments to the court focused exclusively on the sufficiency of the demand. This court has previously held that "[i]n order for appellants to state a derivative action, their petition *must* allege the fact that a demand has been made . . . or that such a demand would be futile." (Emphasis supplied.) *Weimer v. Amen*, 235 Neb. 287, 304, 455 N.W.2d 145, 157 (1990). See, also, *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 131, 507 N.W.2d 665, 670 (1993) ("[w]here no demand was made because it was deemed futile, the petition must state with particularity the facts which excuse such demand").

[10-12] The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pled. *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (2003); *V.C. v. Casady*,

262 Neb. 714, 634 N.W.2d 798 (2001). As a general rule, an appellate court disposes of a case on the theory presented in the district court. *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002). Likewise, an issue not presented to or decided by the trial court is not appropriate for consideration on appeal. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004); *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003). Because the pleadings which were before the district court at the time of its ruling on the demurrer did not raise an issue that demand upon the directors and majority shareholders would have been futile and was therefore excused, the district court was not required or permitted to consider this issue in deciding whether the demurrer should be sustained.

However, as noted above, when a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Regier v. Good Samaritan Hosp.*, 264 Neb. 660, 651 N.W.2d 210 (2002); *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002). Because we cannot conclusively determine that Kubik would be unable to plead facts upon which a court could find that demand would have been futile and is therefore excused, we conclude that the district court erred in sustaining the demurrer without leave to amend and dismissing the action.

CONCLUSION

The district court correctly found that Kubik's petition failed to allege that a demand meeting the specificity requirements and giving rise to authority to sue was served upon SCF. However, the district court erred in failing to grant Kubik leave to amend his petition to allege futility. We therefore affirm the district court's order sustaining the demurrer, but reverse the judgment of dismissal and direct that upon remand, Kubik shall have 30 days from entry of our mandate to file an amended petition.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., participating on briefs.

MCCORMACK, J., not participating.

BUTLER COUNTY SCHOOL DISTRICT NO. 502, ALSO KNOWN AS EAST BUTLER PUBLIC SCHOOLS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. CHRISTINE MEYSENBURG, IN HER CAPACITY AS BUTLER COUNTY CLERK, AND BUTLER COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES.

683 N.W.2d 367

Filed July 16, 2004. No. S-03-171.

1. **Demurrer: Pleadings.** In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
2. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
4. **Demurrer: Pleadings: Records.** A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action.
5. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
6. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally, and if, as so construed, the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled.
7. ____: ____. When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.
8. **Demurrer: Pleadings: Appeal and Error.** Before error can be predicated upon the refusal of a trial court to permit an amendment to a petition after a demurrer is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion.
9. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.
10. **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.

11. **Political Subdivisions Tort Claims Act: Taxes.** Acts performed with respect to the assessment and collection of taxes are exempt under the Nebraska Political Subdivisions Tort Claims Act.

Appeal from the District Court for Butler County: MARY C. GILBRIDE, Judge. Affirmed.

Steve Williams, of Recknor, Williams & Wertz, for appellant.

Randall L. Goyette and Andrew K. Smith, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellant, Butler County School District No. 502, also known as East Butler Public Schools (the school district), brought this action pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Supp. 1999). The amended petition is the operative petition for purposes of this appeal. In the amended petition, the school district alleged that Christine Meysenburg, the Butler County clerk, failed to properly record and transcribe in the "2000 Abstract of Levies" a levy set by the school district's board of education. Butler County was also named as a defendant. As a result of Meysenburg's alleged "negligent or wrongful act, error, omission, or breach of duty," the school district claimed it received $150,000 less from the special building fund levy than had been approved. Appellees demurred to the amended petition, claiming that the amended petition failed to state a cause of action and that appellees were immune from liability. The district court for Butler County sustained the demurrer and dismissed the action without leave to replead. The school district appeals. We affirm the district court's decision sustaining the demurrer without leave to replead and dismissing the school district's action.

STATEMENT OF FACTS

On August 2, 2002, the school district filed an initial petition against Meysenburg and the Butler County Board of Supervisors,

alleging a claim against these defendants under the Political Subdivisions Tort Claims Act. Meysenburg and the board of supervisors demurred to the petition, alleging that there was a defect in the parties as to the board of supervisors and that the petition failed to state a cause of action. The school district conceded that the board of supervisors was not a proper party to the action, and the demurrer as to the board of supervisors was sustained on this ground. The board of supervisors is no longer a party to these proceedings. The district court sustained the demurrer on the additional ground that the petition failed to state a cause of action, and the school district was given leave to replead.

On December 4, 2002, the school district filed its amended petition in which it named Meysenburg and Butler County as defendants. The following facts are alleged in the amended petition: On September 11, 2000, the school district's board of education passed a resolution entitled "2000-2001 Tax Request Resolution for East Butler School District 12-0502," which adopted the 2000-2001 budget information contained in a previous tax request hearing notice. See Neb. Rev. Stat. § 77-1601.02 (Cum. Supp. 2000). Pursuant to the resolution, the school board set a tax request for a special building fund at $150,000 and created a levy of .0930 per $100 of taxable valuation of property subject to the levy.

According to paragraph 8 of the amended petition, shortly after the resolution was passed, and in accordance with Neb. Rev. Stat. § 13-508 (Cum. Supp. 2000), the school board filed the "2000-2001 State of Nebraska School District Budget Form for the East Butler Public Schools" with Meysenburg, in her capacity as the Butler County clerk. As alleged by the school district in paragraph 14 of the amended petition, "[p]ursuant to Neb. Rev. Stat. § 23-1302 [(Reissue 1997)] and/or other Nebraska Law, [Meysenburg] had a legal duty to accurately record and transcribe the levy amount . . . in the 2000 Abstract of Levies." Attached to the amended petition as exhibit D is a seven-page document entitled "2000 Abstract of Levies," which the school district alleged is a true and correct copy of the "2000 Abstract of Levies" maintained by Meysenburg. Exhibit D contains, inter alia, a list of governmental subdivisions and their corresponding levy amounts. The last page of exhibit D contains a certification

and the stamp of the Butler County clerk. Meysenburg signed the certification on the last page of exhibit D in her capacity as "Butler County Clerk," and the document bears a handwritten date of October 26, 2000. The following language appears above Meysenburg's signature: "I, Christine Meysenburg, County Clerk in and for Butler County, Nebraska, do hereby certify the above tax levies for Butler County taxing districts as set by the political subdivisions and approved by the County Board of Supervisors on October 13, 2000."

According to paragraph 9 of the amended petition, Meysenburg "failed to properly record or transcribe" in the 2000 abstract of levies the special building fund levy which had been set by the school district's school board, and according to paragraph 19, Meysenburg "publicly admitted . . . that she 'just made a mistake.' " The school district alleged that as a result of this failure, it had been damaged "in that it will receive $150,000.00 less from the special building fund levy than was approved." For its relief, the school district claimed that as a result of appellees' "failure to certify a proper levy pursuant to Neb. Rev. Stat. § 77-1601.02," the school district was entitled to receive $150,000 from appellees.

On December 23, 2002, appellees filed a demurrer to the amended petition. Appellees claimed that the amended petition failed to state a cause of action and that appellees were immune from liability. In support of their demurrer, appellees relied upon § 13-910, which provides, in pertinent part, that "[t]he Political Subdivisions Tort Claims Act . . . shall not apply to . . . (5) Any claim arising with respect to the assessment or collection of any tax or fee . . . ."

A hearing was held on appellees' demurrer. In a journal entry filed February 4, 2003, the district court sustained the demurrer, stating that "the [school district] seeks to impose liability for an act which falls within the ambit of the 'assessment and collection' of taxes. Sovereign immunity as to such acts has been preserved and no suit against . . . Meysenburg in her official capacity or the county can be sustained . . . ." The district court dismissed the school district's amended petition without leave to replead, concluding, "there is no reasonable possibility that further pleading will cure the defect." The school district appeals.

ASSIGNMENT OF ERROR

On appeal, the school district assigns one error, which, restated, claims that the district court erred in sustaining appellees' demurrer and dismissing the school district's amended petition without leave to replead.

STANDARDS OF REVIEW

[1,2] In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004). When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004).

ANALYSIS

[3,4] At issue in this case is whether the school district's amended petition states a cause of action against appellees. If the amended petition fails to state a cause of action, we consider whether the district court should have granted leave to the school district to replead. In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action. *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001).

[5,6] A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244

(2003). In determining whether a cause of action has been stated, the petition is to be construed liberally, and if, as so construed, the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled. *Regier v. Good Samaritan Hosp.*, 264 Neb. 660, 651 N.W.2d 210 (2002).

[7,8] When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Id.* Before error can be predicated upon the refusal of a trial court to permit an amendment to a petition after a demurrer is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion. *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000).

The district court sustained the demurrer on the basis that appellees were immune under § 13-910(5) of the Political Subdivisions Tort Claims Act which exempts "[a]ny claim arising with respect to the assessment or collection of any tax or fee . . . ." In support of its argument that the district court erred in sustaining appellees' demurrer, the school district essentially claims that Meysenburg's purported negligence as alleged in the amended petition is not exempt under the Political Subdivisions Tort Claims Act. We disagree.

In its amended petition, the school district alleges that after the school board passed the resolution setting the special building fund levy, the board filed the necessary levy form with Meysenburg. The school district further alleges that under state law, Meysenburg "had a legal duty to accurately record and transcribe the levy amount . . . in the 2000 Abstract of Levies." The amended petition describes Meysenburg's duties and refers to § 77-1601.02 and Neb. Rev. Stat. § 23-1302 (Reissue 1997). Meysenburg's duties as alleged in the amended petition are not inconsistent with these statutes.

Paragraph 9 of the amended petition refers to and incorporates exhibit D. As noted above, exhibit D is a document entitled "2000 Abstract of Levies," which lists Butler County governmental subdivisions and their corresponding levy amounts. The document bears Meysenburg's signature and contains her certification as follows: "I, Christine Meysenburg, County Clerk in and for Butler County, Nebraska, do hereby certify the above tax

levies for Butler County taxing districts as set by the political subdivisions and approved by the County Board of Supervisors on October 13, 2000." Exhibit D does not contain an entry for the school district's special building fund levy. In paragraph 9, the school district alleges that contrary to the certification contained in exhibit D, Meysenburg "failed to properly record or transcribe" in the 2000 abstract of levies the special building fund levy set by the school district's school board. The school district claimed that as a result of Meysenburg's negligence, the school district had been harmed in the amount of $150,000, an amount which we observe is equal to the sum which was to have been generated by the special building fund levy.

[9,10] As indicated above, in sustaining the demurrer, the district court relied on § 13-910, entitled "Act and sections; exemptions," which provides that "[t]he Political Subdivisions Tort Claims Act . . . shall not apply to . . . (5) Any claim arising with respect to the assessment or collection of any tax or fee . . . ." We have stated that statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver. *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003). 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. *Id.*; *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). See *King v. State*, 260 Neb. 14, 614 N.W.2d 341 (2000). Our analysis of the Political Subdivisions Tort Claims Act is guided by its plain language and the presumption against a waiver.

Referring to § 13-910(5) and the amended petition, appellees assert that any claim the school district may have as a result of Meysenburg's failure to record the school district's special building fund levy is a " 'claim arising with respect to' " the county's assessment or collection of taxes, and thus is exempt under § 13-910(5). Brief for appellee at 10. In support of their claim that they are immune from suit, appellees also rely, in part, on federal cases.

With respect to appellees' reliance on federal cases, we note that the language in Nebraska's Political Subdivisions Tort

Claims Act is modeled after the Federal Tort Claims Act and that § 13-910(5) is similar to 28 U.S.C. § 2680(c) (2000), the latter of which excludes "[a]ny claim arising in respect of the assessment or collection of any tax . . . ." We have previously referred to federal case law under 28 U.S.C. § 2680(c) in applying § 13-910(5). See *Nash v. City of North Platte*, 198 Neb. 623, 255 N.W.2d 52 (1977), *overruled on other grounds, Knight v. H & H Chevrolet*, 215 Neb. 166, 337 N.W.2d 742 (1983). As noted by appellees, the federal courts have repeatedly stated, albeit in different factual contexts, that the language "in respect of" found in 28 U.S.C. § 2680(c) should be interpreted broadly, thereby preserving immunity. See, e.g., *Perkins v. U.S.*, 55 F.3d 910, 915 (4th Cir. 1995) (stating "exemption immunizes the [Internal Revenue Service] from suit for activities that are even remotely related to . . . tax assessment or collection"); *Capozzoli v. Tracey*, 663 F.2d 654, 658 (5th Cir. 1981) (stating that language "*in respect of* . . . is broad enough to encompass any activities of an [Internal Revenue Service] agent even remotely related to his or her official duties"). The federal analysis is consistent with our approach construing immunity statutes in favor of the sovereign and against waiver.

[11] Examining the school district's allegations in relation to the language of § 13-910(5), and reading this statute in favor of the sovereign and against waiver, we determine that Meysenburg's acts of recording, transcribing, and certifying the tax levies, as alleged in the school district's amended petition, are acts performed "with respect to the assessment and collection of taxes," and as a result are exempt under the Nebraska Political Subdivisions Tort Claims Act. It is apparent from the allegations in the school district's amended petition and exhibits that Meysenburg's duties generally with regard to transcribing and recording levies, and in particular her act in this case of certifying levies set by Butler County governmental subdivisions are acts undertaken to assist in the assessment and collection of taxes and are immune from liability under § 13-910(5). See *LaBarge v. City of Concordia*, 23 Kan. App. 2d 8, 17, 927 P.2d 487, 493 (1996) (interpreting Kansas Tort Claims Act which excepts claims involving "the assessment or collection of taxes"

and stating that "[i]t is obvious that the County cannot be held liable in damages resulting from the preparation of its tax assessment rolls . . . . These rolls were prepared to assist in the assessment and collection of taxes, and the County is specifically immune from liability [under tort claims statute]"). Accordingly, the school district did not state a cause of action against appellees based upon Meysenburg's alleged failure to record, transcribe, and certify the special building fund levy, and the district court did not err in sustaining appellees' demurrer to the amended petition. See § 13-910(5).

Given the allegations in the amended petition and the terms of § 13-910(5), there is no showing of a legal liability of appellees to the school district, and no reasonable possibility exists that amendment will correct the defect. See *Regier v. Good Samaritan Hosp.*, 264 Neb. 660, 651 N.W.2d 210 (2002). Accordingly, the district court did not abuse its discretion in granting appellees' demurrer without leave to replead. We affirm.

CONCLUSION

The district court correctly sustained appellees' demurrer to the amended petition and did not abuse its discretion in denying leave to replead. We affirm the district court's order.

AFFIRMED.

STATE OF NEBRASKA ON BEHALF OF L.L.B., A MINOR CHILD, APPELLANT, V. MARQUISE S. HILL, APPELLEE.

682 N.W.2d 709

Filed July 16, 2004. No. S-03-225.

1. **Judgments: Equity: Time.** A litigant seeking the vacation or modification of a prior judgment after term may take one of two routes. The litigant may proceed either under Neb. Rev. Stat. § 25-2001 (Cum. Supp. 2002) or under the district court's independent equity jurisdiction.
2. **Judgments: Equity: Proof.** To be entitled to equitable relief from a judgment, a party must show that the situation is not due to his or her fault, neglect, or carelessness.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed.

Anthony R. Medina for appellant.

Thomas C. Riley, Douglas County Public Defender, and Robert M. Williams for appellee.

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

CONNOLLY, J.

In 1996, the district court entered a default decree determining that Marquise S. Hill was the father of L.L.B. and ordering him to pay child support. Although Hill moved to set aside the decree within the same court term, the motion was dismissed for lack of prosecution. In 2002, DNA tests showed that Hill was not L.L.B.'s father, and Hill moved to vacate the paternity decree. The court granted the motion and vacated the decree, as well as child support arrearages.

The State on behalf of L.L.B. does not contest the vacation of the paternity determination and concedes that Hill should not be liable for future child support. But it argues that the court erred in vacating the arrearages. Because of Hill's inexcusable delay in invoking the district court's equity powers, we reverse.

BACKGROUND

In May 1996, the State on behalf of L.L.B. filed a petition for establishment of paternity and support. At the same time, the State moved for genetic testing. The transcript shows that a civil process server personally served Hill at Idelman Telemarketing with the petition, a notice of right to counsel, a notice of hearing, and a motion for genetic testing. Hill does not deny that he received these materials, but claims that he was in prison at the time. Hill failed to appear for the scheduled hearing. On July 18, 1996, the court entered a decree determining that Hill was L.L.B.'s father and ordering him to pay child support.

An attorney subsequently entered an appearance for Hill, and on August 15, 1996, Hill moved to set aside the decree and to file an answer out of time. Hill made the motion during the same term that the court had entered the paternity decree.

On May 23, 1997, the court administrator sent a letter to "Marquise S. Hill (C/O Idelman Telemarketing, 7415 Dodge

Street, Omaha, Nebraska 68114)." The letter warned Hill that his motion to set aside the default decree would be dismissed within 30 days unless further action was taken. Hill appears to have been in prison at the time, and it is unclear whether he received the notice.

The motion to set aside the default decree was dismissed on June 26, 1997, for failure to prosecute. Notice was sent to a residential address in Omaha. But it appears Hill was still in prison at the time, and it is unclear whether he received notice of the dismissal.

Hill was released from prison in 1998. In December 2001, Hill's driver's license was suspended for delinquent child support payments. On January 28, 2002, the State filed an application for a show cause order. The court granted the application and ordered Hill to show cause why he should not be held in contempt for failure to pay child support. In response to the show cause order, Hill filed a motion for genetic testing and child support suspension. The court granted the motion, and the testing showed that Hill was not L.L.B.'s father. Hill then filed a motion to terminate.

At a hearing before a referee, Hill testified that when he first received the petition for establishment of paternity, he spoke with the counselor at his housing unit at the penitentiary. He also claimed that he and members of his family had spoken with the "child support department" and told them that he was not L.L.B.'s father. Concerning the attorney who had filed the motion to set aside the paternity decree, he testified, "I tried to hire her to represent me on this and her lawyer abilities just wasn't [sic] up to par. She accepted my money and never called me back. She never said anything, ever." Hill also testified that both while he was in prison and after he was released, the State garnished his wages.

The referee recommended that the court enter an order vacating the paternity determination and terminating Hill's future child support obligations. However, the referee also recommended that the court not vacate the arrearages, reasoning:

> [Hill] does not dispute valid service of process, including the notification of his right to counsel. Instead, he did not legally defend the suit and judgment was entered in default. To now vacate that valid decree would be inequitable to the child. For the last six years, [the child and the State]

> reasonably relied upon the valid judgment thereby precluding pursuit of another. [Hill], not the child, should bear the burden of the failure to defend the case from the outset.

Hill filed an objection to the referee's recommendation. The court disagreed with the referee's recommendation and vacated the arrearages.

ASSIGNMENTS OF ERROR

The State on behalf of L.L.B. assigns that the district court erred in (1) finding that Hill was not liable for any child support arrearages that had accrued from the time that the decree was entered to the time when it was established that he was not the father, (2) using its equitable powers to sustain Hill's motion to terminate, and (3) failing to apply the doctrine of laches to the motion to terminate.

STANDARD OF REVIEW

It would unduly lengthen the opinion to set out the details of this confusing procedural history. However, on appeal, the parties proceed as though Hill had petitioned the district court to use its independent equity power to set aside the paternity decree and to vacate the child support arrearages. We agree that this is the best characterization of the proceedings. On appeal from an equity action, the appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000).

ANALYSIS

Here, the substantive issue is narrow. The State did not oppose Hill's request to vacate the paternity decree or his request to terminate his future child support payments. The sole issue is whether the court erred in vacating the child support arrearages.

[1] A litigant seeking the vacation or modification of a prior judgment after term may take one of two routes. The litigant may proceed either under Neb. Rev. Stat. § 25-2001 (Cum. Supp. 2002) or under the district court's independent equity jurisdiction. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). Hill has invoked the court's independent equity jurisdiction.

In *Gress v. Gress*, 257 Neb. 112, 117, 596 N.W.2d 8, 13 (1999), we said:

> Child support payments become a vested right of the payee in a dissolution action as they accrue. . . . While a past-due child support arrearage is already accrued and vested, a future payment is not. . . . A court may, therefore, modify the amount of child support due in the future but may not forgive or modify past-due child support.

(Citations omitted.) We have not addressed whether this rule precludes a court from using § 25-2001 or its independent equity power to vacate child support arrearages after the underlying paternity determination has been vacated. We need not decide that issue, however, because we conclude that Hill's lack of diligence precludes him from invoking equity.

[2] To be entitled to equitable relief from a judgment, a party must show that the situation is not due to his or her "fault, neglect, or carelessness." 49 C.J.S. *Judgments* § 435 at 600 (1997). "[T]he party seeking relief in equity from a judgment at law must show clearly that the judgment complained of is . . . not of his own negligence." *Shufeldt v. Gandy*, 34 Neb. 32, 36, 51 N.W. 302, 303 (1892). See, also, *Koehler v. Reed*, 1 Neb. (Unoff.) 836, 96 N.W. 380 (1901) (tracing history of rule); Restatement (Second) of Judgments § 67 at 162 (1982) ("a judgment by default may be avoided if . . . (2) The applicant for relief acted with due diligence in ascertaining that the judgment had been rendered and with reasonable promptness in seeking relief").

Here, Hill does not deny that he received notice of the 1996 petition to establish paternity and the State's motion for DNA testing. Instead of having the testing done, he failed to appear, resulting in a default judgment. Within a month, Hill hired an attorney who filed a motion to vacate the decree and child support award. However, neither Hill nor his attorney prosecuted the motion, and it was dismissed. Hill complains that he should not be blamed for the dismissal because it was the result of his attorney's negligence. The soundness of this argument is questionable. See *Roemer v. Maly*, 248 Neb. 741, 746, 539 N.W.2d 40, 45 (1995) ("litigant has a duty to follow the progress of the case, rather than to merely assume that counsel is doing everything necessary and proper"). But even if we were to accept the argument,

the dismissal of his motion to vacate in term occurred almost 5 years before Hill invoked the court's equitable jurisdiction. Hill testified that during this period, the State was garnishing his wages. Thus, he must have known that the arrearages were accruing. Yet even though he firmly believed that he was not the child's father, he did nothing until the State commenced contempt proceedings in 2002, almost 5 years after the dismissal of his motion to vacate in term. It was Hill's inexcusable lack of diligence which led to the accumulation of the arrearages, and as a result, equity will not aid him in vacating those arrearages. See *CSEA v. Guthrie*, 84 Ohio St. 3d 437, 705 N.E.2d 318 (1999).

CONCLUSION

The court erred in vacating the child support arrearages owed by Hill.

REVERSED.

TERLE SLANSKY, APPELLANT, V.
NEBRASKA STATE PATROL, APPELLEE.

685 N.W.2d 335

Filed July 16, 2004. No. S-03-747.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Administrative Law: Judgments: 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.
4. ____: ____: ____. 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.
5. **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.
6. ____: ____. 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.

7. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.
8. **Statutes: Constitutional Law: Sentences.** A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
9. **Constitutional Law: Criminal Law: Other Acts.** Under the Ex Post Facto Clause, the retroactive application of civil disabilities and sanctions is permitted; only retroactive criminal punishment for past acts is prohibited.
10. **Due Process.** Procedural due process limits the government's ability to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause. Due process requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
11. **Constitutional Law: Due Process.** When an individual claims he or she is being deprived of a liberty interest without due process, the claim is examined in three stages. First, a determination must be made that there is a liberty interest at stake. In the second stage, the court must determine what procedural safeguards are required. Finally, the facts of the case are examined to ascertain whether there was a denial of that process which was due.
12. **Due Process: Notice.** Due process does not guarantee an individual any particular form of state procedure. Instead, the requirements of due process are satisfied if a person has reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it.
13. **Administrative Law.** As a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties.
14. ____. An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellant.

Jon Bruning, Attorney General, and Mark D. Starr for appellee.

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

GERRARD, J.

In 1985, Terle Slansky was convicted pursuant to jury verdict of, inter alia, rape and attempted rape, and was sentenced to a term of 15 to 20 years' imprisonment in Kansas. After his release

from prison, Slansky moved to Nebraska and the Nebraska State Patrol (NSP), pursuant to the Sex Offender Registration Act (SORA), Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 2000), determined that Slansky was at a high risk to reoffend sexually and classified him as a Level 3 sex offender. Slansky appealed, and the district court affirmed the NSP's determination. On appeal, Slansky contends that SORA is unconstitutional, the risk assessment instrument used by the NSP to classify sex offenders is invalid, and the evidence was insufficient to classify him as a Level 3 sex offender. For the following reasons, we affirm the judgment of the district court.

I. SORA

Because Slansky challenges numerous aspects of SORA, we begin by outlining some of its pertinent features, as well as the applicable rules and regulations that implement SORA. Similarly, because Slansky questions the validity of the risk assessment instrument that was developed to classify offenders, we briefly set forth its contours.

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, see 42 U.S.C. § 14071 et seq. (2000), which conditioned certain federal funding on a state's adoption of sex offender registration laws within 3 years. See, *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999). In response, the Legislature enacted SORA in 1996. Although there have been a number of amendments to SORA since 1996, see § 29-4001 et seq. (Cum. Supp. 1998 & 2002) and 2004 Neb. Laws, L.B. 943, 98th Leg., 2d Session (2004), we review SORA as it existed at the time the NSP conducted Slansky's assessment in January 2000.

In enacting SORA, the Legislature stated that it was attempting to protect communities by assisting law enforcement agencies in identifying potential repeat sex offenders. See § 29-4002. In this regard, SORA applies to any person who on or after January 1, 1997, (1) pleads guilty to or is found guilty of one of a number of enumerated offenses, most of which are sexual in nature; (2) enters the State of Nebraska after having pled guilty to or been found guilty of any offense in another state that is

substantially equivalent to one of the enumerated offenses; or (3) is incarcerated or is under probation or parole as a result of pleading guilty to or being found guilty of a registrable offense under (1) or (2). See § 29-4003.

Any person subject to SORA must register with the sheriff of the county in which he or she resides within 5 days of becoming subject to SORA. § 29-4004. Registration requires a person to provide, inter alia, his or her name, aliases, date of birth, Social Security number, photograph, fingerprints, current address, place of employment or vocation, any school he or she is attending, a listing of registrable offenses the individual has pled guilty to or been found guilty of, the jurisdiction where the offense was committed, and the name and location of each jail or penal facility in which the person was incarcerated. § 29-4006(1). Such information is then forwarded to the NSP, which must maintain a central registry of persons obligated to register under SORA. § 29-4004.

Although information obtained under SORA was at one time restricted to law enforcement agencies and their authorized personnel, see § 29-4009(1) (Cum. Supp. 1996), this restriction was eliminated in 1998. Under the amendments passed in 1998, in addition to disclosing information obtained under SORA to law enforcement agencies for law enforcement purposes and governmental agencies conducting confidential background checks, the NSP and any law enforcement agency authorized by the NSP may release relevant information concerning the person if it is necessary to protect the public. § 29-4009(1) through (3).

Whether to release information concerning a person subject to SORA to the public is essentially a question about the person's risk of recidivism. See § 29-4013. Generally speaking, the NSP is required to assign a notification level, based on the risk of recidivism, to every person subject to SORA. § 29-4013(2)(e). If the risk of recidivism is low, the person is classified as a Level 1 offender and law enforcement officials who are likely to encounter the offender must be notified. § 29-4013(2)(c)(i). If the risk of recidivism is moderate, the person is classified as a Level 2 offender and schools, daycare centers, and religious and youth organizations must also be notified. § 29-4013(2)(c)(ii). If the risk of recidivism is high, the person is classified as a Level

3 offender and notice must be given to members of the public who are likely to encounter the offender, in addition to those groups that are required to be notified if a person is classified as a Level 1 or 2 offender. § 29-4013(2)(c)(iii).

In order to determine an offender's appropriate classification level, SORA directs the NSP to adopt rules and regulations that identify and incorporate factors that are relevant to a sex offender's risk of recidivism. See § 29-4013. SORA states in part:

> Factors relevant to the risk of recidivism include, but are not limited to:
>
> (i) Conditions of release that minimize the risk of recidivism, including probation, parole, counseling, therapy, or treatment;
>
> (ii) Physical conditions that minimize the risk of recidivism, including advanced age or debilitating illness; and
>
> (iii) Any criminal history of the sex offender indicative of a high risk of recidivism, including:
>
> (A) Whether the conduct of the sex offender was found to be characterized by repetitive and compulsive behavior;
>
> (B) Whether the sex offender committed the sexual offense against a child;
>
> (C) Whether the sexual offense involved the use of a weapon, violence, or infliction of serious bodily injury;
>
> (D) The number, date, and nature of prior offenses;
>
> (E) Whether psychological or psychiatric profiles indicate a risk of recidivism;
>
> (F) The sex offender's response to treatment;
>
> (G) Any recent threats by the sex offender against a person or expressions of intent to commit additional crimes; and
>
> (H) Behavior of the sex offender while confined.

§ 29-4013(2)(b).

Relying on these factors, the NSP's rules and regulations, adopted and promulgated pursuant to § 29-4013, identify factors that mitigate against the risk of recidivism, as well as factors that increase the risk of recidivism. Factors which were determined to reduce the risk of recidivism included (1) conditions of release such as supervised probation or parole; (2) counseling, therapy, or treatment following release; and (3) physical conditions such as advanced age or debilitating illness. 272 Neb.

Admin. Code, ch. 19, § 012.03(A) through (C) (2000). Factors that were identified as increasing the risk of recidivism included (1) criminal history of the offender; (2) repetitive or compulsive behavior including the number of sex-related charges and convictions and offenses committed while confined or on supervised release; (3) age of the victim; (4) age at which the offender was first charged with a sex offense; (5) relationship of the offender to the victim; (6) convictions for sex offenses in jurisdictions other than Nebraska; (7) control of the victim through the threat or use of weapons, force, or violence, or the infliction of serious injury; (8) indications of a risk of recidivism in psychological or psychiatric profiles; (9) the offender's response to treatment; and (10) behavior of the offender while confined. 272 Neb. Admin. Code, ch. 19, § 012.04(A) through (J) (2000). Moreover, the following four factors were determined to be so indicative of a high risk of recidivism that their presence should always result in a Level 3 classification: (1) torture or mutilation of the victim or the infliction of death, (2) abduction and forcible transportation of the victim to another location, (3) threats to reoffend sexually or violently, and (4) recent clinical assessment of dangerousness. 272 Neb. Admin. Code, ch. 19, § 012.05(A) through (D) (2000).

Under the NSP's rules and regulations, the aforementioned factors were to be incorporated into a risk assessment instrument. 272 Neb. Admin. Code, ch. 19, § 012.02 (2000). Thereafter, every offender in the registry was to be evaluated using the risk assessment instrument based upon all records and data available concerning the offender. *Id.* In order to develop a risk assessment instrument, the NSP collaborated with Mario Scalora, Ph.D., of the law-psychology program at the University of Nebraska-Lincoln. To determine what factors best correlate to sexual recidivism, Scalora and a group of researchers tracked 1,300 sex offenders who had either been released from incarceration or placed on community-based probation. Based on this research and a review of the relevant literature, Scalora crafted a risk assessment instrument which scores the risk of recidivism by examining 14 factors. This risk assessment instrument has been used by the NSP to classify every offender in the registry, including Slansky. See § 012.02.

The 14 factors or "Items" in the risk assessment instrument are as follows: (1) number of convictions for sex or sex-related offenses (including current offenses); (2) number of convictions for other offenses, besides traffic infractions; (3) other sex or sex-related charges not resulting in conviction; (4) age at arrest for first sex or sex-related conviction; (5) relationship of offender to victim; (6) prior sex offense in jurisdictions other than from the State of Nebraska; (7) victim's gender; (8) age of sex crime victim(s); (9) use of force (includes current and previous sexual assaults); (10) release environment; (11) disciplinary history while incarcerated; (12) treatment (considers incarceration, court-ordered, or postrelease); (13) mental and cognitive functioning; and (14) calculation of time elapsed from previous release from court-ordered confinement or supervision to arrest for felony or Class I or Class II misdemeanor(s) for which the offender was convicted or while under court-ordered conditions.

If a certain factor is present, the offender is assigned a distinct number of points. For example, in regard to item 1 (number of convictions for sex or sex-related offenses), if the offender has been convicted of one sex-related offense, he or she is assessed 0 points; if the offender has been convicted of two sex-related offenses, he or she is assessed 40 points; and if the offender has been convicted of three or more sex-related offenses, he or she is assessed 60 points. We note that the number of points assigned for each item depends on its correlation with recidivism; items with the highest statistical relationship with recidivism have relatively higher point values on the risk assessment instrument. Once all 14 items have been examined, the offender's score is totaled. If the offender scores below 70 points, he or she is considered a low risk and classified as a Level 1 offender. If the offender scores between 75 and 125 points, he or she is considered a moderate risk and classified as a Level 2 offender. If the offender scores 130 points or higher, he or she is considered a high risk and classified as a Level 3 offender.

We note that the risk assessment instrument, pursuant to § 012.05, includes a list of four factors which, if present, automatically, and regardless of the offender's overall score, results in the offender's being classified as a Level 3 offender. They are as follows: (1) victim tortured or acts resulted in death; (2) victim

abducted and forcibly transported to another location; (3) perpetrator articulates to officials or treatment professionals an unwillingness to control future sexually assaultive behavior or plans to reoffend violently or sexually; and (4) recent clinical assessment of dangerousness by a sex offender treatment or doctoral level professional asserting perpetrator presents a significant risk to reoffend. Conversely, the risk assessment instrument also contains two factors—debilitating illness and advanced age—which automatically result, regardless of the offender's overall score, in the offender's being classified as a Level 1 offender. In addition, the instrument allows the investigator conducting the assessment to depart from the presumptive risk category, if such departure is warranted. If a departure is granted, the investigator must explain the basis for the departure.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1985, at the age of 19, Slansky was charged with and convicted of, inter alia, the crimes of rape and attempted rape in Kansas. *State v. Slansky*, 239 Kan. 450, 720 P.2d 1054 (1986). As a result, Slansky was sentenced to a term of 15 to 20 years in prison. While incarcerated, Slansky refused to participate in mental health counseling and sex offender treatment because he thought it would have interfered with a number of his prison-time activities, including his work as an electrician within the prison.

On May 4, 1995, after serving approximately 10 years, Slansky was released from prison and placed on parole for the remaining 10 years of his sentence. Upon his release from prison, Slansky moved to Kearney, Nebraska. Pursuant to an interstate compact on parolees, Slansky signed a parole agreement with the State of Nebraska which required him to obtain counseling. After a number of sessions, this requirement was discontinued because Slansky's counselor, Anne Buettner, determined that he had readjusted to the community and did not pose a threat to public safety. On July 20, 1998, Slansky was discharged from parole.

On January 6, 2000, an investigator for the NSP completed the risk assessment instrument for Slansky. Slansky scored 150 points and was classified as a Level 3 sex offender. Thereafter, on March 17, the NSP sent Slansky a letter, notifying him that

the NSP Sex Offender Registry had determined he was at a high risk to reoffend sexually and that therefore, he had been classified as a Level 3 sex offender. The letter stated that a Level 3 classification requires the NSP to provide information concerning him to the public, appropriate law enforcement officials, schools, daycare centers, and youth and religious organizations, and that such notification would be done through news releases and other avenues as deemed appropriate. In addition, the letter notified Slansky that if he disagreed with the NSP's determination, he could request a hearing to contest his classification as a Level 3 offender. Five days later, Slansky gave notice of his intent to contest the classification and the grounds therefor.

Slansky's administrative hearing was held on August 28, 2002. Two days later, the hearing officer issued his decision recommending that the NSP's decision classifying Slansky as a Level 3 sex offender be upheld. The same day, the superintendent of the NSP issued an order adopting the recommended decision of the hearing officer in full and making it the final decision of the NSP.

On September 26, 2002, pursuant to the Administrative Procedure Act (APA), see Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Supp. 2003), Slansky filed a petition in the district court for Lancaster County appealing his classification as a Level 3 sex offender. See 272 Neb. Admin. Code, ch. 19, § 014.02 (2000). On May 29, 2003, the district court entered its order affirming the decision of the NSP. Slansky filed a timely notice of appeal, which we moved 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).

III. ASSIGNMENTS OF ERROR

Slansky assigns, restated, that the district court erred in affirming the NSP's decision to classify him as a Level 3 offender because (1) the NSP's decision is unsupported by the evidence and contrary to law; (2) the risk assessment instrument is invalid, flawed, and inaccurate as applied to him; (3) the risk instrument does not include a number of relevant mitigating factors; (4) the NSP failed to find that he had presented mitigating factors which justified a downward departure from his presumptive classification; (5) SORA violates the Ex Post

Facto Clause of the federal and state Constitutions; (6) SORA violates the constitutional prohibition against double jeopardy; (7) SORA violates his procedural and substantive due process rights, as well as his right to equal protection under the law; (8) the NSP's decision is based on speculation, guess, and conjecture; (9) SORA's release-of-information provision is overbroad and violates his due process rights; (10) the NSP's current practice of posting information concerning Level 3 sex offenders on its Web site is not authorized by SORA; and (11) SORA violates the constitutional prohibition against imposing cruel and unusual punishment.

IV. STANDARD OF REVIEW

[1,2] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

[3-6] 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. *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003). 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 not arbitrary, capricious, or unreasonable. *Stejskal, supra.* Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

V. ANALYSIS

1. NSP's Decision and Risk Assessment Instrument

After being notified of his classification as a Level 3 offender, Slansky requested a hearing to challenge his classification level.

The hearing officer rejected Slansky's challenge and upheld Slansky's classification as a Level 3 offender. The NSP adopted the hearing officer's decision. On appeal to the district court, Slansky made a number of arguments concerning the NSP's decision and the risk assessment instrument. In upholding Slansky's classification as a Level 3 offender, the district court determined, inter alia, that the NSP's decision was based upon sufficient evidence and that Slansky's challenges to the risk assessment instrument were without merit.

On appeal to this court, Slansky's first through fourth and eighth assignments of error challenge the district court's decision to uphold the NSP's classification and the court's approval of the risk assessment instrument. These assignments of error, however, can be consolidated into three main arguments: (1) Slansky's score was unsupported by the evidence because it did not account for a number of mitigating factors; (2) to the extent the risk assessment instrument does not account for certain mitigating factors, it fails to accurately reflect an offender's true risk of recidivism; and (3) the risk assessment instrument is invalid, flawed, or inaccurate because it has "a rate of error of 12%." Brief for appellant at 44. Because the district court's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable, we reject Slansky's arguments.

First, Slansky contends that his classification as a Level 3 offender is not supported by the evidence because it fails to account for a number of mitigating factors that he presented. We disagree.

As an initial matter, we note that Slansky did not contest his risk assessment score in regard to items 1 through 9, 11, 13, and 14. Therefore, the district court was presented with undisputed evidence establishing that Slansky had a risk assessment score of 150 points, or 20 points more than were needed to classify him as a Level 3 offender. Slansky did contest his score in regard to items 10 and 12; however, the record contains competent evidence to support the district court's decision to uphold the NSP's score for these two items.

In regard to item 10 (release environment), Slansky was assessed 10 points because he was not under supervision at the

time of the assessment. The evidence adduced at the hearing established that Slansky had been released from supervision more than 4 years prior to the hearing, and the district court's decision to affirm the assessment of 10 points is supported by competent evidence.

With respect to item 12 (treatment), Slansky was assessed 20 points because he did not participate in court-ordered or professionally recommended treatment. At the hearing, Slansky admitted to refusing to undergo sex offender treatment while incarcerated in Kansas. Upon his release from prison, Slansky attended counseling sessions with Buettner, who had been recommended to him by his parole officer.

At his prenotification hearing, Slansky argued that these counseling sessions were tantamount to professionally recommended treatment. However, his own expert witness, Sandra Hale Kroeker, a clinical social worker who specializes in sex offender treatment, testified that the counseling sessions with Buettner did not meet the requirements of sex offender specific treatment. Therefore, the effectiveness of the counseling sessions with Buettner were put into question and the district court's affirmance of the NSP's decision not to deviate from the instrument is supported by competent evidence and is not arbitrary, capricious, or unreasonable.

Slansky contends, however, that the hearing officer should have deviated from the presumptive classification because he presented a number of mitigating factors. For example, Slansky testified that since his release, he has been an emotionally stable, married man, with a small child and a good job. In addition, he notes that after his release, he completed counseling with Buettner, as required by his parole agreement, and that he had been unsupervised, without incident, for over 4 years. Moreover, Slansky contends that expert testimony established that certain life experiences, such as a number of those he experienced, reduce an offender's risk of recidivism.

As the district court noted, however, the record is not as conclusive as Slansky asserts. In fact, the clinical director of the NSP Sex Offender Registry, Shannon Black, Ph.D., testified that a number of these alleged mitigators have either unknown or unquantifiable effects, or bear adversely on an offender's risk of

recidivism. For example, Slansky argues that the fact that he has been unsupervised for over 4 years without incident shows that he is at a low risk to reoffend. Black testified, however, that offenders who are not under supervision, even if they have successfully completed a period of unsupervised release, are at a high risk to reoffend. Black's testimony was echoed by Kroeker, who stated that the risk of recidivism is higher for offenders who are unsupervised, including those who have successfully completed a period of supervision. Moreover, Black's and Kroeker's testimonies are supported by appendix C of the risk assessment manual, which notes that "[m]ultiple studies on recidivism and treatment using long-term follow-ups indicate that sexual offenders may continue to be at risk for recidivism for many years after release or supervision, possibly up to 20 . . . ."

Similarly, Slansky contends that numerous life experiences, such as marriage and child-rearing, decrease an offender's risk to reoffend. However, Black testified that for some offenders, marriage does not decrease their risk of reoffending. In addition, Black testified that these life experiences were not included in the instrument because they are too dynamic and affect individuals differently. Thus, although Slansky presented evidence of a number of positive life experiences, additional evidence concerning the unknown effect of such experiences leads us to conclude that the district court's affirmance of the NSP's decision not to depart from Slansky's presumptive classification is supported by the evidence and is not arbitrary, capricious, or unreasonable.

Second, Slansky contends that to the extent that the risk assessment instrument does not account for a number of life experiences and alleged mitigators, it does not accurately reflect a registrant's true risk of recidivism and, therefore, is contrary to the mandate of SORA. Again, Slansky focuses his challenge on items 10 and 12 of the instrument.

With regard to item 10 (release environment), Slansky argues that the instrument is invalid because item 10 does not account for the fact that he had not reoffended in the 4 years since his release from supervision. However, we again note that item 10 assigns 10 points for offenders who are no longer under supervision because they remain at a high risk to reoffend. Therefore, although Slansky's behavior during the 4 years after his release

from supervision is commendable, it does not provide a basis from which a downward departure in score must be made.

In regard to item 12 (treatment), Slansky argues that the instrument is invalid because it does not account for the fact that he received counseling while on parole. At his prenotification hearing, Slansky presented two witnesses who discussed the adequacy of his counseling sessions with Buettner. Buettner testified that her sessions with Slansky were the equivalent of a specific sex offender treatment program. Kroeker, however, questioned the utility of Slansky's sessions with Buettner and stated that Slansky still needed to undergo sex offender specific treatment. Therefore, Slansky's failure to receive a downward departure for attending counseling did not stem from the instrument's inability to grant such a departure, but, rather, from questions concerning the effectiveness of the counseling sessions.

Slansky also argues that the Legislature intended the instrument to contain more than two mitigating factors—debilitating illness and advanced age—which justify a downward departure in score. As Slansky notes, § 29-4013(2)(b)(i) and (ii) instructs the NSP to incorporate, as relevant factors, conditions of release that minimize the risk of recidivism, including probation, parole, counseling, therapy, or treatment, as well as advanced age and debilitating illness. See, also, § 012.03. Contrary to Slansky's suggestion, however, nothing in SORA mandates that points should be deducted from the score of an offender who has successfully completed treatment or is released on parole. Instead, SORA merely instructs the NSP to take these factors into account when determining an offender's risk of recidivism. Although Slansky may not be satisfied with the way the instrument accounts for these factors, it undoubtedly considers them in determining an offender's risk of recidivism.

Next, Slansky argues that the instrument should include a number of specific mitigating factors, in addition to those referenced above. This argument is without merit. As an initial matter, we note that the instrument allows an investigator to depart from the presumptive risk category so long as such departure is warranted by the facts and the investigator explains the basis for such departure. Moreover, in regard to including additional mitigating factors within the instrument itself, the Legislature

clearly delegated decisionmaking power concerning which additional factors, if any, should be included in the risk assessment instrument. See § 29-4013(2).

Third, Slansky contends that the risk assessment instrument is invalid, flawed, or inaccurate because it has a statistical error rate of 12 percent. The record indicates that the researchers who developed the risk assessment instrument tracked approximately 1,300 sexual offenders who had been either released from incarceration or placed on community-based probation. In order to determine what factors correlated with recidivism, the researchers compared a sample of 190 sex offenders who reoffended after release with a randomly selected sample of 315 offenders who were released during the same time period and did not reoffend. Black testified that the researchers ultimately narrowed the items to those that make up the current risk assessment instrument and that these 14 items correctly classified the statistical samples 88 percent of the time.

Relying on the instrument's statistical error rate, Slansky argues that the NSP's determination that he is at a high risk to reoffend is no better than a speculative guess. Slansky's contention is incorrect. As an initial matter, we note that the instrument's 88-percent validation rate is not tantamount to an admission that 12 percent of the offenders in the registry have been misclassified. Instead, 12 percent simply represents the rate at which the instrument erred in classifying the sample groups. Moreover, the 12-percent statistical error rate represents both over- and under-classifications. Thus, to the extent the instrument erred in classifying the sample offenders, it occasionally did so in favor of the offender.

Furthermore, it is important that we recognize that no instrument will perfectly predict future conduct. As stated elsewhere: "[T]he non-existence of a perfect predictor of recidivism should not preclude legislative resort to a rationally based instrument of risk assessment, developed and validated by mental health professionals." *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997). In this regard, Black's testimony concerning the instrument establishes that it was carefully and rationally crafted. While acknowledging some of the instrument's shortcomings, Black testified that the instrument (1) is based on a significant

amount of empirical data, (2) utilizes factors that correlate with a registrant's risk of recidivism, (3) is valid and appropriate for its purpose, and (4) is consistent with other instruments that have been developed. Consequently, we conclude that the instrument is a rationally based risk assessment tool and that the grounds Slansky asserted to challenge the instrument are without merit.

2. Release of Information

At the time of Slansky's assessment, information obtained under SORA was to remain confidential except in three situations:

> (1) Information shall be disclosed to law enforcement agencies for law enforcement purposes;
>
> (2) Information may be disclosed to governmental agencies conducting confidential background checks; and
>
> (3) The Nebraska State Patrol and any law enforcement agency authorized by the patrol shall release relevant information that is necessary to protect the public concerning a specific person required to register, except that the identity of a victim of an offense that requires registration shall not be released. Release of such information shall conform with the rules and regulations adopted and promulgated by the Nebraska State Patrol pursuant to section 29-4013.

§ 29-4009. As previously mentioned, whether it is necessary to notify the public under § 29-4009(3) is essentially a question whether the offender is at a high risk to reoffend. See § 29-4013. If the offender has been determined to be at a high risk of reoffending, "the public shall be notified through means designed to reach members of the public likely to encounter the sex offender, which are limited to direct contact, news releases, or a system utilizing a telephone system which charges a fee for each use." § 29-4013(2)(c)(iii).

On appeal, Slansky argues that the dissemination of his personal information via the NSP's Web site violates SORA because neither SORA nor the NSP's rules and regulations provide authority for the NSP to release sex offender information through the Internet. Moreover, Slansky claims that by posting information concerning Level 3 sex offenders on its Web site, thereby making such information available worldwide, the NSP is acting contrary to SORA's

requirement that "the public shall be notified through means designed to reach *members of the public likely to encounter* the sex offender." (Emphasis supplied.) § 29-4013(2)(c)(iii).

We conclude that SORA permits the NSP to post information concerning Level 3 offenders on its Web site. Under § 29-4013(c)(iii), the NSP is directed to notify the public about Level 3 offenders through "direct contact, news releases, or a system utilizing a telephone system which charges a fee for each use." *Id.* By posting information concerning Level 3 offenders on its Web site, the NSP is merely disseminating news releases through an alternative medium, i.e., the Internet. This does not violate SORA. Cf. § 29-4013(3) (stating that nothing in subsection (2) "shall be construed to prevent law enforcement officers from providing community notification concerning any person who poses a danger under circumstances that are not provided for in the act").

Likewise, the NSP, by posting information concerning Level 3 offenders on its Web site, is not acting contrary to § 29-4013(2)(c)(iii), which states that notice is to be limited to persons "likely to encounter" Level 3 offenders. Obviously, by posting information concerning Level 3 sex offenders on its Web site, the NSP greatly expands the number of people that can access information concerning persons that have been classified as Level 3 offenders. However, this fact is substantially mitigated by the reality that the farther away a person lives from Nebraska, the less likely it becomes that they will have an interest in accessing the information. See, *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000); *Meadows v. Board of Parole*, 181 Or. App. 565, 47 P.3d 506 (2002).

In addition, the possibility that information concerning Level 3 offenders will end up in the public domain already exists under the more established methods of dissemination. For example, Slansky does not challenge the NSP's authority to disseminate press releases to the media, despite the fact that many media outlets, such as newspapers and television stations, operate Web sites on which they reproduce their newspaper or television reports. Furthermore, the NSP's Web site fulfills the regulatory purpose of SORA because it allows persons who wish to visit or move to certain areas of the state to take appropriate precautions.

See, *A.A. ex rel. M.M. v. New Jersey*, 341 F.3d 206 (3d Cir. 2003) (noting Internet registry protects persons planning to move to or vacation in state by allowing them access to location of high-risk offenders); *Com. v. Williams*, 574 Pa. 487, 832 A.2d 962 (2003). In sum, by posting information concerning Level 3 offenders on its Web site, the NSP is not impermissibly exceeding SORA's notice restriction.

3. Ex Post Facto Clause

[7] Slansky argues that SORA violates the Ex Post Facto Clause of the U.S. Constitution and the Nebraska Constitution. Both U.S. Const. art. I, § 10, cl. 1, and Neb. Const. art. I, § 16, provide that no ex post facto law shall be passed. Although Slansky challenges SORA under both constitutional provisions, we will undertake only a single analysis because this court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution. See, *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

[8,9] Essentially, Slansky argues that SORA's registration and notification provisions violate the Ex Post Facto Clause because he was sentenced in 1985, prior to the operative date of SORA. In support of his argument, Slansky points to our oft-repeated rule that "[a] law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts." *State v. Gales*, 265 Neb. 598, 633, 658 N.W.2d 604, 629 (2003). Accord, *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000); *Urbano, supra*. However, the applicability of this rule depends on whether SORA operates as punishment. Stated otherwise, under the Ex Post Facto Clause, the retroactive application of civil disabilities and sanctions is permitted; only retroactive criminal punishment for past acts is prohibited. *Worm, supra*, citing *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); and *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998).

Recently, in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), the U.S. Supreme Court upheld a similar

sex offender registration statute against an ex post facto challenge. In *Smith*, the court stated that a two-step "intent-effects" test should be used to analyze whether a law constitutes retroactive punishment in violation of the Ex Post Facto Clause. See *Worm, supra.*

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is " 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' "

Smith, 538 U.S. at 92.

Thus, we must first determine whether the intent of the Legislature in enacting SORA was to establish a nonpunitive civil regulatory scheme for sex offenders. See *Smith, supra.* If so, we must then determine whether SORA is so punitive in nature as to negate the Legislature's intent to deem it civil. *Smith, supra.*

We have recently rejected a similar ex post facto challenge to SORA. See *Worm, supra.* In *Worm*, the appellant, James R. Worm, appealed his sentence for attempted first degree sexual assault on a child and the district court's finding that he was subject to SORA. Faced with an ex post facto challenge to the registration requirements of SORA, we turned to the two-part intent-effects test announced in *Smith*, concluding that (1) the Legislature, in enacting SORA, intended to establish a civil regulatory scheme to protect the public from the danger posed by sex offenders and (2) the effect of SORA was not so punitive in nature as to negate the Legislature's intent.

Our decision in *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004), however, dealt only with a challenge to SORA's registration requirements. Here, Slansky's appeal presents a different ex post facto challenge to SORA because he argues that both the registration and notification provisions violate the Ex Post Facto Clause. Therefore, although we are guided by our analysis in *Worm*, it is necessary to analyze SORA's notification provisions.

(a) Legislative Intent

In *Worm, supra*, we determined that the Legislature, in enacting SORA, intended to establish a civil regulatory scheme to

protect the public from the danger posed by sex offenders. Because we conclude that Slansky's arguments to the contrary are without merit, we reaffirm our determination in *Worm*.

On appeal, Slansky contends that the Legislature intended SORA to be criminal punishment because SORA has been placed in chapter 29, the "criminal procedure" chapter, of the Nebraska Revised Statutes. We disagree. As the U.S. Supreme Court has noted, although the manner of codification is probative of legislative intent, the "location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Smith v. Doe*, 538 U.S. 84, 94, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (determining that Alaska's sex offender registration statute's provisions were nonpunitive despite being codified in state's criminal procedure code). Here, a review of chapter 29 illustrates that it "contains many provisions that do not involve criminal punishment." See *Smith*, 538 U.S. at 95. For example, chapter 29 contains provisions relating to the testing of persons convicted of certain crimes for the human immunodeficiency virus, Neb. Rev. Stat. § 29-2290 (Cum. Supp. 2002); record keeping of criminal histories, Neb. Rev. Stat. § 29-3501 et seq. (Reissue 1995 & Supp. 2003); and state support for funding the defense of indigent defendants, Neb. Rev. Stat. § 29-3919 et seq. (Reissue 1995, Cum. Supp. 2002 & Supp. 2003). And "[a]lthough . . . these provisions relate to criminal administration, they are not in themselves punitive." *Smith*, 538 U.S. at 95. Therefore, the codification of SORA in Nebraska's criminal procedure code, by itself, is insufficient to support a conclusion that the Legislature's intent was punitive. See, *Smith, supra*; *State v. White*, 162 N.C. App. 183, 590 S.E.2d 448 (2004).

Slansky also contends that the Legislature evinced an intent for SORA to be criminal punishment because the Legislature found that the "efforts of law enforcement agencies to protect their communities, conduct investigations, and quickly apprehend sex offenders are impaired by the lack of available information" concerning sex offenders "who live, work, or attend school in their jurisdiction." § 29-4002. According to Slansky, this legislative finding shows that SORA was intended to aid criminal enforcement rather than the civil administration of sex offenders.

We rejected this argument in *State v. Worm, ante* p. 74, 83, 680 N.W.2d 151, 160 (2004):

> Worm, however, argues that assisting law enforcement agencies with future investigations and prosecutions evidences a punitive purpose in enacting the law. But assisting future law enforcement efforts by monitoring an offender's whereabouts does not inflict punishment and furthers the legitimate goal of protecting the public and preventing crime.

In sum, like the overwhelming majority of courts that have examined similar sex offender registration statutes, we conclude that in enacting SORA, the Legislature intended to create a civil, nonpunitive regulatory scheme. See, e.g., *Smith, supra*; *Hatton v. Bonner*, 356 F.3d 955 (9th Cir. 2004); *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997); *Com. v. Williams*, 574 Pa. 487, 832 A.2d 962 (2003); *Haislop v. Edgell*, 593 S.E.2d 839 (W. Va. 2003); *State v. Mount*, 317 Mont. 481, 78 P.3d 829 (2003); *State v. Kelly*, 256 Conn. 23, 770 A.2d 908 (2001); *People v. Malchow*, 193 Ill. 2d 413, 739 N.E.2d 433, 250 Ill. Dec. 670 (2000); *Meinders v. Weber*, 604 N.W.2d 248 (S.D. 2000); *State v. Bollig*, 232 Wis. 2d 561, 605 N.W.2d 199 (2000); *Kellar v. Fayetteville Police Dept.*, 339 Ark. 274, 5 S.W.3d 402 (1999); *State v. Cook*, 83 Ohio St. 3d 404, 700 N.E.2d 570 (1998).

(b) Effects of SORA

Because we have determined that the Legislature intended SORA to be civil in nature, its intent will be rejected only if Slansky provides the clearest proof that SORA's notification provisions are so punitive in either purpose or effect as to negate the Legislature's intent. See *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("[b]ecause we 'ordinarily defer to the legislature's stated intent,' . . . '"only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty' "). See, also, *Worm, supra*, quoting in part *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001).

In making this determination, we consider the factors first set forth by the U.S. Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). See *Worm, supra*. They are as follows:

> "(1) '[w]hether the sanction involves an affirmative disability or restraint'; (2) 'whether it has historically been regarded as a punishment'; (3) 'whether it comes into play only on a finding of *scienter*'; (4) 'whether its operation will promote the traditional aims of punishment—retribution and deterrence'; (5) 'whether the behavior to which it applies is already a crime'; (6) 'whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) 'whether it appears excessive in relation to the alternative purpose assigned.' "

Isham, 261 Neb. at 695, 625 N.W.2d at 515-16, quoting *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). Although "neither exhaustive nor dispositive," this list of factors provides a helpful starting point from which to determine whether a civil regulatory scheme "provide[s] for sanctions so punitive as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.' " *United States v. Ward*, 448 U.S. 242, 249, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980).

Ignoring the *Mendoza-Martinez* factors, Slansky sets forth two arguments as to why the effects of SORA are so punitive as to negate the Legislature's intent. First, Slansky argues that the potential release of his status as a sex offender will cause him and his family great emotional stress, and could adversely impact his and his wife's employment situations. Second, Slansky contends that by providing unlimited access to his information via its Web site, the NSP is simply compounding the aforementioned repercussions of community notification.

As an initial matter, it is obvious that community notification can have adverse effects on an offender's life. See, *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997) ("[t]here can be no doubt that the indirect effects of . . . notification on the registrants involved and their families are harsh"). However, "whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment.' "

Department of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 777 n.14, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994).

Here, although SORA's notification provisions may be the "but for" cause of some of the effects Slansky complains of, these effects are not consequences that SORA contemplates or condones, and are the result of independent actions by private third parties. See *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997). See, also, *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999) (noting that burdens on sex offenders do not stem from notification, but from abuse of registry by public); *Verniero, supra*. In fact, the risk of emotional stress and other adverse effects stem "essentially from the fact of the underlying conviction." *Pataki*, 120 F.3d at 1280. See, also, *Smith v. Doe*, 538 U.S. 84, 101, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("consequences flow not from [a sex offender registration act's] registration and dissemination provisions, but from the fact of conviction"); *Verniero, supra*.

Furthermore, although the "[d]issemination of . . . criminal activity has always held the potential for substantial negative consequences for those involved in that activity," "[d]issemination of such information . . . has never been regarded as punishment when done in furtherance of a legitimate governmental interest." *Verniero*, 119 F.3d at 1099-1100. See, also, *Hyatt v. Com.*, 72 S.W.3d 566 (Ky. 2002). Similarly, we note that much of the information that subjects offenders to these alleged burdens is already in the public realm. See, *Smith, supra*; *Pataki, supra*; *Verniero, supra*.

In addition, it is important to recognize that public notification serves one of the fundamental purposes behind SORA; it allows persons who have been notified to take action to protect themselves and their families. See, § 29-4002; *Pataki, supra*. As the U.S. Supreme Court stated: "The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Smith*, 538 U.S. at 99. Therefore, although the burdens that offenders incur as a result of notification are unwelcome to the offender, they are not so excessive as to exceed SORA's

remedial purpose. See *State v. Bollig*, 232 Wis. 2d 561, 605 N.W.2d 199 (2000).

Moreover, although we recognize that the NSP's Web site may compound the adverse effects experienced by Slansky, we conclude that its effects are limited and not so punitive as to negate the Legislature's intent to enact a civil regulatory scheme. In this regard, we find the recent analysis by the U.S. Supreme Court to be persuasive:

> The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. . . .
>
> . . . .
>
> . . . Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment.

Smith v. Doe, 538 U.S. 84, 99-105, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). See, also, *Haislop v. Edgell*, 593 S.E.2d 839 (W. Va. 2003); *State v. Mount*, 317 Mont. 481, 78 P.3d 829 (2003). Slansky's ex post facto challenge is without merit.

4. Double Jeopardy

Slansky argues that SORA punishes him twice for the same offense in violation of the Double Jeopardy Clause of the U.S. Constitution. U.S. Const. amend. V. In the past, we have recognized that the intent-effects test applies to both double jeopardy and ex post facto challenges to a statutory scheme. *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002). In light of our ex post facto analysis, we conclude that SORA merely constitutes a nonpunitive civil regulatory scheme. Therefore, because SORA does not impose punishment, the Double Jeopardy Clause is not implicated, and Slansky's assignment of error is without merit.

5. Due Process

(a) Procedural Due Process

Next, Slansky argues that the public disclosure of information concerning his status as a sex offender violates his right to procedural due process. See, U.S. Const. amend. XIV, § 1; Neb. Const. art. I, § 3. Specifically, Slansky argues that SORA infringes upon his right to privacy without providing him sufficient due process.

[10,11] Procedural due process limits the government's ability to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause. Due process requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004). When an individual claims he or she is being deprived of a liberty interest without due process, the claim is examined in three stages. First, a determination must be made that there is a liberty interest at stake. In the second stage, the court must determine what procedural safeguards are required. Finally, the facts of the case are examined to ascertain whether there was a denial of that process which was due. *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001).

Although Slansky asks us to recognize that he has a constitutional right to keep his registry information private, we need not reach this issue because even if we assume Slansky has a liberty interest in not having such information released, the process afforded to him before public dissemination was surely adequate.

[12] This court has stated that due process does not guarantee an individual any particular form of state procedure. *Boll v. Department of Revenue*, 247 Neb. 473, 528 N.W.2d 300 (1995). Instead, the requirements of due process are satisfied if a person has reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

Under SORA, the NSP was charged with adopting and promulgating rules and regulations concerning community notification. See § 29-4013(2)(a) through (d). Pursuant to the rules and regulations adopted by the NSP, persons required to register

under SORA are to be notified of their classification as a Level 1, 2, or 3 offender by registered mail or personal contact. 272 Neb. Admin. Code, ch. 19, § 014.01 (2000). Once contacted, registrants then have 5 working days in which to notify the Sex Offender Registration Program that they wish to contest the classification level assigned by the NSP. *Id.* If a hearing is requested, it is to be held pursuant to the APA and the Nebraska State Patrol rules and regulations pertaining to administrative hearings. § 014.02. After the hearing, a decision is to be rendered by the hearing officer within 10 days. *Id.* Appeals from that decision are to be filed in Lancaster County District Court in accordance with the APA. *Id.* Community notification is prohibited until after the hearing, and all subsequent appeals are final. See 272 Neb. Admin. Code, ch. 19, § 014.03 (2000).

In the instant case, Slansky received a letter from the NSP that notified him of (1) his classification as a Level 3 sex offender, (2) SORA's public notification provisions for Level 3 offenders, and (3) his ability to contest his classification as a Level 3 offender prior to public disclosure. Furthermore, we note that Slansky had the opportunity to conduct discovery prior to his hearing and the right of compulsory process. Moreover, Slansky was represented by counsel at the hearing, who put on evidence in favor of Slansky and cross-examined the NSP's witnesses. Clearly, Slansky was afforded notice and a meaningful opportunity to contest the NSP's decision.

Nonetheless, Slansky argues that his prenotification review hearing was illusory and constituted insufficient process because (1) he was not allowed to challenge the psychological basis of the classification instrument, (2) the burden of proving his classification as a Level 3 offender should have been on the State, (3) he was not allowed to challenge the NSP's definition of persons "likely to encounter" him, and (4) he was not allowed to challenge the NSP's use of the Internet as a medium for dispensing information concerning Level 3 sex offenders.

Slansky's first argument is without merit because it is based on inaccurate facts. As Slansky contends, the original scope of a prenotification review hearing was limited to a review of the accuracy of the information used in making the classification assessment, and persons challenging their classification level

were not allowed to challenge the psychological basis of the classification instrument. See § 014.02. However, prior to Slansky's hearing, this rule was changed. Cf. 272 Neb. Admin. Code, ch. 19, § 015.02C (2004). In fact, not only did Slansky receive notice of his ability to challenge the risk assessment instrument, he acknowledged this change by giving notice of his intent to challenge the instrument. Moreover, Slansky did in fact challenge the instrument at his hearing.

Next, Slansky contends that the NSP had the initial burden of proving he should have been classified as a Level 3 offender. Assuming, arguendo, that this is true, Slansky did not contest his risk assessment score in regard to items 1 through 9, 11, 13, and 14. Consequently, the hearing officer was presented with undisputed evidence establishing that Slansky had a risk assessment score of 150 points, or 20 points more than were needed to classify him as a Level 3 offender, and the NSP produced sufficient evidence to support its proposed classification.

[13,14] In regard to his two remaining arguments, Slansky fails to recognize the limited nature of an administrative hearing. As a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties. *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998). Here, under the rules and regulations adopted pursuant to SORA, registrants such as Slansky are granted a limited review hearing to contest their classification. Importantly, these hearings are limited to the appropriateness of a registrant's classification; they do not provide a forum to challenge the consequences of that classification. See 272 Neb. Admin. Code, ch. 19, § 014 (2000). The hearing officer was without the authority to question the NSP's authority to disseminate information concerning Level 3 offenders or to challenge the NSP's interpretation of the statutory phrase "likely to encounter." See *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994) (administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish plain purpose of act).

This is not to say, however, that these issues are not appropriate for review. Rather, Slansky, as he did with his other constitutional objections to SORA, was entitled to make these arguments

for the first time before the district court. See *In re Applications A-16027 et al.*, 242 Neb. 315, 495 N.W.2d 23 (1993), *modified* 243 Neb. 419, 499 N.W.2d 548.

(b) Substantive Due Process

In *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990), the U.S. Supreme Court held that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment. Therefore, according to Slansky, the risk assessment instrument, by adding 20 points to his sex offender classification score for failing to complete sex offender treatment while incarcerated, infringes upon his fundamental right to refuse medical treatment.

The record illustrates that while incarcerated in Kansas, Slansky refused to participate in mental health counseling and sex offender treatment because he felt it would have interfered with a number of his prison-time activities. Contrary to Slansky's assertion, however, the risk assessment instrument, by taking note of the fact that he did not undergo treatment, did not punish him for his choice. Rather, the instrument merely accounted for the absence of such treatment in determining whether he is at a risk to reoffend. Therefore, SORA does not implicate Slansky's right to refuse medical treatment, and this assignment of error is without merit.

6. Equal Protection

Next, Slansky contends that SORA violates his right to equal protection under the law. See, U.S. Const. amend. XIV, § 1; Neb. Const. art. I, § 3. Although somewhat unclear, Slansky appears to argue that if he had remained in Kansas until he was discharged from parole in 1998, he would not have been required to register under SORA. Therefore, according to Slansky, SORA treats out-of-state offenders who move to Nebraska prior to the completion of their sentence differently from out-of-state offenders who move to Nebraska after the completion of their sentence.

Slansky's argument is without merit. Under SORA, it is utterly irrelevant that Slansky was discharged from parole in Nebraska, rather than Kansas. See § 29-4003(1). Slansky was required to register as a sex offender because he had been convicted of a registrable sex offense and moved to Nebraska.

See § 29-4003(1)(b). Therefore, even if, as Slansky's hypothetical suggests, he had remained in Kansas until he was discharged from parole in 1998, he would have still been subject to SORA's registration requirements upon his arrival in Nebraska. *Id.*

7. Cruel and Unusual Punishment

In his final assignment of error, Slansky contends that SORA violates the Eighth Amendment's prohibition against cruel and unusual punishment. Slansky's "argument" in this regard, however, merely consists of a reformulation of the assigned error and, therefore, does not constitute the required argument in support of the assigned error. See *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

VI. CONCLUSION

For the foregoing reasons, we conclude that Slansky's challenges to SORA, the risk assessment instrument, and the NSP's classification determination are without merit. The judgment of the district court was correct in all respects and is affirmed.

Affirmed.

Wright, J., not participating.

Diversified Telecom Services, Inc., a Nebraska corporation, appellant, v. David L. Clevinger, Jr., an individual, et al., appellees.

683 N.W.2d 338

Filed July 16, 2004. No. S-03-808.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's.
2. **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.
3. **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.
4. **Pleadings: Judgments.** A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion.

5. **Motions for New Trial: Pleadings: Time: Notice: Appeal and Error.** The running of the time for filing a notice of appeal is not only terminated by a motion for new trial, but also by a motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002).
6. **Pleadings: Judgments: Time.** To qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), and must seek substantive alteration of the judgment.
7. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
8. **Pleadings: Jurisdiction.** Before filing any other pleading or motion, one may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the objector.
9. **Pleadings: Proof.** Confronted with a special appearance, a plaintiff has the burden to establish facts which demonstrate the court's personal jurisdiction over the defendant.
10. **Pleadings: Jurisdiction: Affidavits: Proof.** In a hearing on a special appearance, an affidavit may be used to prove or disprove the factual basis for a court's assertion or exercise of personal jurisdiction over a defendant.
11. **Trial: Evidence: Waiver.** If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection the party may have had thereto, and the evidence is in the record for consideration the same as other evidence.
12. **Trial: Waiver.** A party who fails to insist upon a ruling to a proffered objection waives that objection.
13. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
14. **Constitutional Law: Due Process.** The Due Process Clause of the U.S. Constitution protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations.
15. **Due Process: Jurisdiction: States.** To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have certain minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.
16. ____: ____: ____. The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
17. **Due Process: Jurisdiction.** A personal jurisdiction analysis requires a court to consider the quality and nature of the defendant's activities in order to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process.
18. **Jurisdiction: States.** Under a personal jurisdiction analysis, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.

19. ____: ____. When considering the issue of personal jurisdiction, it is essential in each case that there be some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.
20. ____: ____. Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with the forum state are the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself or herself has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state.
21. **Jurisdiction.** Mail and telephone communications sent by a defendant into a forum may count toward the minimum contacts that support jurisdiction.
22. **Jurisdiction: States.** Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.
23. ____: ____. When weighing the facts to determine whether the exercise of personal jurisdiction would comport with fair play and substantial justice, a court may consider (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies.
24. ____: ____. Where a defendant who has purposefully directed his or her activities at forum residents seeks to defeat jurisdiction, the defendant must present a compelling case that the presence of some other consideration would render jurisdiction unreasonable.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Richard L. Rice, of Crosby, Guenzel, L.L.P., for appellant.

Mark A. Fahleson, Brian S. Kruse, and Troy S. Kirk, of Rembolt, Ludtke & Berger, L.L.P., for appellees.

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

MCCORMACK, J.

I. NATURE OF CASE

The primary issue raised by this case is whether personal jurisdiction exists in Nebraska over David L. Clevinger, Jr., and Jerold J. Hawkins, both Michigan residents, and Skyline Services, L.L.C. (Skyline), a Michigan limited liability company (collectively the

appellees). The district court concluded that it did not have personal jurisdiction and sustained the appellees' special appearance. We reverse the order of the district court in part, concluding that Nebraska's jurisdiction extends over Clevinger and Hawkins.

II. BACKGROUND

Diversified Telecom Services, Inc. (Diversified), filed this action against the appellees on November 1, 2002. Diversified is a Nebraska corporation engaged in the business of construction and site improvement for cellular telephone transmission towers and other communications equipment throughout the United States. Its principal office is located in Waverly, Nebraska. Clevinger and Hawkins were former employees of Diversified who provided project management services to Diversified during their employment. Clevinger was employed with Diversified from November 2001 to October 2002 and was responsible for a region that included Michigan, Indiana, Ohio, and points to the east. Hawkins was employed by Diversified from November 2001 to June 2002, and was responsible for managing sites in Michigan. In February 2002, Clevinger and Hawkins formed Skyline. Diversified alleged that Skyline was formed to also engage in the business of construction and site improvement of transmission towers and communications equipment; in essence, Skyline was to directly compete with Diversified. The petition articulated four causes of action against the appellees: breach of the duty of loyalty, tortious interference, fraud and/or misrepresentation, and conversion.

The appellees filed a special appearance challenging the district court's personal jurisdiction over them. In support of their special appearance, the appellees offered the affidavits of Clevinger and Hawkins. Both affidavits stated that neither Clevinger nor Hawkins played any role in the operations of Skyline until each was terminated by Diversified. The affidavits also stated, in short, that the appellees have never had any contacts with Nebraska, with one exception. Both men admitted that they were in Nebraska on December 3 and 4, 2001, for the purpose of meeting the staff of Diversified.

Diversified offered the affidavit of Amy Grady, a collections specialist and administrative assistant with Diversified. Grady's

affidavit stated that Clevinger and Hawkins were formerly employed by Diversified and, as such, received compensation from Diversified, including rent Clevinger received from Diversified for an office in his Michigan home. The affidavit also contained evidence of the communications that Clevinger and Hawkins had with Diversified's Waverly office. Telephone billing statements included in the record indicate that from November 19, 2001, to July 26, 2002, Clevinger and Hawkins made approximately 326 and 279 telephone calls to Nebraska, respectively. Finally, Grady's affidavit also averred that Clevinger and Hawkins came to Nebraska on December 3 and 4, 2001, to formally accept employment with Diversified, complete paperwork, obtain information regarding their new jobs, and attend meetings with Diversified's personnel.

On May 15, 2003, the district court sustained the appellees' special appearance and dismissed Diversified's petition. On May 22, Diversified filed a motion which stated in full:

> COMES NOW the Plaintiff, Diversified Telecom Services, Inc. and moves this Court pursuant to NEB. REV. STAT. § 25-1142, *et seq.* (Reissue 2000) for an order granting a new trial in this matter. Plaintiff's Motion is directed at a reexamination of this Court's findings and decision in its Order dated May 14, 2003.
>
> Plaintiff contends the Court's decision is not sustained by sufficient evidence, or is contrary to the law (Neb. Rev. Stat. § 25-1142[6]).

On June 13, 2003, the district court denied Diversified's motion. Diversified filed its notice of appeal on July 9. We later moved the case to our docket.

III. ASSIGNMENT OF ERROR

Diversified's four assignments of error can be more succinctly restated as one: The district court erred in finding that it had no personal jurisdiction over the appellees and sustaining the appellees' special appearance.

IV. STANDARD OF REVIEW

[1,2] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion

independent from the trial court's. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

V. ANALYSIS

1. Appellate Jurisdiction

[3] We begin by addressing the appellees' argument that this court does not have jurisdiction over Diversified's appeal. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004). The appellees characterize Diversified's May 22, 2003, motion as a motion for new trial, as it was titled, and then argue that the hearing on the appellees' special appearance was not a "trial" from which a motion for new trial could be filed. See Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002) (providing in part that "[a] new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court"). Thus, the appellees conclude that Diversified's notice of appeal was not timely filed because the May 22 motion did not terminate the 30-day appeal period after the district court sustained the appellees' special appearance.

[4-6] Whether a motion for new trial is a proper motion to file after a defendant's special appearance is sustained is an issue we need not address because the appellees' initial premise—that the May 22, 2003, motion is a motion for new trial—is one we need not accept. A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion. *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra.* The running of the time for filing a notice of appeal is not only terminated by a motion for new trial, but also by a motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002). *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra.* To qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under § 25-1329, and must seek substantive alteration of

the judgment. *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra*; *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). Diversified's May 22 motion, remarkably similar to the motion at issue in *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, requested a "reexamination" of the district court's May 15 decision on the basis that it was contrary to law. Therefore, the motion sought substantive alteration of the judgment and can be characterized as a motion to alter or amend a judgment, which terminated the 30-day appeal period. See *id.* Diversified's notice of appeal was filed within 30 days of the overruling of its motion to alter or amend a judgment; thus, its notice of appeal was timely and we have jurisdiction over this matter.

2. PERSONAL JURISDICTION

[7-10] Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004). Under the statutory pleading rules in effect when this action was filed, before filing any other pleading or motion, one may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the objector. *Id.* Confronted with a special appearance, a plaintiff has the burden to establish facts which demonstrate the court's personal jurisdiction over the defendant. *Id.* In a hearing on a special appearance, an affidavit may be used to prove or disprove the factual basis for a court's assertion or exercise of personal jurisdiction over a defendant. *Id.* When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's. *Id.*

We digress for a moment to note that during oral arguments before this court, Diversified conceded that the district court correctly concluded that no personal jurisdiction exists over Skyline. Thus, our analysis below deals only with the issue of whether Nebraska's assertion of jurisdiction extends over Clevinger and Hawkins.

Addressing that issue first requires us to determine what evidence we may consider. As noted, Diversified had the burden to establish facts demonstrating the court's personal jurisdiction

over the appellees. To satisfy that burden, Diversified offered into evidence the affidavit of Grady. The appellees objected to the offer. The district court stated that it would reserve ruling on the objection, and the hearing on the appellees' special appearance promptly concluded. Thus, the court never expressly received the affidavit into evidence, although the court did refer to it in its order sustaining the appellees' special appearance.

[11] The appellees argue that Grady's affidavit may not be considered on appeal because " '[u]nless the [exhibit] is marked, offered, **and** accepted, it does not become part of the record and cannot be considered . . . as evidence in the case.' " Brief for appellees at 29, quoting *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003). Diversified counters the appellees' argument with a quotation from *R.W. v. Schrein*, 264 Neb. 818, 821, 652 N.W.2d 574, 578 (2002) (supplemental opinion), where we stated:

> " ' "If when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object, *or to insist upon a ruling on an objection to the introduction of the evidence*, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, *and the evidence is in the record for consideration the same as other evidence*." ' "

(Emphasis in original.)

[12] Diversified argues that the appellees waived any objection to Grady's affidavit when they failed to insist upon a ruling on their objection. See *id.* (it is well established that a party who fails to insist upon a ruling to a proffered objection waives that objection). Although we did not consider the exhibit at issue in *R.W. v. Schrein, supra*, because we could not determine whether it had been received into evidence, we cautioned parties that when they fail to insist upon rulings to their objections, they do so at their own peril. Having been forewarned, the appellees in this case did not insist upon a ruling to their objections. Those objections are therefore waived, and Grady's affidavit is available to us as we consider whether personal jurisdiction exists over Clevinger and Hawkins.

[13] Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits. See § 25-536(2); *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004). Thus, we need only consider whether Nebraska's exercise of jurisdiction over the appellees would be consistent with due process.

[14,15] The Due Process Clause of the U.S. Constitution protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations. *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003). To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have certain minimum contacts with the forum state so as not to offend "'traditional notions of fair play and substantial justice.'" *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *Kugler Co. v. Growth Products Ltd., supra*. Thus, the determination whether the court has jurisdiction is a two-step process. First, we must determine whether the appellees had the necessary minimum contacts with Nebraska, and second, if such minimum contacts have been established, the contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice. See *Kugler Co. v. Growth Products Ltd., supra*.

(a) Minimum Contacts

[16,17] The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Quality Pork Internat. v. Rupari Food Servs., supra*. This analysis requires that we consider the quality and nature of the defendant's activities in order to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process. *Kugler Co. v. Growth Products Ltd., supra*.

[18,19] Under such an analysis, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. *Id.* Rather, it is essential in each case that there be some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* This requirement ensures that a defendant will not be subject to litigation in a jurisdiction solely due to random, fortuitous, or attenuated contacts. *Id.*

The scope of Clevinger's and Hawkins' contacts with Nebraska is predicated on several facts established by Grady's affidavit. Each was employed by Diversified, a Nebraska corporation—Clevinger for approximately 11 months and Hawkins for approximately 7 months. By virtue of the employment relationship, Clevinger and Hawkins provided management services to Diversified and were compensated for those services. More importantly, Clevinger and Hawkins came to Nebraska on December 3 and 4, 2001, to meet Diversified's staff and also made hundreds of telephone calls to Nebraska from November 2001 to July 2002.

[20,21] Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's contacts with the forum state are the result of unilateral acts performed by someone other than the defendant, or whether the defendant himself or herself has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004). Clevinger and Hawkins argue that their December 2001 visit to Nebraska and their hundreds of telephone calls with Nebraska were requirements of their employment and that, therefore, they were merely responding to Diversified's unilateral acts. We do not agree. The employment relationship between Diversified and Clevinger and Hawkins by definition includes various *mutual*, rather than unilateral, promises and obligations. While such an employment relationship might not, by itself, provide the necessary contacts for personal jurisdiction in this state, our

record also contains evidence of Clevinger's physical presence in Nebraska and the hundreds of telephone calls they made here. The U.S. Supreme Court has stated that "territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). In addition, this court has stated that mail and telephone communications sent by a defendant into a forum may count toward the minimum contacts that support jurisdiction. *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998). Considering all of the facts before us, we conclude that Clevinger and Hawkins have sufficient minimum contacts with Nebraska that they should reasonably anticipate being haled into court here.

(b) Fair Play and Substantial Justice

[22,23] Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "'fair play and substantial justice.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. at 476; *Quality Pork Internat. v. Rupari Food Servs., supra*. These considerations include (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Burger King Corp. v. Rudzewicz, supra*; *Quality Pork Internat. v. Rupari Food Servs., supra*. Such considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. See, *Burger King Corp. v. Rudzewicz, supra*; *Quality Pork Internat. v. Rupari Food Servs., supra*.

[24] Where a defendant who has purposefully directed his or her activities at forum residents seeks to defeat jurisdiction, the defendant must present a compelling case that the presence of some other consideration would render jurisdiction unreasonable. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474,

675 N.W.2d 642 (2004). We conclude that Clevinger and Hawkins have failed to present such a case in light of the above considerations. With the ease of modern transportation and communications, it is difficult to see the burden on Clevinger and Hawkins of defending this action in a state where they have had contacts and whose laws they have availed themselves of. See *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003). In their brief, Clevinger and Hawkins speculate that many of the witnesses that will testify are located in Michigan and also argue that the business Diversified has conducted in Michigan in the past evidences a minimal burden on it to litigate the action in Michigan. However, Nebraska also has a significant interest in adjudicating a suit brought by a Nebraska corporation based on actions by defendants who have availed themselves of the benefits and protections of the laws of Nebraska. In short, Nebraska's exercise of jurisdiction over Clevinger and Hawkins would not offend notions of fair play and substantial justice.

VI. CONCLUSION

This court has jurisdiction over the matter before it because Diversified's May 22, 2003, motion to alter or amend a judgment terminated the appeal period and Diversified's notice of appeal was timely filed following that motion's denial. With regard to the issue of personal jurisdiction over the appellees, Diversified has conceded that no such jurisdiction extends over Skyline, and that portion of the district court's order is affirmed. However, we conclude that Nebraska's exercise of jurisdiction extends over Clevinger and Hawkins. Thus, we reverse the district court's order sustaining the special appearance in part and remand the cause for further proceedings.

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

WRIGHT, J., participating on briefs.

GERALD G. WELVAERT, JR., APPELLANT, V. NEBRASKA STATE PATROL, APPELLEE.

683 N.W.2d 357

Filed July 16, 2004. No. S-03-1006.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Administrative Law: Judgments: 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.
4. ____: ____: ____. 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.
5. **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.
6. ____: ____. 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.
7. **Constitutional Law: Criminal Law: Other Acts.** Under the Ex Post Facto Clause, the retroactive application of civil disabilities and sanctions is permitted; only retroactive criminal punishment for past acts is prohibited.

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

Donald L. Schense, of Law Office of Donald L. Schense, for appellant.

Jon Bruning, Attorney General, and Mark D. Starr for appellee.

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

GERRARD, J.

Between 1994 and 1996, Gerald G. Welvaert, Jr., had sexual intercourse and/or sexual contact with four underage females. Welvaert was charged and pled guilty to four sex-related offenses, and was sentenced to a term of 18 to 24 months' imprisonment.

After his release from prison, the Nebraska State Patrol (NSP), pursuant to the Sex Offender Registration Act (SORA), Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 2000), determined that Welvaert was at a high risk to reoffend sexually and classified him as a Level 3 sex offender. Welvaert appealed, and the district court affirmed the NSP's determination. On appeal, Welvaert contends that the NSP's risk assessment instrument is invalid and that SORA violates the Ex Post Facto Clause of the U.S. Constitution. For the following reasons, we affirm the judgment of the district court.

I. SORA

Welvaert's appeal represents the third recent challenge to SORA. See, *Slansky v. Nebraska State Patrol, ante* p. 360, 685 N.W.2d 335 (2004); *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004). In *Slansky* and *Worm*, we discussed, at length, the pertinent features of SORA and the rules and regulations that implement SORA. In *Slansky*, we also discussed the risk assessment instrument that was developed to classify sex offenders under SORA. Therefore, it is unnecessary to repeat our review of SORA's features and the risk assessment instrument, and we direct the reader to *Slansky* and *Worm* for such background information.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1994, when he was 25 years old, Welvaert had sexual intercourse with his 13- or 14-year-old cousin. During the next 2 years, Welvaert had sexual intercourse and/or sexual contact with three other young females, ages 14 to 16. As a result, four sex-related charges—three Class II felony counts and one Class IV felony count—were brought against Welvaert. Welvaert testified that in July 1996, he pled guilty to the four felonies and was sentenced to serve 18 to 24 months' imprisonment and 5 years' probation. In July 1997, Welvaert was released from prison; he remained on probation through 2001.

On January 26, 2000, an investigator for the NSP completed a risk assessment for Welvaert using the NSP's risk assessment instrument. Welvaert scored 185 points on the instrument and was classified as a Level 3 sex offender. Thereafter, on March 14, the NSP sent Welvaert a letter, notifying him that the NSP

Sex Offender Registry had determined that he was at a high risk to reoffend sexually and that therefore, he had been classified as a Level 3 sex offender. The letter stated that a Level 3 classification requires the NSP to provide information concerning him to the public, appropriate law enforcement officials, schools, daycare centers, and youth and religious organizations, and that such notification would be done through news releases and other avenues as deemed appropriate. In addition, the letter notified Welvaert that if he disagreed with this determination, he could request a hearing to contest the classification. Soon thereafter, Welvaert gave notice of his intent to contest the classification and the grounds therefor.

At the administrative hearing, the NSP stipulated that 10 points should be deducted from Welvaert's score in regard to item 10 (release environment) because he was on probation, i.e., under supervision, at the time the instrument was scored. In addition, the hearing officer determined that 10 points should be deducted in regard to item 11 (disciplinary history while incarcerated) because prior to Welvaert's hearing, the instrument was revised to eliminate the assessment of points for nonviolent disciplinary infractions. Accordingly, the hearing officer reduced Welvaert's overall score by 20 points. Despite this reduction, Welvaert's amended score was still 165, or 35 points more than needed to classify him as a Level 3 offender. Noting Welvaert's score and stating that Welvaert failed to present sufficient mitigating evidence to support a downward departure, the hearing officer recommended that the NSP's decision classifying Welvaert as a Level 3 sex offender be upheld. Thereafter, on August 13, 2002, the superintendent of the NSP issued an order adopting the recommended decision of the hearing officer in full and making it the final decision of the NSP.

On September 12, 2002, pursuant to the Administrative Procedure Act, see Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999 & Supp. 2003), Welvaert filed a petition in the district court for Lancaster County, appealing his classification as a Level 3 sex offender. See 272 Neb. Admin. Code, ch. 19, § 014.02 (2000). On July 30, 2003, the district court entered its order affirming the decision of the NSP.

Welvaert filed a timely notice of appeal, and the NSP, noting that Welvaert's appeal challenged the constitutionality of SORA, filed a petition to bypass the Nebraska Court of Appeals. We granted the NSP's petition based on our exclusive jurisdiction to decide cases involving the constitutionality of a statute. See Neb. Rev. Stat. § 24-1106(1) (Reissue 1995).

III. ASSIGNMENTS OF ERROR

Welvaert assigns that the district court (1) erred in affirming the decision of the NSP and (2) abused its discretion in affirming the decision of the NSP.

IV. STANDARD OF REVIEW

[1,2] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Slansky v. Nebraska State Patrol, ante* p. 360, 685 N.W.2d 335 (2004). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

[3-6] 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. *Id.* 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.* Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

V. ANALYSIS

Under these broad assignments of error, Welvaert makes two arguments: (1) The NSP's risk assessment instrument is invalid because it is a flawed indicator of a sex offender's risk of recidivism and (2) SORA violates the Ex Post Facto Clause of the U.S. Constitution.

1. Risk Assessment Instrument

Welvaert argues that the risk assessment instrument is invalid because it is a flawed indicator of recidivism. Welvaert raises seven general complaints concerning the risk assessment instrument and the assessment process.

First, Welvaert contends that the instrument is invalid because "[t]oo much variability presently exists between the states so that no uniformity [or] consistency exists in this classification process." Brief for appellant at 5. Welvaert does not explain, however, how the absence of nationwide uniformity in sex offender registration statutes makes the NSP's risk assessment instrument invalid. We decline to speculate on possible arguments in this regard and find Welvaert's first contention to be without merit.

Second, Welvaert contends that the instrument is invalid because NSP investigators score the instrument, "lending to yet more subjective scoring and classification." *Id.* The record does not support Welvaert's contention. During Welvaert's prenotification hearing, the clinical director of the NSP Sex Offender Registry, Shannon Black, Ph.D., under questioning by Welvaert's attorney, testified regarding the reliability of assessments completed by investigators. For example, Black noted that the instrument's author tested it for "inter-rater reliability" prior to allowing the investigators to do assessments individually. In addition, Black stated that prior to completing assessments, the investigators attend training specific to the risk assessment of sex offenders and that she is available to help investigators with questions during the completion of an assessment. Moreover, Black stated that she no longer reviews every assessment because the investigators score the instrument consistently. Furthermore, we note that even if an investigator errs during the completion of an assessment, the offender has the opportunity to correct these errors by contesting his or her classification level to a hearing officer and then to the courts if necessary.

Third, Welvaert contends that the instrument is invalid because the investigators do not conduct interviews prior to assigning offenders their presumptive classifications. However, Welvaert fails to explain why the absence of a preclassification interview invalidates the instrument. In any event, we note that

Welvaert was given the opportunity to put on evidence and testify at his prenotification hearing. Therefore, prior to the public dissemination of his registry information, Welvaert was given a meaningful opportunity to contest his classification, and his argument is without merit. See *Slansky v. Nebraska State Patrol, ante* p. 360, 685 N.W.2d 335 (2004) (determining that SORA's prenotification hearing comports with due process).

Fourth, Welvaert contends that the instrument is invalid because it "never takes into account the particulars of the crime in terms of the counting of convictions or the occasion of the acts that led to the convictions." Brief for appellant at 5. Similarly, in his fifth "argument," Welvaert states that it is "[t]roublesome . . . that the offender is never offered an opportunity to offer any mitigation in this process of classification." *Id.* These arguments are without merit. As an initial matter, an investigator doing the initial classification has the authority to depart from an offender's presumptive classification if the records that he or she reviews justify such a departure. Moreover, if offenders choose to contest their classification, they may present evidence of mitigation, including the circumstances surrounding the underlying crime, during the hearing. Therefore, offenders not only have an opportunity to rebut the facts that led to their presumptive classification level, but they also have the opportunity to present mitigating facts which may justify a downward departure.

Sixth, Welvaert contends that the instrument is invalid because "definitions used by the [NSP] in this classification process also allows [sic] the assessor to double score an individual for the same behavior." *Id.* Essentially, Welvaert's argument stems from his disagreement with his score for item 9 (use of force). Item 9 explores the nature of the sexual assault and is broken down into seven subcategories. Relevant here, Welvaert was assessed 5 points for fondling and 25 points for using physical violence or force against a victim.

At Welvaert's prenotification hearing, the investigator for the NSP was questioned about the assessment of 5 points for fondling and 25 points for physical force or violence. The investigator testified that Welvaert was assigned 5 points for fondling because a police report states that Welvaert fondled two of the victims. A review of the record reveals that the main victim

stated that Welvaert tickled and fondled her, and fondled a second underage girl. Similarly, the investigator discussed a different police report wherein a third victim reported that Welvaert " 'got on top of her and pulled her pants down around her knees. He was also placing his hand under her shirt and fondling her breasts.' " When asked why Welvaert was assessed 25 points for physical violence or force, the investigator again pointed to the third victim's statement that Welvaert " '[g]ot on top of her and pulled her pants down around her knees.' "

On appeal, Welvaert argues that the instrument's vague definitions allowed the instructor to improperly assign him 5 points for fondling and 25 points for physical force for the exact same conduct, i.e., getting on top of and pulling down the pants of the third victim. As an initial matter, we note that Welvaert does not explain why the same conduct could not lead to multiple assessments of points under different items or subcategories. Moreover, because the presence of conduct that corresponds with an item or subcategory correlates to an increased risk of recidivism, it is only logical that conduct that falls under multiple items or subcategories should be scored accordingly. In any event, the record shows that the assessment of 25 points for the use of physical violence or force was not justified solely on the basis of the aforementioned statement concerning pulling down the third victim's pants. The record reveals that after Welvaert got on top of the third victim and pulled her pants down, she " 'placed both hands on his chest and attempted to push him off.' " At this time, the victim is reported to have told Welvaert " ' "no," ' " to "get off," and to " ' "Stop it." ' " In sum, the district court's decision to uphold the NSP's assessment of points under item 9 is supported by competent evidence and is not arbitrary, capricious, or unreasonable.

Seventh, Welvaert contends that the instrument is invalid because it has a statistical error rate of 12 percent. This argument was analyzed and rejected in *Slansky v. Nebraska State Patrol*, *ante* p. 360, 685 N.W.2d 335 (2004). No further discussion is warranted in the present appeal.

2. Ex Post Facto Clause

Welvaert also contends that SORA violates the Ex Post Facto Clause of the federal Constitution. U.S. Const. art. I, § 10, cl. 1.

We have rejected this argument on two separate occasions, and we do so again. See, *Slansky, supra*; *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004).

[7] Essentially, Welvaert argues that SORA violates the Ex Post Facto Clause because it was not enacted until after he was sentenced and incarcerated. The NSP, on the other hand, asserts that SORA is not a penal statute because neither the registration nor notification provisions are "punishment" so as to raise ex post facto concerns. Stated otherwise, the NSP contends that SORA is a civil regulatory scheme and that therefore, the Ex Post Facto Clause is not implicated. See, *Slansky, ante* at 377, 685 N.W.2d at 350 ("under the Ex Post Facto Clause, the retroactive application of civil disabilities and sanctions is permitted; only retroactive criminal punishment for past acts is prohibited"). See, also, *Worm, supra.*

Recently, in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), the U.S. Supreme Court, in rejecting a similar ex post facto challenge to Alaska's sex offender registration statute, stated that a two-step "intent-effects" test should be used to analyze whether a law constitutes retroactive punishment in violation of the Ex Post Facto Clause. See, *Slansky, supra*; *Worm, supra.* Under this test, "we must first determine whether the intent of the Legislature in enacting SORA was to establish a nonpunitive civil regulatory scheme for sex offenders. . . . If so, we must then determine whether SORA is so punitive in nature as to negate the Legislature's intent to deem it civil." *Slansky, ante* at 378,685 N.W.2d at 351.

(a) Legislative Intent

On two occasions, we have determined that the Legislature, in enacting SORA, intended to establish a civil regulatory scheme to protect the public from the danger posed by sex offenders. See, *Slansky, supra*; *Worm, supra.* Because these cases are dispositive of the issue and Welvaert does not contend that the Legislature had a punitive intent in enacting SORA, it is unnecessary to discuss this prong any further.

(b) Effects of SORA

Because the Legislature intended SORA to be civil in nature, its intent will be rejected only if Welvaert provides the clearest

proof that SORA is so punitive in either purpose or effect as to negate the Legislature's intent. See, *Smith, supra*; *Slansky v. Nebraska State Patrol, ante* p. 360, 685 N.W.2d 335 (2004); *Worm, supra*. In making this determination, we consider the factors first set forth by the U.S. Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). See *Slansky, supra*. They are as follows:

> "(1) '[w]hether the sanction involves an affirmative disability or restraint'; (2) 'whether it has historically been regarded as punishment'; (3) 'whether it comes into play only on a finding of *scienter*'; (4) 'whether its operation will promote the traditional aims of punishment—retribution and deterrence'; (5) 'whether the behavior to which it applies is already a crime'; (6) 'whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) 'whether it appears excessive in relation to the alternative purpose assigned.' "

State v. Isham, 261 Neb. 690, 695, 625 N.W.2d 511, 515-16 (2001), quoting *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

Relying on these factors, Welvaert argues that SORA (1) imposes an affirmative disability; (2) operates to promote the traditional aims of punishment, retribution, and deterrence; (3) applies to behavior that is already a crime; and (4) is excessive in relation to its nonpunitive purpose. In *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004), we determined that SORA's registration provisions are not so punitive in effect as to negate the Legislature's stated intent. Therefore, only SORA's notification provisions are at issue in the following analysis.

(i) Affirmative Disability or Restraint

In order to determine whether SORA's notification provisions impose an affirmative disability or restraint on registered sex offenders, we must "inquire how the effects of [a sex offender registration act] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith v. Doe*, 538 U.S. 84, 99-100, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). As an initial matter, we note that although registered sex offenders are subject to public notification, they

remain free to live and work where they want without supervision. See *Worm, supra.*

Nonetheless, Welvaert argues SORA imposes an affirmative restraint because "[t]here are no statutory safeguards as to the extent to which the information may be disclosed and released to the public." Brief for appellant at 8. This is not accurate. The extent to which an offender is subject to public notification under SORA has been tailored to mirror the level of risk an offender presents to their community. See § 29-4013. If the risk of recidivism is low, only law enforcement officials who are likely to encounter the offender must be notified. § 29-4013(2)(c)(i). If the risk of recidivism is moderate, the circle of notification is broadened to include schools, daycare centers, and religious and youth organizations. § 29-4013(2)(c)(ii). If the risk of recidivism is high, notification must also be given to members of the public who are likely to encounter the offender. § 29-4013(2)(c)(iii).

Welvaert contends that the release of such information may have a debilitating effect on an offender's search for housing and employment. However,

> these consequences flow not from [a sex offender registration act's] registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant.

Smith, 538 U.S. at 101.

SORA's public notification provisions impose no restraint whatsoever upon the activities of Welvaert, and his argument is without merit. See, *Hatton v. Bonner*, 356 F.3d 955 (9th Cir. 2004) (determining sex offender registration and notification scheme did not impose affirmative disability or restraint); *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000) (same); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999) (same); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997) (same); *Com. v. Williams*, 574 Pa. 487, 832 A.2d 962 (2003) (same).

(ii) Traditional Aims of Punishment

Welvaert also contends that SORA promotes the traditional aims of punishment, retribution, and deterrence. However, Welvaert's

argument is confined to SORA's registration provisions and, therefore, is without merit under *State v. Worm, ante* p. 74, 680 N.W.2d 151 (2004).

(iii) Criminal Behavior

Next, Welvaert contends that SORA imposes punishment because the behavior to which it applies is already a crime. As we noted in *Worm, supra*, the U.S. Supreme Court in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), concluded that this factor received little weight in analyzing the effect of Alaska's registry statute because the statute's concern was recidivism, and therefore, the offender's past criminal conduct was a necessary starting point. Relying on the Court's determination in *Smith*, we concluded that the criminal behavior factor was not relevant to determining whether a criminal registration statute imposes punishment. *Worm, supra*. Because Welvaert's past criminal conduct is also the necessary starting point for SORA's notification provisions, we again conclude that this factor is not relevant for such a determination.

(iv) Excessiveness

Finally, Welvaert argues that SORA's notification provisions are excessive because SORA does not set forth the type of information concerning the registrant which may be released and it contains "no limitation to the geographical area in which the information may be released." Brief for appellant at 10. This argument is without merit. Under SORA, the NSP and any law enforcement agency authorized by the NSP are required to release "*relevant information* that is necessary to protect the public concerning a specific person required to register." (Emphasis supplied.) § 29-4009(3). By limiting dissemination to information that is relevant to public safety, SORA shields offenders from the publication of irrelevant personal information. See 272 Neb. Admin. Code, ch. 19, § 013.05 (2000).

Additionally, the extent of dissemination is further limited by the severity of the risk the offender is determined to present to the community, see § 29-4013, and even for the high risk offenders like Welvaert, public notification is limited. See, § 29-4013(2)(c)(iii); *Slansky v. Nebraska State Patrol, ante* p.

360, 685 N.W.2d 335 (2004) (rejecting challenge to breadth of SORA's notification provisions).

In sum, SORA's notification provisions represent a reasonable regulatory scheme in light of its nonpunitive objective. See *Smith, supra* (stating question in excessiveness inquiry is not whether legislature has made best choice possible to address problem it seeks to remedy, but whether regulatory means chosen are reasonable in light of nonpunitive objective). Applying the factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), we conclude that SORA is not so punitive as to negate the Legislature's intent to create a valid civil regulatory scheme.

VI. CONCLUSION

For the foregoing reasons, we conclude that Welvaert's challenges to SORA and the risk assessment instrument are without merit. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
BILLY R. AGUILAR, APPELLANT.

683 N.W.2d 349

Filed July 16, 2004. No. S-03-1120.

1. **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.
2. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the trial court's discretion and will not be disturbed on appeal in the absence of an abuse of discretion.
3. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Trial: Courts: Expert Witnesses.** Trial courts are entitled to broad discretion concerning hearings under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

5. ____: ____: ____. A trial court has the discretion to hold a *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), hearing during trial when the need for one arises.
6. **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.
7. **Criminal Law: Statutes.** Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
8. **Jurors: Words and Phrases.** A "regular juror" for purposes of Neb. Rev. Stat. § 29-2004 (Cum. Supp. 2002) is a juror who takes an oath and is seated, erroneously or not.
9. **Trial: Rules of Evidence: Expert Witnesses.** Under Neb. Rev. Stat. § 27-702 (Reissue 1995), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness is qualified as an expert.
10. **Trial: Expert Witnesses.** Whether a witness is qualified as an expert is a preliminary question for the trial court.
11. **Trial: Expert Witnesses: Appeal and Error.** A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.
12. **Expert Witnesses.** Firsthand knowledge is not always required as the only source of information for an expert's opinion.
13. **Expert Witnesses: Evidence.** An expert does not need to have additional expertise in the science or theory underlying instruments used in his or her field. That the expert is trained to operate a device is sufficient foundation for admitting evidence produced by the device.
14. **Rules of Evidence: Witnesses.** When a witness demonstrates familiarity with handwriting and the familiarity was not acquired for the purposes of litigation, the requirements of Neb. Rev. Stat. § 27-901 (Reissue 1995) are met.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

Gerard A. Piccolo, Hall County Public Defender, and John C. Jorgensen for appellant.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

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

CONNOLLY, J.

Billy R. Aguilar appeals his convictions and sentences for first degree assault, burglary, attempt to commit first degree murder, and two counts of use of a weapon to commit a felony.

He contends that the court improperly held a hearing during trial under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and that he was entitled to a mistrial when a stricken juror was inadvertently placed on the jury but later was replaced by an alternate juror. He also raises numerous evidentiary assignments of error.

We conclude that a trial court may, in its discretion, hold a *Daubert* hearing during trial. We also determine that he was not entitled to a mistrial. We further determine that the remaining assignments of error are without merit. Accordingly, we affirm.

BACKGROUND

Billy and his cousin, Mario Aguilar had been good friends during elementary school, but over the years they drifted apart. Still, they remained friends until Billy started behaving in a bizarre manner.

In October 2002, Billy's behavior began to deteriorate. While Mario was exercising at the YMCA, Billy came in and unexpectedly said to Mario, " 'You're everywhere' " and " 'I can hear you in the air and in the vents in my house, and just all over. You're everywhere.' " Other witnesses stated that Billy told people that he heard Mario's voice in his head and that Billy was heard laughing and talking to himself.

On several occasions in December 2002, Mario saw Billy drive by his place of employment. On January 20, 2003, a man wearing a mask approached Mario as he was opening his place of employment. The man asked, " 'How you doing?' " and then jabbed a knife toward Mario's stomach, laughed, and began swinging the knife. He said, " 'Come here, come here,' " and Mario backed away. The man then left. Mario identified the man as Billy, stating that he recognized his voice, body, movements, and laugh. Mario called the police, but initially did not tell them Billy was the perpetrator because he wanted to work things out with Billy and "didn't want him to get in trouble." After he was unable to contact Billy, Mario called the police again and reported that Billy was the perpetrator. The record is silent on what action the police took after the knife incident.

After the knife incident, early in the morning of February 20, 2003, a person knocked on Mario's door in a distinctive pattern.

Mario asked who was there; the person responded " 'Primo,' " the word for cousin in Spanish. Mario stated that he recognized the voice as Billy's and that he looked out the window and saw Billy with his back turned. He called to him, but Billy did not respond and ran away.

At 9 o'clock that night, Mario and his wife heard the same distinctive knock on the door. Mario told his family to stay in a bedroom while he went to the door. A masked man pounded on the door and then shot and kicked it in; the intruder then shot Mario three times. Mario stated that he easily recognized Billy as the shooter.

Later, Billy's sweatshirt was tested for gunshot residue. The State's expert, Joseph Morris, an employee in the forensic department of R.J. Lee Group, testified that he was trained in gunshot residue analysis. He also testified about his experience and the quality control standards that were obtained from another company, Fisher Scientific. Billy objected to the testimony on *Daubert* grounds. The court admitted the testimony; Morris testified that he found residue on Billy's sweatshirt.

The jury found Billy guilty of first degree assault, burglary, attempt to commit first degree murder, and two counts of use of a weapon to commit a felony. The jury acquitted him of a stalking charge. The court sentenced him to varying terms of imprisonment on each count, some running concurrently and some consecutively. Billy appeals.

ASSIGNMENTS OF ERROR

Billy assigns, consolidated and rephrased, that the district court erred by (1) holding a *Daubert* hearing during trial, (2) overruling his motion for a mistrial, (3) allowing Morris to testify about the standards from Fisher Scientific, (4) allowing Mario's testimony about Billy's handwriting, (5) allowing testimony about the cost of further testing, (6) allowing testimony from Billy's brother about writing on a piece of paper, (7) allowing testimony about Billy's meeting with Mario at the YMCA, (8) allowing testimony about the assault on January 20, 2003, (9) overruling a form of the question objection about Billy's not returning a wave, (10) allowing testimony from several witnesses about Billy's looking for a gun, (11) allowing testimony

from another cousin of Billy about a meeting with Billy, (12) allowing a 911 emergency dispatch service tape into evidence, (13) allowing evidence that Mario's wife saw Billy on her way to daycare, (14) allowing evidence about Billy's laughing, (15) allowing impeachment testimony, and (16) allowing testimony from certain police officers.

STANDARD OF REVIEW

[1] 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. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003).

[2] The decision whether to grant a motion for mistrial is within the trial court's discretion and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003).

[3] Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

ANALYSIS

TIMING OF *DAUBERT* HEARING

Billy argues that it is improper to defer *Daubert* determinations until trial.

Neb. Rev. Stat. § 27-104 (Reissue 1995) provides:

> (1) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of subsection (2) of this section.
>
> (2) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
>
> (3) . . . Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness, if he so requests.

Section 27-104 is silent about the timing of a hearing to determine the admissibility of expert opinion testimony. Although we have not specifically addressed when a hearing may be held, we have indicated that a hearing before trial is not mandatory. When we adopted the *Daubert* standard, we noted that a court's decision about the admissibility of expert opinion evidence entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether it can properly be applied to facts in issue. But we also stressed that in making this preliminary assessment, the trial judge has the discretion both to avoid unnecessary hearings and to require hearings when needed. *Schafersman v. Agland Coop.*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[4] Also, the U.S. Supreme Court has emphasized that trial courts are entitled to broad discretion concerning *Daubert* hearings. See, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). In addition, federal courts have determined that a *Daubert* hearing may be appropriate during trial. See, e.g., *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775 (11th Cir. 2004); *U.S. v. Alatorre*, 222 F.3d 1098 (9th Cir. 2000).

In *Alatorre, supra*, the Ninth Circuit addressed whether a *Daubert* hearing must take place before trial. The court noted that the U.S. Supreme Court has not mandated the form that an inquiry into relevance and reliability must take. Although the Court stated in *Daubert* that the inquiry is a "preliminary" one, to be made "at the outset," the Ninth Circuit concluded that those terms did not mean that the inquiry must be made in a separate pretrial hearing. The court reasoned:

> "The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable. . . . Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted,

> and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises."

Alatorre, 222 F.3d at 1102. The court concluded that a pretrial hearing was not a requirement and was consistent with the court's broad discretion. The 11th Circuit has agreed, holding that "a trial court has broad discretion in determining how to perform its gatekeeper function, and nothing prohibits it from hearing a *Daubert* motion during trial." *Club Car, Inc.*, 362 F.3d at 780.

[5] We also agree that the trial court has the discretion to hold a *Daubert* hearing during trial when the need for one arises. We conclude that the court did not abuse its discretion when it held the *Daubert* hearing during trial.

JURY COMPOSITION

Before trial, the district court clerk incorrectly read the jurors' names that had been excused. As a result, the clerk failed to read a juror's name who had been stricken by the State and that juror sat through part of the trial before the mistake was discovered. Another juror who had not been stricken was mistakenly excused. The court gave Billy the option to discharge the juror, which he accepted; the juror was replaced by an alternate juror. Billy moved for a mistrial, which was denied.

Billy contends that he was entitled to a mistrial when, because of an error, an excused juror was improperly allowed to sit through part of the trial and was replaced by an alternate juror when the mistake was discovered. Billy argues that the alternate juror was improperly used and that he was prejudiced by the change.

Neb. Rev. Stat. § 29-2004 (Cum. Supp. 2002) addresses the use of alternate jurors and provides in part:

> The alternate jurors shall take the proper oath or affirmation and shall be seated near the regular jurors with equal facilities for seeing and hearing the proceedings in the cause, and shall attend at all times upon the trial of the cause in company with the regular jurors. They shall obey all orders and admonitions of the court, and if the regular jurors are ordered to be kept in the custody of an officer during the trial of the cause, the alternate jurors shall also be kept with the

> other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the cause to the jury. If, before the final submission of the cause a regular juror dies or is discharged, the court shall order the alternate juror, if there is but one, to take his or her place in the jury box.

According to Billy, under § 29-2004, the juror who was mistakenly allowed to sit through part of trial was not a "regular juror" and could not be replaced with an alternate. We disagree.

[6,7] 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. *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001). Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

[8] Here, the use of the term "regular juror" in § 29-2004 is used to delineate between the initially seated members of the jury and any alternates that were seated. Thus, we conclude that a "regular juror" for purposes of § 29-2004 is a juror who took an oath and was seated, whether erroneously or not.

The court allowed Billy the choice of keeping the stricken juror, who was stricken by the State, or replacing the juror with an alternate; Aguilar chose replacing the juror. We conclude that the district court did not abuse its discretion in replacing the juror with an alternate.

Morris' Familiarity With Fisher Scientific

Billy contends that Morris was not qualified to testify because he was not personally familiar with Fisher Scientific, the source of the standards used by the R.J. Lee Group. A standard is a known substance, like copper or lead, with a known amount being analyzed. Morris' company obtained the standards from Fisher Scientific. Billy does not argue that Morris' reasoning or methodology was invalid or unreliable, or that it could not properly be applied to facts in issue.

Morris testified extensively at trial about his background and qualifications concerning gunshot residue analysis. As part of

the analysis, Morris' company uses standards to confirm that their instruments are operating correctly. By using a "standard" consisting of a known substance with a known amount, Morris is able to verify the instrument's accuracy for gunshot residue.

[9-11] Neb. Rev. Stat. § 27-702 (Reissue 1995) governs the admissibility of expert testimony. It provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Under § 27-702, a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness is qualified as an expert. Whether a witness is qualified as an expert is a preliminary question for the trial court. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal. *Id.*

[12] Under Neb. Rev. Stat. § 27-703 (Reissue 1995):

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Thus, firsthand knowledge is not always required as the only source of information for an expert's opinion. See *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

[13] The Nebraska Court of Appeals has noted that an expert does not need to have additional expertise in the science or theory underlying instruments used in his or her field. That the expert is trained to operate a device is sufficient foundation for admitting evidence produced by the device. See, *State v. Ford*, 1 Neb. App. 575, 501 N.W.2d 318 (1993), citing *State v. Estill*, 13 Kan. App. 2d 111, 764 P.2d 455 (1988). Courts have also held that a certification of calibration solution used in blood alcohol testing is unnecessary to establish foundation for the admissibility of the test. See *Barna v. Commissioner of Public Safety*, 508 N.W.2d 220 (Minn. App. 1993).

Thus, it is unnecessary that Morris be personally familiar with the manner in which Fisher Scientific manufactures or supplies calibration substances or standards. It is enough that Morris is qualified to operate the devices and interpret the results.

Here, Morris testified about his personal knowledge of gunshot residue testing and his qualifications and ability to accurately perform the tests. Had Billy wished to challenge the test's accuracy based on a theory that the quality control substances were inaccurate, he could have explored that theory through cross-examination. The court did not err by allowing Morris to testify as an expert witness.

Testimony About Billy's Handwriting

Billy contends that the district court erred when it allowed Mario to testify about Billy's handwriting. During trial, Mario identified Billy's writing on a page in a small notebook with information about types of guns to show that Billy was seeking to purchase a gun. Mario testified that he was familiar with Billy's handwriting from the years they went to school together. He also stated that he did not become familiar with Billy's handwriting for the purposes of litigation.

Neb. Rev. Stat. § 27-901 (Reissue 1995) provides:

> (1) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (2) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> . . . .
>
> (b) Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

[14] We have held that it was not error to permit a motel clerk to testify that initials on a motel register were written by her coworkers when the clerk testified that she was familiar with their handwriting from the course of the employment. Because the familiarity with the handwriting was not acquired for the purposes of litigation, the requirements of § 27-901 were met,

and the testimony was properly admitted. *State v. Schwartz*, 239 Neb. 84, 474 N.W.2d 461 (1991). We have also held that testimony from a former spouse about familiarity was admissible. *State. v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002).

Billy contends that *Schwartz* is distinguishable. He argues that the motel clerk in *Schwartz* had current familiarity with the handwriting at issue, while in this case, Mario stated his familiarity with Billy's handwriting was based on observations when they were in school together. But the only restriction of § 27-901 is that the familiarity was not acquired for litigation purposes. Here, Mario testified about his familiarity with Billy's handwriting and that he did not acquire the familiarity for litigation purposes. Thus, the requirements of § 27-901 were met and the court did not err in receiving the testimony.

Remaining Assignments of Error

Billy raises many remaining assignments of error that are generally evidentiary in nature. We have reviewed the record and determine that the remaining assignments of error either are without merit or have not caused prejudice.

CONCLUSION

We determine that the court did not abuse its discretion when it held a *Daubert* hearing during trial; Billy is not entitled to a mistrial. We further determine that the court did not err in finding Morris qualified as an expert. Nor did the court err by allowing Mario to identify Billy's handwriting. We further determine that Billy's remaining assignments of error are either without merit or not prejudicial.

AFFIRMED.

WRIGHT, J., participating on briefs.

DONA R. ZIMMERMAN, APPELLANT, V. NEDRA J. POWELL, APPELLEE.

684 N.W.2d 1

Filed July 23, 2004. No. S-02-1356.

1. **Trial: Rules of Evidence: Expert Witnesses.** Neb. Rev. Stat. § 27-702 (Reissue 1995) requires that the trial court act as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. 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.
2. ____: ____: ____. In performing its gatekeeping duty, it is not enough for the trial court to determine that an expert's methodology is valid in the abstract. The trial court must also determine if the witness applied the methodology in a reliable manner. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
3. ____: ____: ____. The objective of the trial court's gatekeeping responsibility is to ensure that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
4. ____: ____: ____. In performing its gatekeeping duty, the trial court has considerable discretion in deciding what procedures to use in determining if an expert's testimony satisfies *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). See Neb. Rev. Stat. § 27-702 (Reissue 1995).
5. ____: ____: ____. In performing its gatekeeping duty, the trial court's discretion extends to deciding what factors are reasonable measures of reliability in each case. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
6. ____: ____: ____. Once a party opposing an expert's testimony has sufficiently called into question the testimony's factual basis, data, principles, or methods, or their application, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
7. ____: ____: ____. The trial court does not have the discretion to abdicate its gatekeeping duty imposed by Neb. Rev. Stat. § 27-702 (Reissue 1995).
8. ____: ____: ____. A trial court, when faced with an objection under *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), must adequately demonstrate by specific findings on the record that it has performed its duty as a gatekeeper. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
9. **Trial: Rules of Evidence: Expert Witnesses: Appeal and Error.** In performing its gatekeeping duty, the trial court must explain its choices so that the appellate court has an adequate basis to determine whether the analytical path taken by the trial court was within the range of reasonable methods for distinguishing reliable expert testimony from false expertise. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
10. **Trial: Rules of Evidence: Expert Witnesses.** A trial court adequately demonstrates that it has performed its gatekeeping duty when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability

that the court relied on in reaching its determination. See Neb. Rev. Stat. § 27-702 (Reissue 1995).

11. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function under *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
12. ____: ____: ____. When the trial court has not abdicated its gatekeeping function under *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), an appellate court reviews the trial court's decision to admit or exclude the evidence for an abuse of discretion.
13. **New Trial: Verdicts: Appeal and Error.** Not every error justifies a new trial; only an error which is prejudicial to the rights of the unsuccessful party does so. In the absence of such an error, the successful party, having sustained the burden and expense of trial, may keep the benefit of the verdict.
14. **Trial: Rules of Evidence: Expert Witnesses.** Only if the admission or exclusion of the expert's testimony did not affect the result of the trial unfavorably for the party against whom the ruling was made will a court's abdication of its gatekeeping duty be deemed nonprejudicial. See Neb. Rev. Stat. § 27-702 (Reissue 1995).
15. **New Trial: Appeal and Error.** Partial retrials are permissible if it clearly appears from the record that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. If the issues are so interwoven that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, then a retrial on all interwoven issues is required.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed as modified.

John P. Weis for appellant.

Ronald R. Kappelman, of Banks, Johnson, Colbath, Sumner & Kappelman, for appellee.

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

CONNOLLY, J.

The appellant, Dona R. Zimmerman, alleged that she was injured in an automobile collision caused by the negligence of the appellee, Nedra J. Powell. Over Zimmerman's objection, the court allowed Powell's accident reconstructionist, Jubal D. Hamernik, Ph.D., to testify that Zimmerman was driving above the speed limit when the vehicles collided. The jury determined that Zimmerman had suffered $17,851.18 in damages, but also determined that she bore 49 percent of the responsibility for the collision and reduced the damages to $9,104.10.

Under Neb. Rev. Stat. § 27-702 (Reissue 1995), the trial court must act as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). The issue is whether the court made adequate findings on the record to show that it had performed its gatekeeping duty when it allowed Hamernik to testify. Because the court's findings were inadequate, we determine that it failed to perform its gatekeeping duty. However, because Hamernik's testimony did not taint the issue of damages, we do not remand for a new trial. Instead, in accordance with concessions made by Powell in her appellate brief, we modify the verdict so that Zimmerman recovers 100 percent of the amount of her damages.

FACTUAL BACKGROUND

The collision occurred at an intersection in Scottsbluff, Nebraska. A yield sign at the intersection required east-west traffic to yield to north-south traffic. As Powell approached the intersection from the west, Zimmerman approached from the south. Although Powell claims that she looked to the south before entering the intersection, she admitted that she did not see Zimmerman. Powell proceeded into the intersection without yielding. Zimmerman slammed on her brakes, but was unable to stop. She struck Powell's vehicle in the center of the passenger's side.

The main focus of this appeal is whether Zimmerman was driving above the 25-m.p.h. speed limit before braking. According to Zimmerman, she approached the intersection at 15 to 20 m.p.h. She testified that before entering the intersection she slowed down and looked both ways. She noticed Powell's vehicle approaching from the left. Zimmerman claims that she could tell that Powell had not seen her and that Powell was not slowing down. Zimmerman then slammed on her brakes, leaving 20 feet of tread marks.

To contradict Zimmerman's claim that she was traveling below the speed limit, Powell relied on Hamernik's testimony. Hamernik has a master's degree in civil engineering from the University of Connecticut and a doctorate in computational mechanics from the University of Colorado. He is employed by a private engineering firm and has analyzed over 2,000 accidents.

Hamernik testified that before braking, Zimmerman was traveling 30 to 35 m.p.h. He also testified that at impact, Zimmerman was traveling at 15 m.p.h. and Powell was traveling at 20 to 22 m.p.h.

Because of our ruling, we need not recite in detail Hamernik's testimony on how he arrived at his opinions. Instead, we include only what is necessary to provide context.

Generally, two well-accepted methods for determining the speed of a vehicle involved in a collision are used within the engineering community: the conservation of momentum method and the conservation of energy method. Hamernik claims to have relied on both methodologies. However, to provide reliable results, each method must have reliable underlying data. Despite 160 pages of testimony, it is not clear what data Hamernik needed to make his calculations reliable, nor is it clearly explained where he got the data that he used. Apparently, some of the data were derived from simulations he ran using a "state-of-the-art" computer program called Human Vehicle Environment (HVE).

PROCEDURAL BACKGROUND

Before trial, Zimmerman moved to prevent Hamernik from testifying at trial. In the motion, Zimmerman argued that Hamernik's opinions were unreliable under *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001) (*Schafersman I*). In *Schafersman I*, we adopted the framework for evaluating expert testimony set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and its progeny.

Seven days before trial, the court held a hearing under Neb. Rev. Stat. § 27-104 (Reissue 1995), i.e., a *Daubert* hearing, to determine whether to admit Hamernik's opinions. After both parties presented evidence, the court took the motion under advisement.

Before opening statements, the court told the parties that it was still unsure whether Hamernik's testimony concerning the vehicles' speeds would be admissible. Specifically, the court noted that it was not convinced that either the HVE software or the manner in which Hamernik had used it was reliable. The court, as we understand it, ruled that Hamernik could not give

his opinions on the vehicles' speeds at trial unless Powell first established the methodology's reliability.

At trial, Hamernik offered further explanation of the methodologies he used to determine how fast the vehicles were going before the collision. This testimony is set out later in our opinion. The court, over Zimmerman's objection, then allowed Hamernik to testify about Zimmerman's speed before braking. In overruling the objection, the court did not explain why it had determined that Hamernik's trial testimony had led it to conclude that his opinions were admissible under *Daubert/Schafersman I*.

We note that in addition to testifying about the vehicles' speeds, Hamernik had intended to offer opinions on the magnitude of force Zimmerman would have experienced in the collision and how this force compared to other forces experienced in human volunteer testing. Before trial, the court specifically ruled that Hamernik could not compare the force Zimmerman experienced to forces experienced in human volunteer testing. Furthermore, although the court did not preclude Hamernik from giving his opinion as to the magnitude of force experienced by Zimmerman, Hamernik did not give any such testimony at trial. Thus, we are concerned only with Hamernik's testimony about the vehicles' speeds.

The jury determined that both Powell and Zimmerman had been negligent and that Zimmerman had suffered $17,851.18 in damages from the collision. In determining the negligence of the parties, the jury concluded that Zimmerman bore 49 percent of the responsibility for the collision and reduced the damages that she could recover by that percentage. Zimmerman appealed.

ASSIGNMENTS OF ERROR

Zimmerman assigns, reordered and consolidated, that the court erred in (1) failing to find that Hamernik's opinions were unreliable under *Daubert/Schafersman I*, (2) refusing to exclude Hamernik's testimony as a sanction for Powell's filing of untimely discovery disclosures, (3) setting the *Daubert* hearing 7 days before trial, (4) placing the burden on Zimmerman at the *Daubert* hearing to show that Hamernik's testimony was unreliable, (5) refusing to allow Zimmerman's counsel to fully explore the basis for the assumptions made by Hamernik at the

Daubert hearing, (6) failing to announce its ruling on the *Daubert* motion until the trial's commencement, and (7) allowing the jury to view computer-generated simulations of the collision prepared by Hamernik.

Zimmerman also assigns as error that the jury's verdict is contrary to the evidence. However, this assignment of error is not argued and therefore we do not consider it on appeal. See *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003).

STANDARD OF REVIEW

The standard of review is discussed in the analysis portion of our opinion.

ANALYSIS

DAUBERT/SCHAFERSMAN I GATEKEEPING DUTY

Section 27-702 governs the admissibility of expert testimony. It provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Until our decision in *Schafersman I*, we had employed the *Frye* test to evaluate the admissibility of an expert's testimony. Under the *Frye* test, when an expert relied on a scientific principle or discovery, the proponent of the expert's testimony had to prove that the principle or discovery had "'gained general acceptance in the particular field in which it belongs.'" *Schafersman I*, 262 Neb. at 222, 631 N.W.2d at 870 (2001) (quoting *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)).

[1,2] In *Schafersman I*, however, we abandoned the *Frye* test and, in its place, adopted the framework set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and its progeny, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), and *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). Under the *Daubert/Schafersman I* framework, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. *Carlson v. Okerstrom*, 267 Neb. 397,

675 N.W.2d 89 (2004). 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 I.* In addition, it is not enough for the trial court to determine that an expert's methodology is valid in the abstract. The trial court must also determine if the witness has applied the methodology in a reliable manner. *Carlson, supra.*

Both the *Daubert/Schafersman I* framework and the *Frye* framework seek to exclude unreliable expert testimony, but they go about this in significantly different ways. The *Frye* framework relies on the expert's field to weed out unreliable testimony. The focus is on whether " 'an asserted expertise [i]s believed valid by enough asserted experts. If enough of them [think] so—that is, if the asserted expertise enjoys "general acceptance"— then a court [i]s justified in concluding that the proffered testimony [i]s valid.' " *Schafersman I*, 262 Neb. at 229, 631 N.W.2d at 875 (quoting Michael J. Saks, *The Aftermath of* Daubert*: An Evolving Jurisprudence of Expert Evidence*, 40 Jurimetrics J. 229 (2000)).

By contrast, under the *Daubert/Schafersman I* framework, the burden to weed out unreliable expert testimony is placed directly on the trial court. While general acceptance remains a valid factor to be considered, the trial court cannot "piggyback" its decision onto someone else's judgment. *Schafersman I*, 262 Neb. at 229, 631 N.W.2d at 875. The trial court must ultimately determine whether the expert has presented enough "rational explanation and empirical support" to justify admitting his or her opinion into evidence. *Id.* at 231, 631 N.W.2d at 876. In short, the *Frye* framework relies exclusively on the assessment of the testifying expert's field; the *Daubert/Schafersman I* framework relies on the trial court.

[3] We recognize that the *Daubert/Schafersman I* framework will frequently require trial judges to grapple with unfamiliar scientific principles. Our recent decisions involving *Daubert/Schafersman I* have shown that this can be a daunting task. Accord *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995). However, a trial court need not discover the "essence of 'science' " each time it is confronted

with expert testimony. *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996). Rather, the objective of the trial court's gatekeeping responsibility is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Schafersman v. Agland Coop*, 268 Neb. 138, 681 N.W.2d 47 (2004).

[4,5] The trial court's task is also eased by the *Daubert/Schafersman I* framework, which recognizes a range of reasonable methods exists for distinguishing reliable expert testimony from false expertise. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (Scalia, J., concurring). Thus, the trial court has considerable discretion in deciding what procedures to use in determining if an expert's testimony satisfies *Daubert/Schafersman I*. See, *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003); *Elsayed Mukhtar v. Cal. State University, Hayward*, 299 F.3d 1053 (9th Cir. 2002), *amended* 319 F.3d 1073 (2003). The trial court's discretion further extends to deciding what factors are reasonable measures of reliability in each case. See, *Kumho Tire Co., supra*. Cf. *Schafersman I*, 262 Neb. at 233, 631 N.W.2d at 877 (setting out factors that might bear on gatekeeping determination but noting "[t]hese factors are . . . neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances").

[6,7] The trial court's discretion, however, is not boundless. As we have discussed, the *Daubert/Schafersman I* framework relies on trial courts to determine whether an expert's testimony is reliable. Once a party opposing an expert's testimony has sufficiently called into question "the testimony's factual basis, data, principles, [or] methods, or their application . . . the trial judge *must* determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline." (Emphasis supplied.) *Schafersman I*, 262 Neb. at 233, 631 N.W.2d at 877. In other words, the trial court does not have the discretion to abdicate its gatekeeping duty. See, *Kumho Tire Co., supra* (Scalia, J., concurring); *Elsayed Mukhtar, supra*;

Goebel v. Denver and Rio Grande Western R.R. Co., 215 F.3d 1083 (10th Cir. 2000).

[8] A necessary component of this rule is that a trial court, when faced with a *Schafersman I* objection, "must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper." *Goebel*, 215 F.3d at 1088. See, also, *Elsayed Mukhtar, supra*; 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 702.02[6][c] (2d ed. 2004); 29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6266 (Supp. 2002). After a sufficient *Daubert/Schafersman I* objection has been made, the losing party is entitled to know that the trial court has engaged in the " 'heavy cognitive burden' " of determining whether the challenged testimony was relevant and reliable, as well as a record that allows for meaningful appellate review. *Schafersman I*, 262 Neb. at 229, 631 N.W.2d at 875. "Without specific findings or discussion on the record, it is impossible . . . to determine whether the [trial] court ' "carefully and meticulously" review[ed] the proffered scientific evidence' or simply made an off-the-cuff decision to admit expert testimony." *Goebel*, 215 F.3d at 1088 (quoting *U.S. v. Call*, 129 F.3d 1402 (10th Cir. 1997)).

[9] This does not mean, however, that trial courts must " 'recite the *Daubert* standard as though it were some magical incantation.' " *Goebel*, 215 F.3d at 1088 (quoting *Ancho v. Pentek Corp.*, 157 F.3d 512 (7th Cir. 1998)). Nor does it infringe on the discretion that the trial court has in making the *Daubert/Schafersman I* determination. But it does mean that the trial court "must explain its choices" so that the appellate court has an adequate basis to determine whether the analytical path taken by the trial court was within the range of reasonable methods for distinguishing reliable expert testimony from false expertise. Margaret A. Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony*, in Reference Manual on Scientific Evidence 29 (Federal Judicial Center 2d ed. 2000).

[10] Thus, the record must include more than a recitation of the *Daubert/Schafersman I* boilerplate and a conclusory statement that the challenged evidence is or is not admissible. A trial court adequately demonstrates that it has performed its

gatekeeping duty when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination. See 29 Wright & Gold, *supra*. When the court fails to make these findings, it abdicates its gatekeeping function. *Goebel, supra*.

STANDARD OF REVIEW

[11,12] We digress momentarily to discuss our standard of review. Generally, a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). But an abuse of discretion standard is only applicable where the trial court has discretion to act or refrain from acting. As noted previously, a trial court does not have the discretion to abdicate its gatekeeping function. Thus, an appellate court reviews the record de novo to determine whether a trial court has abdicated its *Schafersman I* gatekeeping function. See *Goebel v. Denver and Rio Grande Western R. Co.*, 346 F.3d 987 (10th Cir. 2003). When the trial court has not abdicated its *Schafersman I* gatekeeping function, an appellate court reviews the trial court's decision to admit or exclude the evidence for an abuse of discretion.

TRIAL COURT'S INADEQUATE *DAUBERT/SCHAFERSMAN I* RULING

Here, the trial court held a *Daubert* hearing to determine whether to admit Hamernik's opinions. At the hearing, both parties offered evidence on the admissibility of Hamernik's testimony, and the trial court took under advisement Zimmerman's motion to exclude the testimony. Before opening statements, the court told the parties:

> I am concerned because of the way Dr. Hamernik did [his analysis] was that he used simulation software to try to replicate the actual action in the accident, and the Court is told virtually nothing about the simulation software except that its name is HVE and it's software manufactured by General Dynamics, but its reliability I know nothing about.

> . . . I am not satisfied that Dr. Hamernik is absolutely precluded from having sufficient basis to do this scientifically validly [sic] just because I don't know yet about this simulation software, whether it was reliable and whether it will accomplish some deficiencies that Dr. Hamernik had on inputs . . . . Although it's my suspicion that this simulation software was used and that is how he came up with the numbers that he did for things like the angle of the cars after the impact, the distance traveled after impact and so forth.
>
> So what I'm going to do is I'm going to exercise the discretion in [Neb. Evid. R.] 705, which requires that the expert disclose the underlying facts or data before I will allow his opinion. And some things that I am deficient in the underlying facts or data to make it scientific is any explanation about this software, how the simulations work, whether it's reliable and whether it's reliable enough information for Dr. Hamernik to fill in the variables that he is missing when he then seeks to reconstruct the accident.
>
> Some of those variables that he is missing is [sic], as a I said, what the angle the car was after impact, he's coming up with that from simulation software, in my opinion. Whether those will fill in the holes or not will just depend on his testimony at trial whether he'll be able to establish it. I am requiring that he give that underlying facts and data before I will allow his opinion.

Later, the following exchange occurred between the parties' counsel and the court:

> [Counsel for Powell]: Okay. Just so I'm understanding the Court's ruling, [Hamernik] can come in and testify about the speeds, it's the forces that you are needing more information about? In other words, the fact that he has calculated . . . Zimmerman going 30 miles an hour before she applied her brakes, the fact that he has calculated she was going 15 miles an hour at impact, those are fine opinions?
>
> THE COURT: I'm sure if you check, the 15-mile-an-hour impact comes from a myriad of assumptions through simulations that he ran, and he needs to establish that those

simulations were both reliably done and can furnish sufficient reliable information for him to conclude what that speed was at impact, because my hunch is that he is simply taking some photographs and estimating crush from photographs to get the speed at impact, and that may not be sufficiently reliable. That certainly is not sufficiently reliable according to some of these reconstructionists, you would need more information than a photograph of one car to come up with all of that.

. . . .

THE COURT: I don't know how he's doing it. I know he did not explain it at the hearing.

[Counsel for Powell]: You need for him to explain to you in more detail how he had done his calculations?

THE COURT: No, explain to the jury. I'm going under [rule] 705, so I am requiring that he furnish to the jury, quote, "the underlying facts and data," before I will let him give any opinions at all. I'm not precluding him from giving any opinions, I'm requiring that he'll have to establish the underlying facts and data to show that his opinion is scientifically valid and it's not just a product of a whole bunch of unreliable simulations.

[Counsel for Zimmerman]: I just have a little question. You don't want the information outside the presence of the jury before?

THE COURT: No, no, no. We've had plenty here. We spent almost a day and I still have no idea about this simulation software, not one word except the name.

. . . .

THE COURT: I think he's qualified as a witness, I'm not concerned about that, I'm concerned whether he had enough data to put into the formulas to get the conclusions he did.

. . . .

THE COURT: I'm not limiting his testimony, I'm just saying it's going to be done in a certain way. He'll just give his opinions and then go on, and in cross-examination to reveal its basis he'll have to establish the basis first, which is somewhat opposite from the way experts are allowed to testify many times.

> [Counsel for Powell]: Okay.
>
> THE COURT: If it doesn't work out to make it scientifically reliable . . . you will be in the spot of having to tell the jury in opening you think you'll get those opinions in and discover you were not able to, I can't prejudge that.

These pretrial discussions show that the court believed—and we think correctly—that it did not yet have enough information to determine whether Hamernik's opinions on the vehicles' speeds were admissible under *Daubert/Schafersman I*. Specifically, the court expressed concern whether the HVE software was reliable and whether the manner in which Hamernik used it was reliable. The court, as we understand it, ruled that before Hamernik could offer his opinions at trial, Powell would have to establish the reliability of Hamernik's methodology.

At trial, Hamernik gave the following explanation of the HVE program:

> There's software out there . . . produced by . . . Engineering Dynamics Corporation . . . . They've developed programs over the years to look at both energy and momentum for car crashes. This program was initially developed by . . . the National Highway Transportation Safety Administration, but now has evolved over the years into a program that they call HVE, which stands for Human Vehicle Environment.
>
> This program matches the physics associated with a car crash and it models both energy and momentum simultaneously at the same time. When you use this program, you produce something called a simulation. It looks like an animation, but it's a simulation, actually how the two cars interact and move and the damage that will result.
>
> So I've checked my hand calculations with HVE. In fact, I ran HVE to get a ball park idea of how the cars would likely move, conducted hand calculations, then subsequent to that I've done complete simulations of this accident.
>
> . . . .
>
> [HVE] is state of the art. It was first released in 1992. Engineering Dynamics has been producing software for, I think, 25 years now. HVE is the latest and greatest of their software, it's well-validated. They've ran hundreds of tests that actually take cars and crash them at known

speeds, measure the change in speed, the post-impact speeds and where the cars end up at rest. Their software matches all these values within 1 percent. It's a very scientific, very accurate program.

You can recreate accidents with this program, but you cannot make it do whatever you want, you have to obey the law of physics. And the input will — in this accident, if you know how the cars roughly approach, you can calculate where the cars should end up, it will actually show you that. It will predict the damage, so you can modify the speeds until the damage matches and also that the cars end up where they're supposed to end up, roughly.

. . . .

. . . You can't violate the laws of physics. This program takes in account the entire forces of the roadway, the locations of what we call the center of gravity. . . .

HVE takes into account the location of the [center of gravity], the weights of the vehicle and the tire forces with the roadway and the stiffnesses or the strength of the vehicles so you can account for the deformation and the post-impact movement, and they all have to match in order to get the right solution. I cannot simply say that I want the car to end up here and this car ends up here, it won't do that unless I obey the laws of physics.

Shortly after this testimony, Powell's counsel asked Hamernik what opinions he had reached as a result of his accident reconstruction. Zimmerman's counsel objected, and the court stated, "Overruled. You may give your opinions." The transcript also contains a written order, noting that Zimmerman's "*Daubert* Motion was . . . overruled in part."

The record, however, contains only the court's conclusion; there is no analysis. The court should have explained why Hamernik's trial testimony was sufficient to show that HVE and the manner in which he used it were reliable. For example, if the court believed that HVE was reliable because Hamernik suggested that it was widely accepted as quality software within the engineering community, it should have said so. Because the court failed to explain its reasoning, we conclude that it abdicated its gatekeeping duty.

PREJUDICE TO ZIMMERMAN

[13] Our conclusion that the trial court erred by failing to perform its gatekeeping duty does not, however, end our inquiry. Not every error justifies a new trial; only an error which is prejudicial to the rights of the unsuccessful party does so. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003). In the absence of such an error, the successful party, having sustained the burden and expense of trial, may keep the benefit of the verdict. *Id.* Thus, the question is whether the court's failure to perform its gatekeeping duties resulted in prejudice to Zimmerman.

Some courts have held that when the trial court fails to make the required findings, the appellate court should conduct the *Daubert/Schafersman I* analysis on the appellate record. See, *Kinser v. Gehl Co.*, 184 F.3d 1259 (10th Cir. 1999), *abrogated on other grounds, Weisgram v. Marley Co.*, 528 U.S. 440, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000); *Tanner v. Westbrook*, 174 F.3d 542 (5th Cir. 1999), *superseded on other grounds*, Fed. R. Evid. 103(a). If the appellate court concludes that the evidence in the appellate record justifies the admission or exclusion of the evidence, then, according to these courts, no prejudice results to the complaining party. See *Kinser, supra.*

But in our view, this improperly shifts the gatekeeping duty from trial courts to appellate courts. There is a reason that trial courts, rather than appellate courts, bear the gatekeeping duty. "Trial courts . . . have a much broader 'array of tools which can be brought to bear on the evaluation of expert testimony' . . . ." 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 702.02[6][c] at 702-29 (2d ed. 2004). An appellate court is limited to a cold record and thus is not in a position to perform the gatekeeping role in a manner that is fair to the parties. Cf., *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083 (10th Cir. 2000); *Cortés-Irizarry v. Corporación Insular*, 111 F.3d 184 (1st Cir. 1997).

[14] Thus, when a trial court fails to make the requisite findings, the losing party will usually be prejudiced. Only if the admission or exclusion of the expert's testimony did not affect the result of the trial unfavorably for the party against whom the ruling was made will a court's abdication of its gatekeeping

duty be deemed nonprejudicial. See, *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003); *Elsayed Mukhtar v. Cal. State University, Hayward*, 299 F.3d 1053 (9th Cir. 2002), *amended* 319 F.3d 1073 (2003).

Here, Powell conceded that she failed to yield at the intersection, but argued that Zimmerman was contributorily negligent because she was driving above the speed limit as she approached the intersection. The jury agreed and concluded that Zimmerman bore 49 percent of the responsibility for the collision. Because Hamernik's testimony was the centerpiece of Powell's comparative negligence defense, we cannot say that the admission of his testimony did not affect the result of the trial.

REMEDY

Zimmerman contends that we should remand for a new trial on all issues. Powell argues that Hamernik's testimony was relevant only to the issues whether Zimmerman was contributorily negligent and the apportionment of damages and that therefore Zimmerman cannot relitigate her damages. We agree with Powell.

[15] Partial retrials are permissible if it clearly appears from the record that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999). If the issues are so interwoven that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, then a retrial on all interwoven issues is required. *Id.*

The jury verdict form specifically shows that the jury determined (1) both Powell and Zimmerman had been negligent, (2) Zimmerman incurred $17,851.18 in damages, and (3) Zimmerman was 49 percent responsible for the collision and thus could recover only 51 percent of her damages, or $9,104.10. Hamernik's testimony focused on whether Zimmerman was driving above the speed limit before she began braking. Thus, the court's failure to conduct its gatekeeping function tainted the jury's determination of Zimmerman's contributory negligence and the apportionment of damages. If we were to remand, these issues would have to be retried. Moreover, because a jury would be unable to apportion damages without an understanding of

Powell's negligence, the issue of Powell's negligence would also have to be retried.

Hamernik's testimony, however, did not taint the issue of Zimmerman's damages. Zimmerman and her family and friends testified about her injuries and how those injuries had affected her life. Medical personnel who had treated her also testified, and she introduced a summary of her medical bills into evidence. To counter Zimmerman's evidence on damages, Powell relied on cross-examination and a private investigator to rebut Zimmerman's evidence of damages. Hamernik's testimony did not touch on Zimmerman's damages; he focused only on how fast the vehicles were going before the collision.

Nor can we say that if we were to grant a retrial, the issue of damages would be so interwoven with the negligence and apportionment damages issues that a partial retrial would be unfair to either party. We fail to see how knowledge of the nature and extent of Zimmerman's injuries would be necessary to resolve those issues.

Thus, were we to remand, we would limit the issues to be tried to the parties' negligence and the apportionment of damages. Partial remand, however, is not required. Because of our conclusion that Zimmerman cannot relitigate damages, the most she could recover at a new trial would be $17,851.18. In her brief, Powell conceded that if we were to decide that the court erred in allowing Hamernik to testify, "there is no reason to retry the case and this Court can modify the Judgment . . . so as to allow [Zimmerman] the sum of $17,851.18, the sum awarded by the jury before any deduction for [Zimmerman's] contributory negligence." Brief for appellee at 45. In other words, instead of remanding for a new trial, Powell has asked us to modify the judgment so as to give Zimmerman the best possible result she could receive if the case were retried. Because of this concession, we choose not to remand for a new trial. Instead, we modify the judgment so that Zimmerman receives $17,851.18.

Zimmerman's Other Assignments of Error

Finally, it is necessary for us to comment on Zimmerman's other assignments of error. In each of these, she argued that the

court erred in allowing Hamernik to testify. As a result, if we were to conclude that any of these assignments of error had merit, the remedy would be the same as what we have already granted to Zimmerman. As a result, we need not address Zimmerman's remaining assignments of error.

CONCLUSION

We conclude that the trial court failed to perform its *Daubert/Schafersman I* gatekeeping function and that this error tainted the issues of contributory negligence and apportionment of damages, but not the amount of Zimmerman's damages. Because of the concessions made by Powell, however, we do not remand for a partial new trial. Instead, we modify the court's judgment so that Zimmerman receives $17,851.18.

AFFIRMED AS MODIFIED.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT, AND PAUL STEENSON, APPELLANT, V. ALLSTATE INSURANCE COMPANY ET AL., APPELLEES AND CROSS-APPELLEES.

684 N.W.2d 14

Filed July 23, 2004. No. S-03-443.

1. **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.
2. **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.
3. ____: ____. Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong.
4. **Declaratory Judgments.** Whether to entertain an action for declaratory judgment is within the discretion of the trial court.
5. **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, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
6. **Service of Process: Notice.** In the case of substitute service by publication under Neb. Rev. Stat. § 25-519 (Cum. Supp. 2000), service is not "made" until the third

publication, and prior to the third publication, a defendant is "not served" under Neb. Rev. Stat. § 25-217 (Reissue 1995).

7. **Service of Process: Notice: Time.** Where service by publication has been approved, a defendant is not served within 6 months from the date the petition was filed under Neb. Rev. Stat. § 25-217 (Reissue 1995) unless the third publication under Neb. Rev. Stat. § 25-519 (Cum. Supp. 2000) has occurred within 6 months from the date the petition was filed.
8. **Declaratory Judgments.** Actions for declaratory judgment are not to be entertained where another equally serviceable remedy has been provided by law, nor are they to be used to create new causes of action or cumulative remedies.
9. ____. In declaratory judgment actions, relief will not be entertained if there is pending, at the commencement of the declaratory action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action.

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

Michael G. Reilly, of Reilly, Petersen, Hannan & Dreismeier, P.L.C., and Diana J. Vogt for appellant.

Waldine H. Olson, of Nolan, Olson, Hansen, Fieber & Lautenbaugh, L.L.P., for appellee Allstate Insurance Company.

Mark C. Laughlin and Timothy J. Thalken, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee State Farm Mutual Automobile Insurance Company.

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

MILLER-LERMAN, J.

INTRODUCTION

This is an appeal from the March 19, 2003, order of the district court for Douglas County dismissing this declaratory judgment action. The action was brought by appellee and cross-appellant, State Farm Mutual Automobile Insurance Company (State Farm), against appellees Allstate Insurance Company (Allstate), H. Michael Harvey, and Gerald Campbell and appellant, Paul Steenson. Steenson was realigned with State Farm during the trial proceedings.

In its petition for declaratory relief, filed under Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995 & Cum. Supp. 2000) on

November 2, 2001, State Farm sought a declaration of the rights, duties, and obligations of the parties arising from an automobile accident which occurred on July 28, 1997, in Omaha, Nebraska. It is agreed that Campbell, driving a vehicle owned by Harvey and insured by Allstate, collided with a vehicle owned by Steenson and insured by State Farm. Campbell was uninsured. Allstate denied coverage on the basis that Campbell was driving without Harvey's permission.

In a separate personal injury action (the underlying action) filed on July 26, 2001, Steenson sought damages from Campbell or alternatively from State Farm under uninsured motorist insurance provisions. State Farm was served and appeared in the underlying action. Steenson published service on Campbell on January 16, 23, and 30, 2002.

In the instant declaratory judgment case, the district court concluded that service on Campbell had not been completed within 6 months of the filing of the petition in the underlying action, as required by Neb. Rev. Stat. § 25-217 (Reissue 1995), and that the underlying action stood dismissed. The district court reasoned that because there was "no viable claim" against Campbell and because Allstate had no obligation to defend or indemnify, there was no justiciable controversy involved in the instant declaratory judgment action. Based on this reasoning, the district court dismissed this declaratory judgment action. Steenson appealed, and State Farm cross-appealed.

For the reasons outlined below, we agree with the district court's legal conclusion that because Campbell was not served within 6 months of the date the petition was filed in the underlying action, the underlying action stood dismissed as to Campbell. However, given the fact of State Farm's appearance in the underlying action, we disagree with the district court's further determination that the entire underlying action stood dismissed. We disagree with the district court's reasoning that there are no justiciable issues among the parties, which reasoning was the basis for dismissal of this declaratory judgment action. In particular, whether Campbell was driving with Harvey's permission has not been adjudicated, and resolution of this issue bears on resolution of Steenson's claim for uninsured motorist coverage from State Farm, which claim remains an actual unresolved controversy.

However, because the pending underlying action between Steenson and State Farm provides an equally serviceable remedy for resolution of the remaining issues between the parties, we do not find error in the district court's dismissal of this declaratory judgment action. Thus, for reasons other than those asserted by the district court, we affirm.

BACKGROUND

On July 28, 1997, Steenson was involved in an automobile accident with Campbell. At the time of the accident, Campbell was driving a vehicle owned by Harvey. Steenson's vehicle was insured by State Farm, Harvey's vehicle was insured by Allstate, and Campbell had no automobile insurance. Steenson made a claim on Allstate for the injuries he received as a result of the accident. Allstate investigated the claim and determined that Campbell was driving Harvey's vehicle without permission. Allstate denied the claim. Steenson then made a claim against State Farm, asserting that Campbell was an uninsured motorist.

On July 26, 2001, Steenson filed the underlying action against Campbell in the district court for Douglas County, seeking damages for the personal injuries he received in the July 28, 1997, automobile accident. This lawsuit is governed by a 4-year statute of limitations. See Neb. Rev. Stat. § 25-207 (Reissue 1995). The parties agree that the underlying action was later amended to include Steenson's claim against State Farm for uninsured motorist coverage, and State Farm appeared in the action.

On November 2, 2001, State Farm filed the instant declaratory judgment action against Allstate, Harvey, Campbell, and Steenson, seeking judgment in its favor declaring the following:

> 1. That no State Farm automobile insurance coverage exists under the uninsurance provision of the State Farm Policy for Defendant Steenson in any way relating to or arising out of the collision;
>
> 2. That State Farm is under no duty to either defend or pay any judgment in regard to the [underlying action]; and
>
> 3. That the terms of the Allstate policy obligate Allstate to indemnify and defend Campbell;
>
> 4. That Allstate wrongfully denied liability under the terms of its policy with Harvey;

5. Any other further just and equitable relief which this Court deems necessary.

During the trial court proceedings, Steenson became realigned with State Farm.

On November 14, 2001, in the underlying action, Steenson filed a motion for order for substitute and constructive service of process upon Campbell, whom the parties could not locate. See Neb. Rev. Stat. § 25-519 (Cum. Supp. 2000). On November 16, the district court granted the motion and authorized service on Campbell by publication. Publication occurred on January 16, 23, and 30, 2002.

The declaratory judgment action was scheduled for trial on February 10, 2003. On February 8, Allstate filed a motion seeking dismissal of the declaratory judgment action. Allstate claimed that Steenson had not obtained service of process upon Campbell within 6 months of the filing of the underlying action and that by operation of law under § 25-217, the underlying action stood dismissed. Allstate claimed that the declaratory judgment action had become nonjusticiable as a result of the dismissal of the underlying action. In sum, Allstate asserted that as a result of the dismissal of the underlying action, the issues in the declaratory judgment action had been rendered moot and required dismissal.

The parties waived their right to a jury trial, and two evidentiary hearings were conducted. At the first hearing, certain documentary exhibits, including the insurance policies, were received into evidence. One exhibit shows that Harvey had become an incapacitated person and that letters of guardianship had been issued. No live testimony was offered. The deposition of Campbell was received in lieu of live testimony. The substance of his testimony was that Harvey had given Campbell permission to drive Harvey's vehicle on July 28, 1997. At the second hearing, Allstate offered and the court received into evidence several pleadings and other documents relating to service of process in the underlying action. Included in these exhibits were the petition filed in the underlying action, the motion for constructive service, the order on constructive service, and the affidavit of proof of service.

At the conclusion of the second hearing, the district court stated that Campbell had not been served within 6 months of the filing of the petition in the underlying action and that as a result, the underlying action "was automatically dismissed pursuant to Neb. Rev. Stat. 25-217." In its written order, the district court stated that the court in the underlying action "lost jurisdiction to make any further orders, except those orders necessary to formalize the dismissal of the action." The district court also observed that the statute of limitations on the potential action by Steenson against Campbell had run on July 28, 2001, 2 days after the petition in the underlying action was filed. The district court reasoned that because there was no longer any claim against Campbell in the underlying action for which Allstate could be obligated to defend or indemnify, the declaratory judgment action which, in part, sought a declaration of rights concerning Campbell and Allstate should be dismissed. The district court dismissed the declaratory judgment action.

Steenson appealed, and State Farm cross-appealed.

ASSIGNMENTS OF ERROR

Steenson assigns nine errors. We find no merit to any of the errors assigned. Our discussion below is limited to Steenson's claim, restated, that the district court erred when it concluded that when only two of the three publications required under § 25-519 had occurred within the 6 months' timeframe provided in § 25-217, Campbell had not been served.

State Farm, as appellee and cross-appellant, assigns four errors, all essentially claiming that the district court erred in dismissing the declaratory judgment action.

STANDARDS OF REVIEW

[1] 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. *Gast v. Peters*, 267 Neb. 18, 671 N.W.2d 758 (2003).

[2] 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. *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003).

[3] Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

[4] Whether to entertain an action for declaratory judgment is within the discretion of the trial court. *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988); *Continental Western Ins. Co. v. Farm Bureau Ins. Co.*, 2 Neb. App. 527, 511 N.W.2d 559 (1994).

[5] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains 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 v. Agland Coop, ante* p. 138, 681 N.W.2d 47 (2004).

ANALYSIS

Appeal: Failure to Complete Service by Publication.

Referring to the underlying action, Steenson claims on appeal that service by publication on Campbell two times within 6 months from the date the petition was filed was satisfactory service and that the district court erred when it concluded that the underlying action stood dismissed under § 25-217. Contrary to Steenson's claim, we agree with the district court's legal conclusion that in order for service by publication to be complete, all three publications must be accomplished within 6 months from the date the petition was filed and that service on Campbell was not complete. However, because State Farm had appeared in the underlying action, that action stood dismissed only as to Campbell and was not entirely dismissed as the district court stated.

The underlying action was filed on July 26, 2001, and we, therefore, refer to the statutory pleading procedure in effect at that time. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2003). The following statutes control our resolution of the legal question at issue:

At the time the declaratory judgment action was filed, § 25-217 provided: "An action is commenced on the date the petition is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed." Section 25-519 provided:

> The publication shall be made once in each week for three successive weeks in some newspaper printed in the county where the petition is filed if there is any printed in such county and, if there is not, in some newspaper printed in this state of general circulation in that county. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer.

We also refer to Neb. Rev. Stat. § 25-821 (Reissue 1995), since repealed, in our consideration of this case. See 2002 Neb. Laws, L.B. 876 (operative date January 1, 2003). Section 25-821 provided: "The answer or demurrer of the defendant shall be filed within thirty days after service of the summons and petition or completion of service by publication. The reply or demurrer of the plaintiff shall be filed within fifteen days after the filing of the answer."

It is undisputed that the petition in the underlying action was filed on July 26, 2001, and service by publication occurred on January 16, 23, and 30, 2002. Although the third publication occurred later than 6 months after the petition was filed, under a variety of theories such as tolling and liberal construction of statutory language, Steenson invites this court to conclude that service on Campbell was sufficient for purposes of § 25-217. We reject this invitation.

The controlling statutes allow for service by publication which "shall be made once in each week for three successive weeks," § 25-519, and that "[t]he action shall stand dismissed . . . as to any defendant not served within six months from the date the petition was filed," § 25-217. We read §§ 25-217 and 25-519 in pari materia. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004).

[6,7] Looking at the language in §§ 25-217 and 25-519, it is clear that service on a defendant is not an evolutionary process

as urged by Steenson, but, rather, an event accomplished at a definite point in time. In the case of substitute service by publication under § 25-519, service is not "made" until the third publication, and prior to the third publication, a defendant is "not served" under § 25-217. Our reading of these statutes is consistent with § 25-821, which, at the time the underlying case was commenced, provided for filing an answer or demurrer within 30 days after "completion of service by publication." Section 25-821 indicates that service must be completed, not partially completed, to be effective. In the case of service by publication, service is completed upon the third publication. Giving the controlling statutes their plain meaning, we conclude that where service by publication has been approved, a defendant is "not served within six months from the date the petition was filed" under § 25-217 unless the third publication under § 25-519 has occurred within 6 months from the date the petition was filed. The district court's conclusion to the same effect was correct, and Steenson's assignment of error challenging this conclusion is without merit.

Although the district court correctly concluded that Campbell had not been served in the underlying action, the district court further stated in its March 19, 2003, order that

> on January 26, 2002, the [underlying] action . . . was automatically dismissed pursuant to §25-217, Neb. Rev. Stat. After that date, said action was no longer pending and the District Court of Douglas County, Nebraska, lost jurisdiction to make any further orders, except those orders necessary to formalize the dismissal of the action.

The latter pronouncement by the district court in which it concluded that the underlying action in its entirety was no longer pending was error.

Under § 25-217, a case stands dismissed "as to any defendant not served within six months from the date the petition was filed." We read the expression "any defendant" to mean that dismissal is indicated as to that defendant who is "not served" but not all defendants in the action. See Webster's Third New International Dictionary of the English Language, Unabridged 97 (1993) (defining "any" as "one or some indiscriminately of whatever kind"). Referring to the underlying action, it is agreed that State

Farm had appeared in the underlying action and that although Campbell was not served, dismissal of State Farm was not warranted under § 25-217. Because the district court believed that the underlying action stood dismissed, it reasoned that there was no justiciable controversy among or between the parties in the declaratory judgment action and dismissed the instant declaratory judgment case. The district court's reasoning was flawed.

In the underlying personal injury action, Steenson sought to recover from Campbell, the driver of the other vehicle, who was allegedly at fault. Had Campbell been served and if it was established that he was negligent, and it was further established that Campbell was driving Harvey's vehicle with permission, recovery may well have been forthcoming from Harvey's insurance carrier, Allstate. If, however, it was established that Campbell was driving Harvey's vehicle without permission, then Steenson would seek recovery from his own carrier, State Farm, based on uninsured coverage. Because Campbell was not served within 6 months of the date the petition was filed in the underlying action, and given that the 4-year statute of limitations on Steenson's negligence claim against Campbell has run, Steenson cannot recover from Campbell on the basis alleged in his petition in the underlying action and Harvey's insurance carrier, Allstate, has no obligation to defend or indemnify. However, because the issue of whether or not Campbell was driving Harvey's vehicle with permission has not been determined, and the resolution of this issue impacts State Farm's obligation to Steenson, there remains a real controversy between Steenson and State Farm. The issue of whether Campbell was driving Harvey's vehicle with permission is implicit in the underlying action, and such action is still pending between Steenson and State Farm.

Cross-Appeal: Dismissal of Declaratory Judgment Action.

The district court dismissed the instant declaratory judgment action. On cross-appeal, State Farm claims that this ruling was error and asks this court to reverse the district court's order of dismissal so that the permission issue can be resolved herein. In this regard, State Farm notes that the issue of whether Campbell was driving Harvey's vehicle with permission awaits resolution and that the district court's statement that there were

no justiciable issues was error. We agree with State Farm that the permission issue remains viable. However, in view of the pendency of the underlying action between Steenson and State Farm, the resolution of this issue need not occur in the declaratory judgment action. Thus, for reasons other than those asserted by the district court, we reject State Farm's argument and affirm the district court's dismissal of this declaratory judgment action. See *Dean v. Yahnke*, 266 Neb. 820, 670 N.W.2d 28 (2003) (stating that when record adequately demonstrates that trial court's decision is correct, although such correctness is based on ground or reason different from that assigned by trial court, appellate court will affirm).

[8] Section 25-21,154 provides as follows: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." We have long stated that this provision indicates discretionary rather than mandatory power. *Haynes v. Anderson*, 163 Neb. 50, 77 N.W.2d 674 (1956). Under Nebraska appellate authority, whether to entertain an action for declaratory judgment is within the discretion of the trial court. *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988); *Continental Western Ins. Co. v. Farm Bureau Ins. Co.*, 2 Neb. App. 527, 511 N.W.2d 559 (1994). We have said that actions for declaratory judgment are not to be entertained where another equally serviceable remedy has been provided by law, nor are they to be used to create new causes of action or cumulative remedies. *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992); *Continental Western Ins. Co. v. Farm Bureau Insurance Co., supra.*

[9] In *Sim v. Comiskey*, 216 Neb. 83, 85, 341 N.W.2d 611, 612 (1983), relying on *Strawn v. County of Sarpy*, 146 Neb. 783, 21 N.W.2d 597 (1946), we stated that the rule in declaratory judgment actions is that "relief will not be entertained if there is pending, at the commencement of the declaratory action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action." In view of the failure of service on Campbell and the consequent relief afforded to Allstate in the underlying action, the controversy has been distilled to

Steenson and State Farm involving the permission issue. Because the underlying action was pending at the commencement of this declaratory judgment action and the availability of witnesses is comparable in both cases, the permission issue can be adjudicated in the underlying action and the declaratory judgment action should not be entertained. See *id.* Accordingly, the district court's dismissal of the declaratory judgment action, albeit for different reasons, was correct and is affirmed.

CONCLUSION

Finding no merit to the appeal or cross-appeal, the district court's dismissal of this declaratory judgment action is affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

CHIEF INDUSTRIES, INC., A DELAWARE CORPORATION, APPELLANT AND CROSS-APPELLEE, V. GREAT NORTHERN INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

683 N.W.2d 374

Filed July 23, 2004. No. S-03-619.

1. **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 trial court.
2. **Insurance: Contracts.** An insurer's duty to defend is usually a contractual duty, rather than one imposed by operation of law. The nature of the duty to defend is defined by the insurance policy as a contract.
3. ____: ____. Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because of injury caused to a third party by acts of the insured.
4. **Insurance: Liability.** Because the duty to defend and the duty to indemnify are separate and distinct obligations, it is possible, if perhaps not commonplace, for an insurer to limit its duty to defend without simultaneously limiting its duty to indemnify.
5. **Insurance: Contracts.** Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning.

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

Daniel E. Klaus, of Rembolt, Ludtke & Berger, L.L.P., for appellant.

Cathleen H. Allen and Roger G. Steele, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Chief Industries, Inc. (Chief), filed a declaratory judgment action pursuant to Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995) against Great Northern Insurance Company (Great Northern) in the district court for Hall County. Chief sought a declaration that Great Northern had an obligation pursuant to an insurance policy issued to Chief to provide coverage and to defend Chief in a lawsuit filed against Chief by Arabian Agricultural Services Company (ARASCO) in the U.S. District Court for the District of Nebraska (federal case). The district court found that Great Northern had no duty to defend Chief in the federal case. After judgment was entered against Chief in the amount of $1,466,507 in the federal case, the district court in the instant case determined that the Great Northern policy provided coverage in the sum of $87,927 for part of the damages but that the remaining damages were excluded from coverage under the policy. Chief appeals, and Great Northern cross-appeals. We determine that there is no merit to the appeal and that two aspects of one assignment of error in the cross-appeal have merit. Accordingly, we affirm in part, and in part reverse and remand with directions.

II. STATEMENT OF FACTS

Chief previously appealed, and Great Northern cross-appealed, a November 5, 1998, order in which the district court had determined that Great Northern had no duty to defend in the federal

case and that the Great Northern policy upon proper proof could provide coverage for unspecified damages not otherwise excluded. *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000) (*Chief Indus. I*). In our opinion in that appeal, we stated the facts of the case as follows:

> Chief is a Delaware corporation with its principal place of business in Grand Island, Nebraska. Great Northern is an insurance corporation organized and existing under the laws of the State of Minnesota and is authorized to do business in the State of Nebraska. The insurance policy at issue herein was issued to Chief by Great Northern for the period of July 1, 1995, to July 1, 1996.
>
> In 1991, Chief Industries U.K. Ltd. (Chief U.K.), a wholly owned subsidiary of Chief's, entered into a contract with ARASCO to manufacture, sell, and supervise the construction of 16 grain bins and related equipment in Damman, Saudi Arabia. Chief U.K. subsequently fulfilled the terms of its contract with ARASCO.
>
> ARASCO alleges that the grain bins collapsed on October 10, 1995, causing damage to the grain bins, equipment attached to the grain bins, and the grain which was stored in the bins. On October 11, Chief notified its insurance agent of the occurrence, and Great Northern commenced an investigation. On October 24, ARASCO made written claims against Chief and Chief U.K. for the damages caused by the collapse of the grain bins.
>
> On November 17, 1997, Great Northern notified Chief of its position regarding coverage of the claims made by ARASCO. Great Northern acknowledged that there had been an "occurrence" during the policy period which resulted in "property damage." However, it concluded that the exclusions set forth in paragraphs 12 and 13 of the insurance contract applied to exclude property damage to the named insured's products arising out of such products or any part of such products. Great Northern's position was that since a large portion of the claim by ARASCO involved the value of the 16 grain bins, the value of the bins was excluded from coverage. Great Northern informed Chief that exclusion 13 precluded coverage for property damage to "work performed

by or on behalf of [Chief] arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith." The letter stated that some of the damage alleged may have arisen out of work performed under the guidance of a foreman hired by Chief U.K. Great Northern also informed Chief that the insurance contract did not apply to suits brought in the United States. In addition, Chief was informed that "should Arasco pursue this claim further, or file suit on this matter in the United States, this amendment would be triggered and you would have to look to your domestic liability insurer for coverage."

On April 2, 1998, ARASCO sued Chief in the U.S. District Court for the District of Nebraska, asserting damages arising out of the collapse of the grain bins. The lawsuit set forth claims for breach of contract, breach of express warranties, and products liability. When Chief notified Great Northern of the lawsuit, Great Northern denied coverage and declined to investigate or defend Chief in the lawsuit.

On May 6, 1998, Chief commenced this action for declaratory judgment in the district court for Hall County, Nebraska. Pursuant to Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995), Chief requested the trial court to declare the rights of the parties arising by virtue of the insurance contract. Specifically, Chief requested (1) that a judgment be entered declaring that Great Northern's insurance policy provides coverage for the claims that ARASCO asserts in its lawsuit against Chief; (2) that Great Northern be ordered to investigate and provide Chief a defense in that lawsuit and be ordered to pay any judgment entered against Chief in that lawsuit to the limits of coverage provided in the contract; (3) that Chief be awarded as damages the expenses, including attorney fees, it incurs in defending the lawsuit brought against it by ARASCO and in bringing the declaratory judgment action; and (4) such other relief as the trial court deemed proper.

Both parties moved for summary judgment. The trial court determined that there were two issues presented: whether the insurance contract provided coverage and whether Great Northern had a duty to defend.

The applicable portion of the policy provided: "The Company will pay on behalf of the **Insured** all sums which the **Insured** shall become obligated to pay as damages by reason of liability to which this insurance applies, imposed by law or assumed by the **Insured** under any written or oral contract, for **bodily injury** or **property damage**, caused by an **occurrence** and **personal injury** or **advertising injury** caused by an offense occurring during the policy period." The exclusions section of the policy provided: "**This insurance does not apply:** . . . . 12. to **property damage** to the **named insured's** products arising out of such products or any part of such products; 13. to **property damage** to work performed by or on behalf of the **named insured** arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith."

The trial court concluded there had been an "occurrence" during the policy period which resulted in "property damage" and that the policy applied to at least part of Chief's claims. Thus, the trial court found that Chief was entitled to partial summary judgment, declaring that coverage attached to losses, not otherwise excluded, from the occurrence on October 10, 1995.

Next, the trial court addressed whether Great Northern had a duty to defend. Amendment No. 4 to the insurance policy, entitled "Foreign Suits Only Amendment," stated in part: "This insurance applies anywhere in the world, except the United States of America, its territories and possessions, Puerto Rico and Canada. The settlement, investigation and defense provisions of this contract shall only apply to claims made or suits brought within the policy territory herein defined."

In interpreting the contract, the trial court relied upon the policy language which this amendment replaced. The original contractual provision stated: "This insurance applies anywhere in the world except the United States, its territories and possessions, Puerto Rico and Canada. The settlement, investigation and defense provisions of this contract shall apply to claims made or suits brought anywhere in the world provided such suit emanates from damages caused by an

> **occurrence** or offense arising from the **Insured's** operations in the policy territory described above."
>
> The trial court concluded that since the lawsuit had been filed outside the policy territory, i.e., within the United States, Great Northern had no duty to defend.
>
> The trial court stated: "The end result is that although coverage attaches under the policy to any covered losses occurring as the result of the collapsed grain bins, defendant does not have a duty to defend lawsuits filed within the United States. Whether defendant will ultimately pay the claims of that lawsuit depends on whether such losses are covered under the policy. The Court at this time makes no determination at [sic] to the extent of losses which may be payable under the policy."

Chief Indus. I, 259 Neb. at 773-76, 612 N.W.2d 227-29.

We concluded in *Chief Indus. I* that the district court had not fully decided the issue of whether the insurance policy provided coverage and that the November 5 order was not a final, appealable order. We therefore dismissed Chief's appeal and Great Northern's cross-appeal. *Id.*

On February 5, 2001, the jury in ARASCO's federal case against Chief rendered a verdict in ARASCO's favor. The jury found damages in the following amounts:

> A. The amount for damage to the silos themselves:
> $1,378,580.00
>
> B. The amount for damages incurred as a direct result of the collapse, such as clean-up and inspection, but excluding the damage to the silos themselves (as provided in A above) and to other property (as provided in C below):
> $43,420.00
>
> C. The amount for damages to other property incurred as a direct result of the collapse, such as to out-buildings damaged at the collapse site (excluding the amounts provided in A and B above);
> $4500.00
>
> D. The amount for increased business expenses:
> $40,007.00
>
> E. The amount of lost profits:
> $0.00

Based on the jury verdict, the U.S. District Court for the District of Nebraska entered judgment in favor of ARASCO in the federal case in the amount of $1,466,507. The judgment was affirmed on appeal to the U.S. Court of Appeals for the Eighth Circuit. *Arabian Agri. Servs. Co. v. Chief Indus., Inc.*, 309 F.3d 479 (8th Cir. 2002).

On November 21, 2002, the parties in this case submitted evidence to the district court on the issue of the amount of damages determined in the federal case which may be covered under the insurance policy Great Northern issued to Chief. A set of 11 stipulated facts was entered. In an order filed April 7, 2003, the court reiterated its conclusion that the "Foreign Suits Only Amendment" relieved Great Northern of its duty to defend Chief in ARASCO's federal case, but the court concluded that the amendment did not exclude coverage for damages awarded to ARASCO unless that coverage was otherwise excluded under the policy.

With regard to coverage, the court determined that the damages of $1,378,580 under subparagraph A of the jury's verdict for "damage to the silos themselves" were excluded from coverage under the policy exclusion for "**property damage** to the **named insured's** products arising out of such products or any part of such products." The court rejected Chief's arguments that "the named insured's products" did not include: (1) component parts manufactured by third parties, which Chief asserted totaled $173,011 of the purchase price paid by ARASCO, and (2) component parts manufactured by Caldwell Manufacturing Co. (Caldwell), a division of Chief, which Chief asserted totaled $297,717 of the purchase price paid by ARASCO. The court noted that the policy defined "**named insured's** products" as "goods or products manufactured, sold, handled or distributed by the **named insured** or by others trading under [its] name." The court found that "all of the components manufactured by third parties were sold, handled and distributed to ARASCO by Chief or Chief U.K." and that "Caldwell's products are Chief's products and damages to products manufactured by either entity should be treated the same under the terms of the policy." In reaching this determination, the court focused on policy language to the effect that the exclusion was for property damage to

the named insured's products arising out of such products "'**or any part of such products**'" (emphasis supplied by district court) and therefore found that "[a]ll of the silos and all of the parts manufactured by [Chief's] Caldwell [d]ivision are the named insured's products for purposes of coverage" and concluded that damage to the Caldwell components was not covered under the policy.

The court found that the damages which were contained in the jury verdict and listed in subparagraphs B for resulting damages, C for damages to other property, and D for increased business expenses were covered under the policy. The court found that the $43,420 in damages listed in subparagraph B was composed of $7,100 for the cost of inspecting the wreckage and $36,320 for the cost of removing the silo wreckage from the site and that these amounts constituted covered consequential damages related to the property damage to the silos. The court found that the $4,500 in damages listed in subparagraph C was for damage to other property and consisted of damage to an outbuilding which was covered. The court found that the $40,007 in damages listed in subparagraph D for increased business expenses was composed of $29,871 for removing corn stored in the silos from the wreckage site and $10,136 in increased rail contract penalties and that these amounts were covered. The court therefore concluded that Chief should recover the sum of $87,927 and entered judgment against Great Northern and in favor of Chief in that amount. Chief appeals, and Great Northern cross-appeals.

III. ASSIGNMENTS OF ERROR

In its appeal, Chief asserts that the district court erred in (1) concluding that the foreign suits only amendment excused Great Northern from defending Chief in the federal case filed by ARASCO, (2) concluding that the policy excluded coverage for property damage to components that were manufactured by third parties, and (3) concluding that the policy excluded coverage for property damage to components manufactured by Caldwell.

In its cross-appeal, Great Northern asserts that the district court erred in (1) failing to conclude that the foreign suits only amendment precluded coverage for all damages and (2) concluding that the policy covered damages under subparagraph B

of the jury's verdict for inspection and removal of silo wreckage and under subparagraph D of the jury's verdict for removal of corn from the collapsed silo.

IV. STANDARD OF REVIEW

[1] 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 trial court. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003).

V. ANALYSIS

Both the appeal and cross-appeal raise issues regarding both the application of the foreign suits only amendment and the application of the coverage provisions of the policy. We, therefore, consider all arguments as to each of these two topics together.

1. Foreign Suits Only Amendment

(a) Chief's Appeal: Foreign Suits Only Amendment and Duty to Defend

Chief asserts that the district court erred in ruling that where the federal case was brought in the United States and thus outside the defined policy territory, Great Northern had no duty to defend. We conclude that the foreign suits only amendment excused Great Northern of its duty to defend once the federal case was brought in the United States and that the district court was correct in so ruling.

[2] An insurer's duty to defend is usually a contractual duty, rather than one imposed by operation of law. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). The nature of the duty to defend is defined by the insurance policy as a contract. *Id.* Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning. *Id.*

The foreign suits only amendment states in part: "This insurance applies anywhere in the world, except the United States of America, its territories and possessions, Puerto Rico and Canada. The settlement, investigation and defense provisions of this contract shall only apply to claims made or suits brought within the policy territory herein defined." The district court noted that this

amendment replaced language which had previously provided, " 'The settlement, investigation and defense provisions of this contract shall apply to claims made or suits brought anywhere in the world provided such suit emanates from damages caused by an **occurrence** or offense arising from the **Insured's** operations in the policy territory described above.' " See *Chief Indus. I*, 259 Neb. at 775-76, 612 N.W.2d at 229.

Chief argues that the district court erred by focusing on the fact that ARASCO brought suit in the United States, which was admittedly outside the policy territory. Chief argues that the foreign suits only amendment comes into play under two scenarios, one of which occurred in this case and is the scenario which Chief asserts requires a duty to defend. For purposes of this case, Chief claims that under the policy, the duty to defend provisions become relevant where either a claim is made or, alternatively, a suit is brought. Chief argues that where a claim is first made inside the policy territory, a duty to defend arises, notwithstanding the fact that a suit is subsequently brought outside the policy territory, which suit in the absence of an antecedent claim made within the policy territory would not give rise to a duty to defend. Chief asserts that although in this case suit was brought in the United States, the defense provisions apply because a claim had been made either in Saudi Arabia, where the accident occurred, or in the United Kingdom, where Chief U.K. is located, and that both Saudi Arabia and the United Kingdom are within the policy territory. In this regard, we note that the parties stipulated that ARASCO made claims against Chief U.K. on October 24, 1995, and that the federal case was not filed until April 2, 1998.

We reject Chief's arguments. Whether or not a claim was made within the policy territory, the defense obligation that Great Northern sought to avoid through the policy language herein was the defense of a suit outside the policy territory, such as in this case where the suit was brought in the U.S. District Court for the District of Nebraska. For completeness, we note that the parties stipulated in this case that Great Northern undertook to investigate the claim originally made by ARASCO, and the costs of such investigation are not at issue herein.

In its November 5, 1998, order, the district court declared that Great Northern had "no duty to defend the lawsuit filed in

the United States District Court for the District of Nebraska." Although Chief argues that the federal case was a mere continuation of the claim that was made within the policy territory and that the investigation of the claim was tantamount to undertaking the defense, the district court correctly read the clear language of the foreign suits only amendment to provide that once the suit was filed outside the policy territory, Great Northern had no duty to defend. It is fundamental that a duty to defend arises when a lawsuit has been filed. See *Mapes Indus. v. United States F. & G. Co.*, 252 Neb. 154, 560 N.W.2d 814 (1997) (in determining whether defense duty exists, insurer's duty to defend action against insured must, in first instance, be measured by allegations of petition against insured). The language of the foreign suits only amendment is consistent with this principle. The district court did not err in concluding that Great Northern had no duty to defend in the federal case, and we reject Chief's first assignment of error.

(b) Great Northern's Cross-Appeal:
Foreign Suits Only Amendment and Coverage

Great Northern argues in its cross-appeal that because the federal case was brought in the United States, the foreign suits only amendment not only provides that Great Northern has no duty to defend, it also excludes coverage for all damages. Because the foreign suits only amendment pertains only to the duties to investigate, settle, and defend, we conclude that it does not limit the duty to indemnify for occurrences within the policy territory.

The foreign suits only amendment provides, "This insurance applies anywhere in the world, except the United States of America, its territories and possessions, Puerto Rico and Canada. The settlement, investigation and defense provisions of this contract shall only apply to claims made on suits brought within the policy territory herein defined." The losses at issue in the present case arose from an incident which occurred in Saudi Arabia. The incident therefore occurred within the policy territory, and the indemnification provisions of the insurance policy apply. The second sentence of the amendment limits only the duties to investigate, settle, and

defend claims made and suits brought outside the policy territory; it does not limit coverage for occurrences within the policy territory, and it does not nullify the duty to indemnify resulting from a court judgment.

[3,4] Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because of injury caused to a third party by acts of the insured. *R.W. v. Schrein*, 263 Neb. 708, 642 N.W.2d 505 (2002). We have observed that generally, an insurer's duty to defend is broader than its duty to indemnify. See *Ohio Cas. Inc. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). However, we have also stated that because contract terms govern the duty, an insurance policy may relieve the insurer of any duty to defend. *Id.* Because the duty to defend and the duty to indemnify are separate and distinct obligations, it is possible, if perhaps not commonplace, for an insurer to limit its duty to defend without simultaneously limiting its duty to indemnify. See *American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881 (9th Cir. 2003). We conclude that although the clear language of the policy in the present case relieved Great Northern of its duty to defend the federal case, nothing in the policy language simultaneously relieved Great Northern of its duty to indemnify Chief for losses otherwise within the coverage of the policy and established by a court judgment.

The district court did not err in concluding that the foreign suits only amendment did not exclude coverage otherwise provided under the policy, and we therefore reject Great Northern's first assignment of error in its cross-appeal.

2. Other Coverage Provisions

(a) Chief's Appeal: Coverage for Damage to Components Manufactured by Third Parties and by Caldwell

Chief asserts that the district court erred in declaring that the entire $1,378,580 awarded in the federal case for "damage to the silos themselves" under subparagraph A of the jury's verdict was excluded from coverage under the policy's exclusion for damage

to "the named insured's products arising out of such products or any part of such products." Chief specifically argues that the policy covered damage to two categories of components within the grain silo structure: (1) components manufactured by third parties, totaling $173,011 of the purchase price paid by ARASCO, and (2) components manufactured by Caldwell, totaling $297,717 of the purchase price paid by ARASCO. We note that under an amendment to the policy, "Caldwell Manufacturing Co." is a named insured. Upon review of the law and the facts, we reject Chief's arguments with respect to both categories and conclude that the district court did not err in concluding that property damage to such components was not covered under the policy.

With respect to components manufactured by third parties, Chief argues that because such components were not manufactured by Chief, they were not "the named insured's products." Chief asserts that such components were neither integral nor essential to the operation of the grain bin and could be used as distinct products apart from the Chief-manufactured product sold to ARASCO.

[5] Although such components were not manufactured by Chief, we note that the policy defined "**named insured's** product" to include products "manufactured, sold, handled or distributed by the **named insured** or by others trading under [its] name." Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning. *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001).

The district court noted that the Chief U.K. managing director testified that all of the component parts manufactured by third parties were "'sold, distributed, and handled'" by Chief and Chief U.K. The evidence shows that Chief's arrangement with ARASCO was that Chief would assemble all the component parts to construct the grain bin structures and that ARASCO would pay Chief for all components used in the structures. We determine that the district court did not err in finding that under the definition provided in the policy, the components manufactured by third parties were "the named insured's products."

With respect to both the components manufactured by third parties and the components manufactured by Caldwell, Chief

further argues that damage to such components was not excluded from coverage because the policy excluded coverage for damage to the named insured's products only when the damage arose out of the specific products themselves. Chief argues that because the damage in this case arose out of problems in components manufactured by Chief itself and not out of those components manufactured by others, damage to those components manufactured by third parties and by Caldwell was not excluded from coverage.

In response to this argument, the district court noted that the policy language provided that the exclusion was for property damage to the named insured's product arising out of such products "'**or any part of such products**'" (emphasis supplied by district court). The district court determined that the exclusion applied to damage to all components because under the language of the policy, the exclusion applied whether the damage arose out of the components themselves or out of other components that were part of the named insured's products. It is evident that the district court found the entire structure to be Chief's products and therefore concluded that damage to the entire structure was excluded from coverage regardless of what specific component gave rise to the damage.

We find no error in the district court's findings that the components manufactured by third parties and by Caldwell were part of "the **named insured's** products" under the policy and that damage to such components was excluded under the policy exclusion for damage to the named insured's products arising out of such products or any part of such products. We therefore reject Chief's second and third assignments of error, and we affirm that portion of the district court's order in which it held that the entire $1,378,580 awarded for "damage to the silos themselves" under subparagraph A of the jury's verdict was excluded from coverage.

(b) Great Northern's Cross-Appeal: Coverage for Costs of Clean-up, Inspection, and Removal of Corn

Great Northern asserts in its cross-appeal that the district court erred in ruling that the following damages awarded by the jury in the federal case were covered under the policy: (1) costs

of $7,100 awarded under subparagraph B for inspection of the silo wreckage, (2) costs of $36,320 awarded under subparagraph B for removing the silo wreckage from the site of the silo collapse, and (3) costs of $29,871 awarded under subparagraph D for removal of corn from the wreckage site. Because we conclude that the items of damage under subparagraph B were excluded from coverage under the policy, we agree with Great Northern that the district court erred when it declared there was coverage for these items. We conclude, however, that the district court did not err in concluding that there was coverage for the costs of $29,871 awarded under subparagraph D for removal of corn.

The policy provides coverage for bodily injury or property damage and defines "property damage" as follows:

> 1. physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
>
> 2. loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an **occurrence** during the policy period.

Great Northern argues that damages for inspection of the silo wreckage, for removal of the silo wreckage, and for removal of the corn from the wreckage site were not "property damage" under the policy definition and therefore were not covered under the policy. Chief argues in response that such damages are covered because they are consequential damages of the property damage to the silo.

We note that, as discussed above, the policy excludes coverage for "property damage to the named insured's products arising out of such products or any part of such products." The silo was "the **named insured's** product" under the policy, and it follows that the categories of damage listed under subparagraph B, that is, inspection and removal of the silo wreckage, are damages necessarily related to the silo. Therefore, even if these damages are considered "property damage" under the policy definition, coverage would be excluded because such damage would be considered "property damage to the named insured's products." We conclude that the district court erred in holding that the policy covered these damages.

However, the cost to remove corn from the wreckage site, awarded under subparagraph D of the jury verdict in the federal case, was not an item of damage related to property damage to the named insured's product because the corn was not Chief's product. We determine that the district court could reasonably find that the dispersal of corn on the wreckage site, which necessitated the corn's removal, falls within the policy's definition of "property damage" either as "physical injury" to the corn or as "loss of use" of the corn. Therefore, the district court did not err in concluding that the policy issued by Great Northern covered the costs of $29,871 awarded under subparagraph D for removal of corn from the wreckage site.

Great Northern does not dispute the district court's decision that damages of $4,500 under subparagraph C of the jury award in the federal case for damage to an outbuilding and damages of $10,136 awarded under subparagraph D for increased rail contract penalties were covered under the policy and, therefore, these amounts were properly included in the district court's award. As discussed above, we also conclude that the district court did not err in concluding that there was coverage for the costs of $29,871 awarded under subparagraph D for the removal of corn. The awards for $4,500, $10,136, and $29,871 were properly ordered, and we therefore affirm the district court's award related to these three items of damage, but reverse the district court's decision that the remaining damages awarded under subparagraph B discussed above were covered under the policy. The award is, therefore, ordered reduced to $44,507.

VI. CONCLUSION

We conclude that the district court did not err in concluding that the foreign suits only amendment excused Great Northern of its duty to defend Chief once ARASCO brought suit in the United States and its further conclusion that the amendment did not excuse Great Northern of its duty to indemnify Chief for losses otherwise covered under the policy. We also conclude that the district court did not err in finding that the policy excluded coverage for damage to components manufactured by third parties and for damage to components manufactured by Caldwell. We further conclude that the district court did not err in finding

that the policy covered damages of $4,500 to the outbuilding, damages of $10,136 for the increase in rail contract penalties, and damages of $29,981 for removal of corn from the wreckage site. We therefore affirm the district court's rulings on these issues. However, we conclude that the district court erred in finding that the policy covered damages of $43,420 for inspection of the silo and associated cleanup costs. We reverse the district court's rulings in these respects. We affirm in part, and in part reverse and remand with directions to the district court to enter judgment in Chief's favor in the amount of $44,507, representing damage to the outbuilding, the increase in rail contract penalties, and the cost of removal of corn from the site.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., participating on briefs.

LORI PLOWMAN, APPELLANT, V.
LAURIE PRATT ET AL., APPELLEES.

684 N.W.2d 28

Filed July 30, 2004. No. S-02-1357.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Animals: Landlord and Tenant: Liability: Negligence.** As a general rule, a landlord is liable for injuries caused by the attack of a tenant's dog only where the landlord had actual knowledge of the dangerous propensities of the dog and where the landlord, having that knowledge, nevertheless leased the premises to the dog's owner or, by the terms of the lease, had the power to control the harboring of a dog by the tenant and neglected to exercise that power.
4. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

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

G. Rosanna Moore, of the Law Offices of Ronald J. Palagi, P.C., for appellant.

Patricia McCormack, of Hillman, Forman, Nelsen, Childers & McCormack, and Michael W. Pirtle for appellee Joe Semin.

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

PER CURIAM.

In 1998, Lori Plowman was attacked and injured by Laurie Pratt's pit bull terrier. Seeking compensation for her injuries, Plowman filed an action against Pratt and Pratt's landlord, Joe Semin. Semin moved for summary judgment, and the district court granted Semin's motion. The court, relying on our decision in *McCullough v. Bozarth*, 232 Neb. 714, 442 N.W.2d 201 (1989), in which we held that a landlord is liable for injuries caused by the attack of a tenant's dog only when the landlord has "actual knowledge" of the dangerous propensities of that dog, determined that Semin did not have actual knowledge of the dog's dangerous propensities. On appeal, Plowman asks us to overrule our decision in *Bozarth* and adopt a standard wherein a landlord is liable for the injuries caused by the attack of a tenant's dog if the landlord "knew or should have known" of the dog's dangerous propensities. Because we believe that *Bozarth* continues to represent the better rule, we decline to do so.

FACTUAL AND PROCEDURAL HISTORY

At the time of the attack, Plowman was employed by the Metropolitan Utilities District (M.U.D.) as a meter reader in Omaha, Nebraska. Plowman's job required her to walk through certain assigned neighborhoods and record usage on gas and water meters. On December 2, 1998, Plowman was walking her route, reading meters. While in the yard of Pratt's neighbor, Plowman saw Pratt and her young daughter standing on their porch, and asked Pratt if she could come over and read the relevant meters. Pratt agreed, and Plowman began walking toward Pratt's house. At this time, Plowman noticed Pratt's dog. The dog, a 1½-year-old pit bull terrier, then jumped off the porch and began running toward Plowman. Pratt told Plowman not to worry because the dog was a puppy and would not do anything.

When the dog reached Plowman, it leapt toward her face. Plowman attempted to block the dog's attack with her right hand, and the dog bit Plowman's right hand, ripping a splint off Plowman's previously broken finger. The dog then attacked Plowman's left hand, pulling her onto the ground and dragging her toward Pratt's house. Screaming, Pratt ran toward Plowman. Eventually, Pratt was able to pull the dog off of Plowman and took it into the house. Plowman suffered serious injuries as a result of the attack and was taken to the hospital.

At the time of the attack, Pratt was renting the home she lived in from Semin. The rental agreement that Pratt signed prohibited pets on the premises without Semin's prior written consent. In November 1998, approximately 2 weeks prior to the attack, Pratt traveled to St. Joseph, Missouri, to pick up the dog. Pratt did not receive Semin's written consent concerning the dog prior to moving it into her home. In their deposition testimony, Pratt and her mother agreed that Pratt's mother called Semin, asking him if Pratt could temporarily house a dog until a permanent home for it could be found. According to the Pratts, Semin consented to the temporary arrangement. In his deposition, Semin did not remember receiving a call from Pratt's mother. However, Semin did acknowledge that he saw the dog while at the residence one day and stated that he understood that the dog would be living with Pratt on a temporary basis.

After the attack, Plowman sued Pratt, Semin, and M.U.D. Plowman alleged that Pratt was strictly liable for her injuries under Neb. Rev. Stat. § 54-601 (Reissue 1998) and that Semin was negligent in failing to (1) inspect the premises in order to determine that it was free of dangerous conditions, (2) maintain the premises in a reasonably safe condition, and (3) warn Plowman of the hazardous condition of which Semin knew or should have known about. Plowman included M.U.D. in the suit because it had a subrogated interest in her workers' compensation benefits.

Semin moved for summary judgment against Plowman. The district court granted Semin's motion, concluding that Semin did not have actual knowledge of the dog's dangerous propensities, and therefore, under *McCullough v. Bozarth*, 232 Neb. 714, 442 N.W.2d 201 (1989), could not be found liable for

Plowman's injuries. Thereafter, the court granted Plowman's motion for summary judgment against Pratt as to liability. After a trial on damages, the court entered a judgment against Pratt in the sum of $84,237.

Plowman filed a timely notice of appeal. Thereafter, Plowman filed a motion to bypass the Nebraska Court of Appeals. We granted Plowman's motion, and this appeal followed.

ASSIGNMENTS OF ERROR

Plowman assigns that the district court erred in (1) failing to apply a "known or should have known" standard of care, (2) granting Semin's motion for summary judgment, and (3) excluding exhibit 11.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Tri-Par Investments v. Sousa, ante* p. 119, 680 N.W.2d 190 (2004). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

ACTUAL KNOWLEDGE STANDARD

[3] In *McCullough v. Bozarth, supra*, the mother of a child who was bitten by a dog owned by a tenant brought an action against the tenant's landlord. The district court sustained the defendant landlord's motion for summary judgment and dismissed the plaintiff's action. *Id.* After noting that only the owner of a dog can be strictly liable under § 54-601, we reviewed a number of cases from other jurisdictions concerning when a landlord could be held liable for injuries caused by a tenant's dog. Based on our review, we held that

> as a general rule, a landlord is liable for injuries caused by the attack of a tenant's dog only where the landlord had *actual knowledge* of the dangerous propensities of the dog

> and where the landlord, having that knowledge, nevertheless leased the premises to the dog's owner or, by the terms of the lease, had the power to control the harboring of a dog by the tenant and neglected to exercise that power.

(Emphasis supplied.) 232 Neb. at 724-25, 442 N.W.2d at 208.

Plowman acknowledges that *Bozarth* represents the current state of our law. However, Plowman asks us to overrule *Bozarth* and lower the threshold for a finding of negligence on the part of a landlord. Specifically, Plowman asks us to hold that a landlord is liable for injuries caused by the attack of a tenant's dog if the landlord *knew or should have known* of the dangerous propensities of the dog. According to Plowman, such a standard would prevent landlords from blindly ignoring the unreasonable risks created by their tenants' dogs. Moreover, Plowman contends that lowering the standard for negligence under these circumstances would not be unfairly burdensome to landlords because landlords are already required to warn against other foreseeable dangers on their property. In other words, Plowman appears to be suggesting that our standard premises liability jurisprudence should extend to the instant case. See, e.g., *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004); *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

We decline Plowman's invitation. The standard announced in *Bozarth* is well supported in that it has been adopted in a number of other jurisdictions, and appears to represent the majority rule. See, e.g., *Twogood v. Wentz*, 634 N.W.2d 514 (N.D. 2001); *Strunk v Zoltanski*, 62 N.Y.2d 572, 468 N.E.2d 13, 479 N.Y.S.2d 175 (1984); *Batra v. Clark*, 110 S.W.3d 126 (Tex. App. 2003); *Giaculli v. Bright*, 584 So. 2d 187 (Fla. App. 1991); *Compagno v. Monson*, 580 So. 2d 962 (La. App. 1991); *Goddard by Goddard v. Weaver*, 558 N.E.2d 853 (Ind. App. 1990); *Gibbons v. Chavez*, 160 Ariz. 73, 770 P.2d 377 (Ariz. App. 1988); *Szkodzinski v Griffin*, 171 Mich. App. 711, 431 N.W.2d 51 (1988); *Lucas v. Kriska*, 168 Ill. App. 3d 317, 522 N.E.2d 736, 119 Ill. Dec. 74 (1988); *Vigil By and Through Vigil v. Payne*, 725 P.2d 1155 (Colo. App. 1986); *Palermo v. Nails*, 334 Pa. Super. 544, 483 A.2d 871 (1984); *Uccello v. Laudenslayer*, 44 Cal. App. 3d 504, 118 Cal. Rptr. 741 (1975); Annot., 87 A.L.R. 4th 1004 (1991).

We continue to believe that the actual knowledge standard is appropriate because it holds landlords responsible for failing to act against certain known, unreasonable risks, while recognizing that, as a general rule, tenants enjoy a level of privacy in their rental premises. As noted elsewhere:

> [A] duty of care may not be imposed on a landlord without proof that he knew of the dog and its dangerous propensities. Because the harboring of pets is such an important part of our way of life and because the exclusive possession of rented premises normally is vested in the tenant, we believe that *actual* knowledge and not mere constructive knowledge is required. For this reason . . . a landlord is under no duty to inspect the premises for the purpose of discovering the existence of a tenant's dangerous animal; only when the landlord has actual knowledge of the animal, coupled with the right to have it removed from the premises, does a duty of care arise.

(Emphasis in original.) *Uccello v. Laudenslayer*, 44 Cal. App. 3d at 514, 118 Cal. Rptr. at 748.

The actual knowledge standard represents the better rule, and nothing in our recent premises liability cases would alter the reasoning in *McCullough v. Bozarth*, 232 Neb. 714, 442 N.W.2d 201 (1989). Plowman's first assignment of error is without merit.

SUMMARY JUDGMENT

In her second assignment of error, Plowman argues that the district court erred in determining that there was no genuine issue of material fact as to whether Semin had actual knowledge of the dog's dangerous propensities. As Plowman notes, the record establishes that the dog "fiercely" barked at Semin one day while Semin repaired a ceiling fan in the rental property. However, "[i]t is not . . . reasonable to attribute vicious propensities to a dog merely because he barks at strangers . . . ." *Royer v. Pryor*, 427 N.E.2d 1112, 1117 (Ind. App. 1981). Normal canine behavior, such as a dog barking at a stranger, is not sufficient to infer that a landlord has actual knowledge of a dog's dangerous propensities. The district court did not err in concluding that Semin did not have actual knowledge of the dog's dangerous propensities.

EXHIBIT 11

At the hearing on Semin's motion for summary judgment, Plowman offered exhibit 11, which consisted of an affidavit by an employee of the law firm representing Plowman and a number of news articles from the Internet regarding the dangerousness of pit bull terriers. Semin objected to the admission of the attachments, claiming that they contained hearsay and lacked proper foundation. After taking the objection under advisement, the district court sustained Semin's objection. On appeal, Plowman argues that exhibit 11 should have been admitted into evidence.

[4] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003). See, also, Neb. Rev. Stat. § 27-801(3) (Reissue 1995). Plowman contends that exhibit 11 was not offered for the truth of the matter asserted, but, rather, "to justify and support a change of public policy." Brief for appellant at 16. Although Plowman's brief is silent as to what policy change exhibit 11 supported, a review of the bill of exceptions makes it clear that exhibit 11 was offered in an attempt to persuade the court that it should not apply the actual knowledge standard enunciated in *Bozarth*.

In any event, that exhibit 11 was intended to support a change in public policy is irrelevant because Plowman admits that exhibit 11 was offered into the "record as further evidence [of] the danger of vicious dogs." Brief for appellant at 16. Thus, it is clear that exhibit 11 was offered to prove the truth of the matters asserted within the articles; namely, that pit bull terriers are vicious dogs. The articles constitute inadmissible hearsay, and the district court did not err in refusing to admit exhibit 11 into evidence.

CONCLUSION

For the foregoing reasons, the district court's order granting summary judgment in favor of Semin and against Plowman was correct and is hereby affirmed.

AFFIRMED.

McCORMACK, J., not participating.

JERRY J. WEBB, APPELLEE, V. AMERICAN EMPLOYERS GROUP, AN INSURANCE COMPANY AUTHORIZED AND DOING BUSINESS IN THE STATE OF NEBRASKA, APPELLANT.

684 N.W.2d 33

Filed July 30, 2004. No. S-03-954.

1. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous.
3. **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.
4. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
5. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
6. **Actions: Judgments: Final Orders.** For the purposes of Neb. Rev. Stat. § 25-1902 (Reissue 1995), a special proceeding includes every special statutory remedy which is not in itself an action. 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. A special proceeding which affects a substantial right is, by definition, not part of an action.
7. **Trial: Evidence: Records: Appeal and Error.** The admission of evidence which is primarily duplicative of other evidence admitted into the record is not reversible error.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Jeffrey A. Silver for appellant.

Roger R. Holthaus and Joseph L. Howard, of Holthaus Law Offices, P.C., L.L.O., for appellee.

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

STEPHAN, J.

Jerry J. Webb brought an action against American Employers Group (AEG), his health insurance provider, after AEG denied

coverage for surgery performed on Webb's right shoulder. After a bench trial, the district court for Douglas County entered judgment in favor of Webb. AEG filed this appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTS

In 1997, Webb began working as an installer for Office One, Inc. Office One was a "client company" of AEG, which provided payroll, health insurance, and workers' compensation services to Office One and its employees. Webb's duties with Office One involved heavy lifting. In early 2000, Webb experienced increasing discomfort in his right shoulder. On May 30, 2000, he had surgery on his shoulder at Immanuel Medical Center in Omaha, Nebraska.

AEG provided health insurance to Webb as an Office One employee. Webb paid for this insurance through an automatic payroll deduction of $35.12 every 2 weeks. Office One also contributed $20 a month to the premium. The health insurance was an "Omnea Group Health Care Plan" established by AEG for the benefit of its client companies and their eligible employees and dependents.

David Kavan, the president of Office One, testified that he granted Webb a leave of absence in early May 2000 so that Webb could have the surgery performed on his shoulder. The last day on which Webb actually performed labor for Office One was May 15. Kavan testified, however, that Webb did not terminate his employment with Office One until after the surgery, when he realized he would reinjure the shoulder if he continued performing his duties as an installer.

Sometime after Webb last performed labor for Office One, AEG asked Kavan to complete a termination record for Webb. Although AEG provided health insurance to Office One from 1996 to 2001 and other employees had left during that time period, Kavan had never before been asked to complete such a record on an employee. A termination record dated July 10, 2000, and signed by Kavan was offered and admitted at trial. Kavan testified that he remembered filling out part of the record,

but did not recall filling in "5/15/00" as the "LAST DAY WORKED" or "5/01/00" as the "Date notice was given." He testified that the last day worked and the date notice was given were not in his handwriting.

Office One also filled out a second termination record for Webb dated August 16, 2000. There is contradictory evidence whether this record was requested by Webb and Office One or by AEG. The August 16 record was completed by Kavan's partner, Kevin Jensen. This record indicated that Webb's last day of work was "6/20/00" and that the date he gave notice was "5/18/00." Kavan testified that he was familiar with Jensen's handwriting and that the dates for last day of work and the date notice was given were not written by Jensen. Kavan further testified that the dates on the August 16 termination record were incorrect. Office One did not receive a refund of any premiums it paid for Webb's health insurance.

On cross-examination, Kavan admitted that although the termination record contained a space in which he could have indicated that Webb was on a leave of absence, he did not fill in that section.

Webb testified that he requested and received a leave of absence from Kavan in early May 2000. He further testified that he obtained precertification for his surgery as required by his insurance plan by calling the number on the back of his insurance card in early May. He was familiar with the precertification process because he had utilized it on prior occasions. He testified that after calling the number on his insurance card and providing the requisite information, he was informed that the surgery would be covered.

Webb's last employee contribution to his health insurance premium was deducted from his May 25, 2000, paycheck. On July 12, Webb received a letter from AEG notifying him that his insurance coverage "will terminate" on May 15, 2000, at midnight and informing him of his option to continue coverage via COBRA. Subsequently, AEG mailed Webb a check dated October 13, 2000, in the amount of $32.43, which he understood was a return of his premium for the time period after May 15. Webb admitted cashing the check, but testified at trial that he did not understand that by doing so he would be retroactively canceling his insurance. He further testified that he would be

willing to return the money to AEG. On cross-examination, Webb admitted that he did not receive any type of authorization number for the surgery when he called to precertify. He also did not remember receiving a confirmation letter. An employee of the physician who performed Webb's surgery testified that on May 18, 2000, she called an "888" telephone number and spoke to a "Jo Ann" who gave her a precertification number of "1125" for Webb's surgery.

Sue Flanagan, the manager of secondary benefits at AEG, testified that she reviewed Webb's termination records. She testified that in the general course of business, AEG would complete certain information on the forms, but that the information regarding the last day worked and date notice was given would be provided and filled in by the client prior to AEG's receiving the form. She testified that the "last day worked" on the record was a significant date because "[i]t would indicate when the insurance coverage would end if premiums were not collected."

Flanagan testified that AEG contracted with a company called PPHA to provide precertification services. When precertification is granted, a precertification number is given. Flanagan testified that although she was not sure what PPHA's precertification numbers were, "normally it had letters in front of it and letters behind it." In addition, once precertification is given, a confirmation letter is mailed to the physician, the hospital, and the employee.

Flanagan also testified that she exchanged correspondence with Nebraska's Department of Insurance regarding Webb's claim. Although she wrote three letters to the department regarding Webb's claim, she could not recall ever raising the precertification issue. Flanagan further testified that on August 15, 2001, her position was that Webb should file a civil lawsuit to determine whether the surgery was covered.

On March 6, 2002, Webb filed this action in which he alleged that AEG was liable for the medical expenses he incurred in connection with the shoulder surgery under alternative theories of recovery, including breach of contract, estoppel, and intentional misrepresentation. On April 3, AEG filed a motion to dismiss and to compel arbitration. An evidentiary hearing on the motion was held on April 30, but the bill of exceptions from that hearing is

not included in the record before us on appeal. On May 15, the district court entered an order denying the motion to compel arbitration, concluding that AEG waived the arbitration provision in the insurance policy by indicating in correspondence with the Department of Insurance that Webb should file a civil lawsuit to resolve the controversy. Neither party filed an appeal from the May 15 order.

On May 31, 2002, AEG filed an answer generally denying the allegations in Webb's petition and alleging affirmative defenses. Following a bench trial, the court entered an order on July 24, 2003, in which it found that Webb was covered under the health insurance provided by AEG at the time of his shoulder surgery and that AEG was therefore obligated to pay the disputed medical expenses. The court entered judgment in favor of Webb in the amount of $7,449.74, together with an attorney fee of $2,500 pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1998). AEG perfected this appeal on August 15, 2003.

ASSIGNMENTS OF ERROR

AEG assigns, restated, that the district court erred in (1) failing to compel arbitration as provided for in the policy, (2) failing to find that Webb had not paid the premium for the period in which the surgery was performed, (3) failing to find that Webb's employment and thus his insurance coverage ended on May 15, 2000, (4) admitting medical bills into evidence over AEG's objection, and (5) awarding attorney fees.

STANDARD OF REVIEW

[1] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004); *In re Estate of Pfeiffer*, 265 Neb. 498, 658 N.W.2d 14 (2003).

[2] In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001); *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000).

ANALYSIS

We note as an initial matter that Webb's cause of action arises under the Employee Retirement Income Security Act of 1974 (ERISA). Because his claim is for recovery of benefits under the terms of an ERISA plan, it falls within the provisions of 29 U.S.C. § 1132(a)(1)(B) (2000), and thus, pursuant to 29 U.S.C. § 1132(e)(1), a state court of competent jurisdiction has concurrent jurisdiction with federal district courts to award any benefits due.

DENIAL OF MOTION TO COMPEL ARBITRATION

AEG contends that the district court erred in refusing to enforce the arbitration clause in the insurance policy it issued to Webb. The policy provides in relevant part:

> After exhausting the ERISA Claims Review and Appeal procedures noted above, if the claimant is still dissatisfied with the Plan Administrator's decision, prior to any legal action being brought against the Plan or the Plan Administrator, the appeal shall be submitted to the American Arbitration Association pursuant to its rules. The decision of the arbitrator(s) shall be binding and final on AEG and the Covered Person, with the costs of the arbitration to be borne by the party or parties as determined by the arbitrator(s).

Although AEG's motion to compel arbitration did not identify the statutory authority upon which it sought to enforce the arbitration provision of the policy, its counsel stated during oral argument of the appeal that the federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (2000), provides the enforcement mechanism.

The FAA applies to "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. "Commerce" as defined by the Act includes "commerce among the several States." 9 U.S.C § 1. The U.S. Supreme Court has given the FAA an expansive scope by broadly construing the phrase " 'a contract *evidencing a transaction* involving commerce.' " *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) (cited in *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996)). The Court has held that the phrase " 'involving commerce' " requires a broad interpretation in order to give effect to the FAA's basic purpose, which is to put

arbitration provisions on the same footing as a contract's other terms. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. at 277. The Court has further noted that "the word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full." *Id.* The statutory phrase " 'evidencing a transaction' " has been construed by the Court to include transactions involving interstate commerce even where the parties did not contemplate an interstate commerce connection. *Id.*

Under this expansive interpretation of 9 U.S.C. § 2, we conclude that this case involves a transaction which would come within the scope of the FAA. During the relevant time period, Webb resided in and was employed in Douglas County, Nebraska, and AEG had an office in and regularly conducted business in Nebraska. However, the record reflects that AEG transacted business in other states and that portions of Webb's claim were processed outside of Nebraska. As directed in the insurance card issued to Webb, claim forms relating to his shoulder surgery were submitted to an address in Pewaukee, Wisconsin. The insurance card also provided that precertification was required for certain benefits and noted that precertification was administered by a company located in Concord, California. Flanagan explained at trial that AEG contracted with the California company to provide precertification services. Because the transaction at issue in this case falls within the scope of the FAA, the substantive issue of whether the motion to compel arbitration should have been granted is a question of federal law. See *Kelley v. Benchmark Homes, Inc., supra.* We note that claims arising under ERISA have generally been held to be arbitrable under the FAA. See *Eckel v. Equitable Life Assur. Soc. of the U.S.*, 1 F. Supp. 2d 687 (E.D. Mich. 1998) (citing cases).

[3,4] However, 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. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004). A jurisdictional question which does not involve a factual dispute is a matter of law. *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003); *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002). The district court's order denying AEG's motion to

compel was entered on May 15, 2002. This appeal was not filed until August 15, 2003, 15 months after the entry of the order and subsequent to trial on the merits in the district court. Thus, if the denial of AEG's motion to compel was a final, appealable order, we would lack jurisdiction to consider the assignment of error pertaining to that issue.

Section 4 of the FAA sets forth a procedure whereby a party may seek judicial enforcement of a contractual arbitration provision. Section 16 governs appeals and provides in part that "[a]n appeal may be taken from . . . (1) an order . . . (B) denying a petition under section 4 of this title to order arbitration to proceed." 9 U.S.C. § 16(a). However, this statute provides that except in specified circumstances, "an appeal may not be taken from an interlocutory order . . . (2) directing arbitration to proceed under section 4 of this title." 9 U.S.C. § 16(b). The FAA does not indicate whether its provisions relating to appeals are applicable in state court actions, such as the instant case, where a party seeks to enforce an arbitration clause under the FAA.

In *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 368, 550 N.W.2d 640, 642 (1996), we considered the merits of an appeal from the denial of a motion to stay judicial proceedings in favor of arbitration, characterizing it as "an interlocutory appeal pursuant to the [FAA]." However, we did not specifically analyze the jurisdictional issue. In addressing this issue, other jurisdictions have concluded that the FAA does not necessarily preempt state procedural rules with respect to appeals. See, *Muao v. Grosvenor Properties Ltd.*, 99 Cal. App. 4th 1085, 122 Cal. Rptr. 2d 131 (2002); *Simmons v. Deutsche Financial Services*, 243 Ga. App. 85, 532 S.E.2d 436 (2000); *Clayco Const. Co. v. THF Carondelet Dev.*, 105 S.W.3d 518 (Mo. App. 2003); *Superpumper, Inc. v. Nerland Oil, Inc.*, 582 N.W.2d 647 (N.D. 1998); *Toler's Cove Homeowners v. Trident Const.*, 355 S.C. 605, 586 S.E.2d 581 (2003); *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266 (Tex. 1992). As stated by the Supreme Court of South Carolina:

> The federal policy favoring arbitration, as expressed in the FAA, is binding in state courts and supersedes inconsistent state law and statutes that invalidate arbitration agreements. . . . However, the FAA contains no express

> preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. . . . The question is whether the state law would undermine the goals and policies of the FAA. There is no federal policy favoring arbitration under a certain set of procedural rules and the federal policy is simply to ensure the enforceability of private agreements to arbitrate.

Toler's Cove Homeowners v. Trident Const., 355 S.C. at 611, 586 S.E.2d at 584.

We conclude that in order to determine whether state law governs the finality for purposes of appeal of an order denying a motion to compel arbitration under the FAA, we must first apply our state procedural rules to determine if the order is final for purposes of appeal and then determine whether the result of that inquiry would undermine the goals and policies of the FAA. To the extent our opinion in *Kelly v. Benchmark Homes, Inc., supra*, conflicts with this analysis, it is disapproved.

[5] In Nebraska, the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. Neb. Rev. Stat. § 25-1902 (Reissue 1995). See *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004). In this case, the order denying the motion to compel clearly did not determine the action or prevent a judgment, and thus does not fall within the first category of final orders. See *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003). In addition, the order was not made on summary application in an action after judgment was rendered, and thus does not fall within the third category of final orders. See *id.* The question, therefore, is whether the denial of the motion to compel arbitration affected a substantial right and was made during a special proceeding.

[6] The denial of the motion to compel arbitration clearly affected a substantial right, as it prevented AEG from enjoying the contractual benefit of arbitrating the dispute between the parties as an alternative to litigation. For the purposes of § 25-1902, a special proceeding includes every special statutory remedy which

is not in itself an action. See *Mumin v. Dees, supra.* 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. *Id.* A special proceeding which affects a substantial right is, by definition, not part of an action. *Id.*

The order denying AEG's motion to compel was not merely a step or a proceeding within the overall action. Instead, the motion sought to completely halt the pending lawsuit and "transfer" the dispute to a nonjudicial forum as a matter of contractual right. The motion to compel arbitration is a specific statutory remedy which is not in itself an action. Thus, we conclude that the denial of a motion to compel arbitration is a final, appealable order under Nebraska law because it affects a substantial right and is made in a special proceeding.

This conclusion is consistent with the goals and policies underlying the FAA, which implements a "'national policy favoring arbitration and [withdrawing] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" *Cornhusker Internat. Trucks* v. *Thomas Built Buses*, 263 Neb. 10, 17, 637 N.W.2d 876, 882 (2002), quoting *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). In enacting the FAA, it was "Congress' clear intent . . . to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). A direct appeal from an order denying a motion to compel arbitration furthers that purpose by permitting final resolution of the issue of arbitrability without having to first conclude a judicial proceeding on the merits, at which point the arbitral remedy would be rendered essentially meaningless. Our resolution of this issue under state law is consistent with the provision of the FAA which permits an appeal from an order of a U.S. District Court denying a motion to compel arbitration. 9 U.S.C. § 16(a)(1)(B). Accordingly, we conclude that the order denying AEG's motion to compel arbitration was a final, appealable order from which no timely appeal was taken, and we therefore have no jurisdiction to review that order in this appeal from the district court's subsequent determination on the merits.

PAYMENT OF PREMIUM

In its second assignment of error, AEG contends that the district court erred in entering judgment in favor of Webb because of the undisputed evidence that it refunded the premium paid by Webb for the period in which the surgery was performed. AEG argues that the absence of a premium payment for the applicable time period resulted in a termination of coverage under the terms of the policy.

In its brief, AEG relies on *Brouilette v. DBV Enters.*, 9 Neb. App. 757, 619 N.W.2d 482 (2000), for the proposition that the burden is on an insured to keep a policy in force by the payment of premiums and is not on the insurer to exert every effort to prevent the insured from allowing a policy to lapse through failure to make premium payments. While this is a correct statement of the law, see *Struve Enter. v. Travelers Ins. Co.*, 243 Neb. 516, 500 N.W.2d 580 (1993), it does not apply to the facts of this case. The evidence clearly reveals that the insurance premium for the applicable time period was automatically deducted from Webb's paycheck and had been paid at the time of the surgery. AEG's argument that Webb failed to pay the premium is based on the fact that in October 2000, nearly 5 months after the surgery, it refunded the applicable premium to Webb after denying his claim, and he cashed the refund check. This retroactive return of Webb's premium does not negate the coverage that existed at the time of the surgery. Moreover, there is undisputed evidence in the record that AEG never refunded the portion of Webb's premium paid by Office One for the applicable time period. Thus, the district court was not clearly wrong in concluding that all premiums due under the policy were paid through May 31 and that the health insurance was in force at the time of the May 30 surgery. The district court properly credited the purported premium refund received and retained by Webb against the amount of AEG's liability.

TERMINATION OF EMPLOYMENT

In its third assignment of error, AEG contends that the district court erred in failing to find that Webb's last day of work was May 15, 2000, and that his coverage terminated on that date pursuant to the terms of the policy. The policy provides that coverage

will terminate upon the earliest of several events, including "the last day of the month in which the Employee's employment" is terminated, and that ceasing active work is deemed termination of employment unless "cessation of work is due to a temporary layoff or approved leave of absence."

In support of this argument, AEG relies primarily upon the July 10, 2000, termination record. As noted, however, there was conflicting evidence at trial as to who completed the portion of the termination record which indicated the last day worked and the date notice was given. Moreover, both Kavan and Webb testified that while May 15 was the last day that Webb actually performed labor for Office One, his employment was not terminated until sometime after the surgery was performed. There is thus sufficient evidence to support the trial court's factual finding that Webb was employed by Office One and was on leave of absence status on the date of his surgery. This assignment of error is without merit.

Admissibility of Medical Bills

In its fourth assignment of error, AEG assigns that the district court erred in "admitting the medical bills without foundation and without qualifying as an exception to hearsay." At trial, AEG objected to the receipt of all the medical bills and to most of Webb's testimony regarding the amount of medical expenses for which he was obligated and sought recovery from AEG. On appeal, however, AEG does not assign error with respect to the overruling of its objections to Webb's testimony.

[7] The admission of evidence which is primarily duplicative of other evidence admitted into the record is not reversible error. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003). Because the information in the medical bills themselves is primarily duplicative of Webb's testimony, and the rulings of the trial court with respect to Webb's testimony are not assigned as error on appeal, the district court could not have committed reversible error in admitting the bills into evidence. This assignment of error is therefore without merit.

Attorney Fees

The district court ordered AEG to pay Webb $2,500 in attorney fees pursuant to § 44-359. On appeal, AEG contends that the district court erred in doing so because it is not an insurance

company subject to § 44-359. This argument ignores the plain language of § 44-359, which provides in relevant part:

> In all cases when the beneficiary or other person entitled thereto brings an action upon *any type of insurance policy*... *against any company*, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs.

(Emphasis supplied.) Under this statute, a successful plaintiff in an action on an insurance policy against any company doing business in this state, whether or not the company meets the technical definition of an "insurance company," is entitled to recover an attorney fee. Because Webb obtained a judgment against AEG, a company doing business in this state, in an action on an insurance policy, the district court did not err in awarding Webb attorney fees under § 44-359.

CONCLUSION

For the reasons discussed, we do not reach AEG's contention that the district court erred in denying its motion to compel arbitration because no timely appeal was taken from that final, appealable order. We conclude that all other assignments of error are without merit and therefore affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOHN I. SUTTON, RESPONDENT.

684 N.W.2d 23

Filed July 30, 2004. No. S-03-1113.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

On September 29, 2003, formal charges containing two counts were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against John I. Sutton, respondent. Respondent's answer disputed the allegations. A referee was appointed. On April 8, 2004, the referee's hearing was held on the charges. Respondent appeared. Both the complainant, Ryan Weber, and respondent, testified. Twenty exhibits were admitted into evidence.

The referee filed a report on May 10, 2004. With respect to the charges, the referee concluded that respondent's conduct had breached the following disciplinary rules of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule), DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); Canon 3, DR 3-101(B) (violating rules regarding practice of law); Canon 6, DR 6-101(A)(3) (neglecting legal matter); and Canon 9, DR 9-102(A)(2) (concerning obligation to deposit client funds in trust account), and DR 9-102(B)(4) (returning client funds or properties as requested). The referee further found that respondent had violated his oath of office as an attorney. Neb. Rev. Stat. § 7-104 (Reissue 1997). With respect to the discipline to be imposed, the referee recommended that respondent be suspended from the practice of law for a period of 1 year. The referee also recommended that following suspension, respondent's reinstatement be conditioned on respondent's demonstrated ability to practice law. Neither relator nor respondent filed exceptions to the referee's report. Relator filed a motion for judgment on the pleadings under Neb. Ct. R. of Discipline 10(L) (rev. 2003). We grant the motion for judgment on the pleadings and impose discipline as indicated below.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 12, 1979. He has practiced in Douglas County, Nebraska.

Based upon respondent's testimony during the hearing, the referee concluded that the material facts in this case are generally not

in dispute. The substance of the referee's findings may be summarized as follows: As to count I of the formal charges, the referee found that respondent had been hired by Weber to file a lawsuit against two individuals and to incorporate a business. Weber paid respondent a total of $2,173 for costs and attorney fees, a portion of which, the record reflects, consisted of advanced costs and fees. Respondent failed to deposit these advanced funds in his attorney trust account. Further, respondent failed to file the lawsuit, despite representations to Weber that the suit had been filed. With regard to the business Weber hired respondent to incorporate, the referee found that "the only document ever given . . . to . . . Weber was a bare-bones set of articles of incorporation. . . . No bylaws or minutes on [sic] corporate minute book w[as] ever prepared or sent" to Weber by respondent. The referee found that respondent returned $400 of the advanced fees to Weber and promised "to work the balance off in free legal work, but [respondent] never followed through on that promise." The referee also found that respondent failed to respond to repeated inquiries from relator's office regarding respondent's representation of Weber, until he was advised that relator would seek temporary suspension if respondent failed to respond.

As to count II of the formal charges, the referee found that on or about May 13, 2002, respondent was notified that he had not paid his 2002 dues to the Nebraska State Bar Association. Respondent failed to reply to this letter, and on July 2, this court suspended respondent from the practice of law due to his failure to pay his annual dues. The referee found that respondent continued to practice law despite having been suspended. On November 12, following respondent's satisfaction of his bar dues, respondent was reinstated to practice law.

In his report filed May 10, 2004, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary rules as indicated above, as well as his oath of office as an attorney. The referee also found certain aggravating and mitigating factors present. As an aggravating factor, the referee found that respondent had previously received a private reprimand in a disciplinary matter involving allegations similar to the instant case. The mitigating factors noted by the referee included respondent's cooperation with relator, albeit "belated,"

his demeanor during the hearing, and "his recognition that he has a serious, longstanding problem which must be addressed." In this regard, we note that the record contains evidence of respondent's admitted misuse of prescription drugs and his treatment for depression. The record also contains evidence of certain health conditions from which respondent has suffered in the past or is presently suffering.

With respect to the sanction which ought to be imposed for the foregoing violations, and considering the aggravating and mitigating factors the referee found present in the case, the referee recommended that respondent's license to practice law should be suspended for a period of 1 year. The referee also recommended that following this suspension, the grant of respondent's application for reinstatement, if any, be conditioned on respondent's demonstrated ability to practice law.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion for judgment on the pleadings under rule 10(L). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Janousek*, 267 Neb. 328, 674 N.W.2d 464 (2004). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence, and the motion for judgment on the pleadings is granted.

A proceeding to discipline an attorney is a trial de novo on the record. *Id.* To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *State ex rel. Counsel for Dis. v. Villarreal*, 267 Neb. 353, 673 N.W.2d 889 (2004).

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1), (4), and (5); DR 3-101(B); DR 6-101(A)(3); and DR 9-102(A)(2) and (B)(4). The record

also supports a finding by clear and convincing evidence that respondent violated his oath of office as an attorney, and we find that respondent has violated said oath.

We have stated that "[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances." *State ex rel. Counsel for Dis. v. Swanson*, 267 Neb. 540, 551, 675 N.W.2d 674, 682 (2004). Neb. Ct. R. of Discipline 4 (rev. 2004) provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court; or
> (5) Temporary suspension by the Court; or
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, rule 10(N).

With respect to the imposition of attorney discipline in an individual case, we have stated that "[e]ach attorney discipline case must be evaluated individually in light of its particular facts and circumstances." *State ex rel. Counsel for Dis. v. Swanson*, 267 Neb. at 549, 675 N.W.2d at 681. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Rokahr*, 267 Neb. 436, 675 N.W.2d 117 (2004).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Id.*

We have noted that the determination of appropriate discipline to be imposed on an attorney requires consideration of any aggravating and mitigating factors. *State ex rel. Special Counsel for Dis. v. Fellman*, 267 Neb. 838, 678 N.W.2d 491 (2004).

The evidence in the present case establishes among other facts that respondent has neglected several legal matters for a client, failed to deposit client funds in his attorney trust account, failed to return funds to a client, failed to respond to relator's inquiries, and practiced law while under a suspended license.

As an aggravating factor, we note respondent's prior private reprimand for conduct similar to that which occurred in this case. As a mitigating factor, we note respondent's cooperation during the disciplinary hearing.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court finds that respondent should be suspended from the practice of law for a period of 1 year. Should respondent apply for reinstatement, his reinstatement shall be conditioned as follows: Respondent shall be on probation for a period of 2 years following reinstatement, during which period respondent (1) shall be supervised by an attorney approved by relator, which attorney shall file quarterly reports with relator, summarizing respondent's progress and his adherence to the Code of Professional Responsibility, and (2) shall continue treatment as directed by his physicians, psychiatrist, and substance abuse counselor.

CONCLUSION

The motion for judgment on the pleadings is granted. We find by clear and convincing evidence that respondent violated DR 1-102(A)(1), (4), and (5); DR 3-101(B); DR 6-101(A)(3); DR 9-102(A)(2) and (B)(4); and his oath of office as an attorney. It is the judgment of this court that respondent should be and is hereby suspended from the practice of law for a period of 1 year, effective immediately, after which period, respondent may apply for reinstatement, subject to the terms outlined above. Respondent shall comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent

is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and rule 10(P) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

McCORMACK, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. PATRICK T. O'BRIEN, RESPONDENT.

684 N.W.2d 46

Filed July 30, 2004. No. S-03-1273.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, Patrick T. O'Brien, was admitted to the practice of law in the State of Nebraska on June 27, 1972, and at all times relevant hereto was engaged in the private practice of law in Lincoln, Nebraska. On November 10, 2003, formal charges were filed against respondent. The formal charges set forth one count that included charges that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule), DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice), DR 1-102(A)(6) (engaging in conduct that adversely reflects on fitness to practice law), and Canon 9, DR 9-102(B)(4) (returning client funds or properties as requested), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). A referee was appointed and heard evidence. On May 3, 2004, the referee filed his report. With respect to the single count in the charges, the referee found that respondent's conduct had breached DR 1-102(A)(1), (5), and (6), and DR 9-102(B)(4), as well as his oath of office as an attorney. The referee recommended that respondent be suspended from the practice of law for 90 days.

On June 7, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly did not challenge or contest the findings of fact and recommended sanction set forth in the referee's report. In addition, respondent agreed to a 1-year period of probation following the reinstatement of his license, during which probationary period, he would engage and work with a practicing attorney to monitor respondent's practice, and continue treatment for depression as directed by his psychiatrist and psychologist. In his conditional admission, respondent also waived all proceedings against him in connection with the formal charges in exchange for the sanction set forth above. Respondent asked that discipline be imposed 14 days after the ruling by this court on the conditional admission. Upon due consideration, the court approves the conditional admission and orders that respondent be suspended from the practice of law for 90 days commencing 14 days after the filing of this opinion and, should respondent apply for reinstatement, that respondent be subject to probation with monitoring as outlined *infra* for 1 year.

FACTS

In summary, in his report, the referee found that respondent had represented at trial Richard Allen, who had been charged with first degree sexual assault. Allen was convicted and sentenced, and respondent unsuccessfully appealed the sentence. Respondent's representation of Allen ended in approximately February 2002, at which time respondent held in his attorney trust account $10,894.76 belonging to Allen. Allen retained new counsel, and in August, Allen's new attorney directed respondent to transfer Allen's funds to Allen's sister. Respondent did not transfer the funds until April 25, 2003, which was after Allen had filed a formal complaint against respondent with the Counsel for Discipline's office. The referee found that respondent had failed to refund Allen's funds in a timely manner and that Allen had been harmed by respondent's delay. The referee found that respondent's conduct had breached DR 1-102(A)(1), (5), and (6), and DR 9-102(B)(4), as well as his oath of office as an attorney. The referee also found that respondent was suffering from depression and had been undergoing treatment with a

psychologist and a psychiatrist since March 2003. The referee found respondent's treatment for depression to be a mitigator which he took into account when he recommended that respondent be suspended for 90 days.

ANALYSIS

Rule 13 provides in pertinent part:

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

Pursuant to rule 13, we find that respondent knowingly does not challenge or contest the findings of fact and recommended sanction set forth in the referee's report and knowingly does not challenge or contest that he violated DR 1-102(A)(1), (5), and (6), and DR 9-102(B)(4), as well as his oath of office as an attorney. We further find that respondent waives all proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1), (5), and (6), and

DR 9-102(B)(4), as well as his oath of office as an attorney, and that respondent should be and hereby is suspended for a period of 90 days, effective 14 days after filing this opinion, after which time respondent may apply for reinstatement. Should respondent apply for reinstatement, his reinstatement shall be conditioned as follows: Respondent shall be on probation for a period of 1 year following reinstatement during which period respondent (1) shall be supervised by an attorney approved by relator, which attorney shall file quarterly reports with relator, summarizing respondent's progress and his adherence to the Code of Professional Responsibility, and (2) shall continue treatment for his depression as directed by his psychiatrist and psychologist. Respondent shall comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 10(P) (rev. 2003) and 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

STEPHAN and MCCORMACK, JJ., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. GREGG E. WILLIAMS, RESPONDENT.

684 N.W.2d 45

Filed July 30, 2004. No. S-04-331.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

Respondent, Gregg E. Williams, was admitted to the practice of law in the State of Nebraska on February 15, 1985. Respondent was engaged in the private practice of law in Sioux City, Iowa. On

February 13, 2004, the office of the Counsel for Discipline received a grievance against respondent. Respondent's alleged misconduct involved the misappropriation of funds from his former law firm, resulting, in certain circumstances, in the erroneous billing of clients for expenses that had not been incurred. On March 12, an application for temporary suspension was filed by the Chair of the Committee on Inquiry of the First Disciplinary District. Upon consent, on March 17, respondent was temporarily suspended from the practice of law until further order of this court.

FACTS

On July 1, 2004, respondent filed with this court a voluntary surrender of license, voluntarily surrendering his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent stated that he "knowingly [does] not challenge or contest the truth of the allegations" in the grievance that he misappropriated funds from his former law firm. In addition to surrendering his license, respondent voluntarily consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment.

ANALYSIS

Neb. Ct. R. of Discipline 15 (rev. 2001) provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to rule 15, we find that respondent has voluntarily surrendered his license to practice law, admitted in writing that he knowingly does not challenge or contest the truth of the allegations, and waived all proceedings against him in connection therewith. We further find that respondent has not challenged or contested the truth of the allegations that he misappropriated funds

from his former law firm and that respondent has consented to the entry of an order of disbarment. We further find that Williams has admitted to facts which are not consistent with adherence to the Code of Professional Responsibility or his oath of office as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997).

CONCLUSION

Upon due consideration of the pleadings in this matter, the court finds that respondent knowingly did not challenge or contest the truth of the allegation that he misappropriated funds from his former law firm and that his waiver was knowingly made. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 10(P) (rev. 2003) and 23(B) (rev. 2001).

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. LYNN E. MOORER, RESPONDENT.

684 N.W.2d 44

Filed July 30, 2004. No. S-04-533.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

Respondent, Lynn E. Moorer, was admitted to the practice of law in the State of Nebraska on April 20, 1999, and at all times

relevant hereto was engaged in the private practice of law in Lincoln, Nebraska. On May 4, 2004, formal charges were filed against respondent. The formal charges set forth one count that included charges that the respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule), DR 1-102(A)(6) (engaging in conduct that adversely reflects on fitness to practice law), and Canon 7, DR 7-101(A)(3) (prejudicing or damaging client during course of professional relationship), as well as her oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). On June 9, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which she knowingly did not challenge or contest the truth of the allegations that she violated DR 1-102(A)(1) and (6), and DR 7-101(A)(3), as well as her oath of office as an attorney, and waived all proceedings against her in connection therewith in exchange for a public reprimand. Upon due consideration, the court approves the conditional admission and orders that respondent be publicly reprimanded.

FACTS

In summary, the formal charges allege that on June 11, 2001, respondent was employed as general counsel and director of operations for the Organic Crop Improvement Association International, Inc. (OCIA). On that same day, her employment with OCIA was terminated, and she was instructed to leave OCIA's premises. The formal charges further allege that respondent refused to leave and instead met and spoke with other OCIA employees, resulting in OCIA calling the police, who forcibly removed respondent from OCIA's premises.

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member

> appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly does not challenge or contest the essential relevant facts outlined in the formal charges and knowingly does not challenge or contest that she violated DR 1-102(A)(1) and (6), and DR 7-101(A)(3), as well as her oath of office as an attorney. We further find that respondent waives all proceedings against her in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1) and (6), and DR 7-101(A)(3), as well as her oath of office as an attorney, and that respondent should be and hereby is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 10(P) (rev. 2003) and 23(B) (rev. 2001).

JUDGMENT OF PUBLIC REPRIMAND.